



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kikuvi v Yusuf & 2 others (Civil Application E062 of 2021)  
[2022] KECA 454 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 454 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E062 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MARCH 18, 2022**

**BETWEEN**

**JEREMIAH MUSEMBI KIKUVI ..... APPLICANT**

**AND**

**ALI IBIDO YUSUF ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMED BUTE GALGALO ..... 2<sup>ND</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

*((An application for stay of execution of the judgment and subsequent orders of the Environment & Land Court at Malindi (Angote, J.) dated 15th April 2016 pending appeal and extension or enlargement of time and leave to file appeal out of time in ELC Case No. 164 of 2011))*

**RULING**

1. In the application before us dated 1st December 2021 bearing the title, “an application for stay of execution of the judgment and subsequent orders of the Environment and Land Court dated 15th April 2016...pending appeal and extension or enlargement of time and leave to file appeal out of time” the applicant seeks: an order to vary or rescind the order issued on 9th July 2018 in Civil Application No. 60 of 2016 and for reinstatement of his application dated 10th November 2016 and for the same be set down for inter parties hearing; and an order of stay of execution of the judgment and subsequent orders of the Environment and Land Court delivered on 15th April 2016 being executed by way of a notice to show cause dated 10th August 2021, pending inter parties hearing of the application.
2. The application is based on the grounds that the applicant's application dated 10th November 2016 was dismissed due to the failure of his advocate to appear in court to prosecute it; that the respondents have already applied for execution of the decree in respect of the judgment delivered on 15th April 2016; that the amount claimed as costs is Kshs.500,000 which the applicant, a Reverend of Redeemed Gospel Church, is not able to raise because his income or resources are minimal and depends entirely



on the offerings and contributions made by church members; that there is a looming danger that the applicant's liberty will be curtailed if he fails to satisfy the decree.

3. The background, in brief, is this: In his suit before the Environment and Land Court (ELC) at Malindi, the applicant, Jeremiah Musembi Kikuvi, sought rectification and cancellation of the 1<sup>st</sup> respondent's title over a property known as Lake Kenyatta II Settlement Scheme No. 452, Lamu on the basis that it was allocated to him in September 2002 after the 1<sup>st</sup> respondent, Ali Ibido Yusuf, who was initially allotted the property, failed to comply with the conditions of allotment.
4. In the judgment delivered on 15<sup>th</sup> April 2016 the ELC dismissed the applicant's suit having found that the 1<sup>st</sup> respondent's title to the property could not be defeated because the applicant failed to establish that the 1<sup>st</sup> respondent's title was obtained either fraudulently or by mistake. He was condemned to pay costs of the suit.
5. Intending to appeal the judgment out of time, the applicant applied under Rule 4 of the Court of Appeal Rules before a single judge of the Court for extension of time by application dated 10<sup>th</sup> November 2016. That application was however dismissed by the Court (W. Karanja, JA) on 9<sup>th</sup> July 2018 for non-appearance under Rule 56 of the *Court of Appeal Rules*.
6. The applicant is now before us, with his said application dated 1<sup>st</sup> December 2021, seeking reinstatement of his application dated 10<sup>th</sup> November 2016 for extension of time. He also seeks an order to stay execution proceedings before the lower court in respect costs of the dismissed suit awarded and taxed in favour of the 1<sup>st</sup> respondent. In that regard it has been demonstrated that a notice to show cause why the applicant should not be committed to jail for failing to pay the 1<sup>st</sup> respondent's costs has since been issued by the lower court.
7. Urging the application before us, learned counsel for the applicant has submitted that it took rather long from the time the application for extension of time was filed to the time it was listed for hearing; that as a result of the delay in fixing it for hearing, counsel lost track of it; that when it was finally listed for hearing on 9<sup>th</sup> July 2018, it was not brought to his attention by his office despite a hearing notice having been served on his firm.
8. As regards prayer for stay of execution, it was submitted that the applicant was constrained to consent to payment of the taxed costs when the notice to show cause came up for hearing on 6<sup>th</sup> December 2021, to avoid being committed to civil jail. Counsel urged that mistake of counsel should not be visited on the client and implored the Court to exercise its discretion in favour of the applicant and allow the application.
9. The application is opposed. There is a replying affidavit sworn by the 1<sup>st</sup> respondent and submissions by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It is contended for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the delay from 9<sup>th</sup> July 2018 (when the applicant's application was dismissed) to December 2021 (when the present application was made) is inordinate; that there is no explanation or sufficient cause shown why the applicant did not attend court when the application was fixed for hearing; that in any case the applicant and the respondent entered into consent on 6<sup>th</sup> December 2021 on payment of costs within 120 days; that the prayer for stay of execution is wrongly mixed up with the prayer for reinstatement; that even if the application for reinstatement is allowed, the application for extension of time has remote chances of success considering the inordinate delay between 2016 and 2021



10. We have considered the application, the affidavits, and the rival submissions. In relation to the prayer for reinstatement of the application dismissed on 9<sup>th</sup> July 2018 for non-appearance, Rules 56(3) and (4) of the Court of Appeal Rules are relevant and provide as follows:

“(3) Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.

(4) An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.”

11. The present application is clearly out of time quite apart from the absence of a plausible explanation why it took over three years to bring it. As Nambuye, JA stated in *Ngugi vs. Thogo* (Civil Application No.372 of 2018) [2021] KECA 88 (KLR)(civ)(22 October 2021)(Ruling):

“By the use of the word “shall” in sub-rule 4 of Rule 56 of the Court of Appeal rules, it is mandatory that such application should be filed within thirty (30) days of the making of the impugned order.”

Counsel for the respondents is therefore right that the prayer for reinstatement is out of time and incompetent.

12. In as far as the prayer for order of stay of execution is concerned, it is incumbent on the applicant to demonstrate that the intended appeal is arguable and that if the order sought is declined, the intended appeal, if successful, will be rendered nugatory. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR. Although the applicant lodged a notice of appeal on 15<sup>th</sup> April 2016, the day the judgment of the ELC was delivered, there appears little prospect, six years later, and given the trajectory the matter has taken, that a memorandum and record of appeal, will be filed and the intended appeal prosecuted even though the intended appeal may be arguable. Furthermore, considering that parties entered a consent in the lower court on costs, we are not satisfied that the intended appeal would be rendered nugatory by reason only of costs of the suit having been paid.

13. The application dated 1st December 2021 accordingly fails, and is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents only, as the 3<sup>rd</sup> respondent did not participate in the application.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF MARCH 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**



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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

