



REPUBLIC OF KENYA



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**Musotsi v Ambani (Civil Application E009 of 2022)
[2022] KECA 837 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 837 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E009 OF 2022**

M NGUGI, JA

JULY 22, 2022

BETWEEN

CHRISTOPHER A. MUSOTSI APPLICANT

AND

ADRIANO I. AMBANI RESPONDENT

(Being an application seeking enlargement of time to file and serve a notice of appeal, record of appeal and a stay of execution against the judgment of the Environment and Land Court in Kakamega (N.A. Matheka J) dated 2nd July 2019 in Kakamega ELC No. 329 of 2017)

RULING

1. The applicant has filed the application dated June 23, 2021 seeking the following the orders:
 - i. That the time for filing a Notice of appeal and Record of Appeal against the Judgement of Hon.N.A. Matheka dated and delivered on July 2, 2019 in ELC No. 329 of 2017 Kakamega be extended and/or enlarged.
 - ii. That the Notice of appeal dated July 22, 2019 and filed on July 22, 2019 be deemed as duly filed as the applicant had already paid the required requisite fees but late with one day.
 - iii. That there be a stay of execution of the Judgement dated and delivered on July 2, 2019 in ELC No. 329/17 between the parties herein pending the intended appeal.
 - iv. That costs be in the intended appeal.
2. The application is brought under the provisions of section 3A and 3B of the *Appellate Jurisdiction Act* and Rules 45(2) (b) and 41 of the *Court of Appeal Rules* and is supported by the affidavit sworn by the applicant on June 23, 2021.



3. The grounds forming the basis of the application as set out on its face and in the affidavit in support are that the applicant was aggrieved by the decision delivered on July 2, 2019 and he intends to file an appeal to this Court out of time and seek stay of execution. It is contended that upon delivery of the judgment, the applicant instructed his advocates on record, the firm of Momanyi Manyoni & Co Advocates, to appeal against the decision. However, on July 22, 2019, upon visiting his advocate on record, he discovered that a notice of appeal had not been filed. He then filed a consent to act in person and a notice of appeal and requested for typed proceedings.
4. The applicant further deposes that he thereafter appointed the firm of Khanimwa and Khanimwa Advocates to act on his behalf, and the said firm filed an application for review, enlargement of time and stay of execution. The application was dismissed on April 20, 2021. His Advocates then filed applications dated 28th February, 2019 (sic) and 1st February, 2021 seeking various orders, rulings in which were delivered on April 20, 2021, thereby necessitating the instant application.
5. The applicant avers that the delay in filing the notice of appeal and in lodging the appeal was as a result of the various applications filed after judgment as the applicant had to await the outcome. He further avers that the mistake of his advocate should not be visited upon him.
6. There was no affidavit or submissions filed by the respondent in opposition to the application.
7. The background to this application is that the applicant was the defendant before the Environment and Land Court. The issue before the trial court related to ownership of land parcel number S/Kabras/Shamberere /1735. The respondent, the plaintiff in the case, alleged that the applicant, who was the defendant, had fraudulently registered the land in his own name. The trial court found that indeed the applicant, a brother of the respondent, held the land in trust for the respondent and his brothers, the land having belonged to their father, one Joel Ambani (deceased). The trial court directed that the applicant's title be cancelled and the land reverts to the name of Joel Ambani and thereafter be subjected to succession proceedings.
8. The present application seems to have been precipitated by steps on the part of the respondent to put into effect the decision of the trial court. The applicant avers that the District Land Surveyor has been visiting the land for the purpose of carrying out the subdivision thereof without a proper court order. The applicant has cited Rules 45(2) (b) and 41 of the 2010 Rules of this Court. I observe that the applicant cites Rule 45(2)(b) erroneously- indeed no such rule exists. The reference may be to Rule 5(2)(b) under which this Court is granted jurisdiction to grant orders for stay of execution. Rule 41 permits this Court:

‘...in its discretion [to] entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court.’
9. An application for extension or enlargement of time to do any act required under the Rules ought to be made under Rule 4. This Rule gives the Court unfettered discretion whether to extend time or not, such discretion to be exercised in accordance with the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2 EA. The principles to be considered in exercising the said discretion enunciated in the said case include the length of the delay, the reasons for the delay and (possibly) the chances of success of the appeal.
10. The applicant seeks, in the same application, an order for extension of time and an order for stay of execution of the decision of the trial court under Rule 5(2)(b) of the Rules. I consider first whether the



applicant merits the exercise of discretion in his favour under Rule 4, which he has not invoked in his application. The judgment that the applicant seeks to appeal against was delivered on 2nd July 2019. He was aware of its delivery on 22nd July 2019. He avers that he filed a consent with his previous advocate to act in person. Thereafter, he filed, through his advocates on record, several applications, all of which were dismissed in or about April 2021. The present application was filed on June 23, 2021.

11. The applicant has not offered any explanation for the failure to take any steps in the matter to have the time extended for filing the notice of appeal and the record of appeal for a whole year, 2020. He has not cited any provision of the law that would stop him from filing the notice of appeal or an application for extension of time to do so while an application for stay of execution in the trial court is pending. I am not, therefore, satisfied that a plausible reason has been advanced to explain the near two-year delay from the delivery of judgment in the matter on July 2, 2019 to the date when the present application was filed.
12. The applicant has not cited the provisions of Rule 5(2)(b) of the Rules of this Court which grants the Court jurisdiction to grant orders of stay of execution. I will nonetheless, in the interests of substantive justice, consider his prayer for stay of execution under the provisions of the said Rule, which provides that:
 - (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - (a) ...
 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

(Emphasis added).
13. The jurisdiction of this Court under Rule 5(2)(b) can only be invoked where there is a duly filed notice of appeal, a proposition that does not need belabouring. Until the applicant has obtained extension of time to file his notice of appeal out of time and has done so, all the other prayers in his application are premature. Unless a valid and competent notice of appeal is filed in accordance with the Rules, this Court lacks jurisdiction to entertain any proceedings regarding the applicant's intended appeal.
14. In this case, the applicant seeks to have time extended for the filing of his notice of appeal, but also orders of stay of execution of the decision of the trial court. There being no notice of appeal filed before this Court, there is no jurisdiction for the court to exercise jurisdiction under Rule 5(2)(b), a jurisdiction that is, in any event, exercised by the full bench, rather than a single judge on behalf of the Court.
15. It is therefore my finding and I so hold that the application dated June 23, 2021 is devoid of merit, and it is hereby dismissed. As the application was not opposed, there shall be no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JULY, 2022

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

