



REPUBLIC OF KENYA



KENYA LAW
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**Mutoro v Machiri & 2 others (Civil Application E056 of 2022)
[2022] KECA 1027 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1027 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E056 OF 2022
M NGUGI, JA
SEPTEMBER 23, 2022**

BETWEEN

FRANCIS JUMA MUTORO APPLICANT

AND

ABUBAKAR SALIM MACHIRI 1ST RESPONDENT

SIMON KABURU SICHANGI 2ND RESPONDENT

GREGORY MUGODO 3RD RESPONDENT

*(An application for extension of time to file an appeal out of time
against the judgment of the Environment and Land Court at Bungoma
(B. Olao J) dated 4th November, 2021 in ELC Case No. 17 of 2009)*

RULING

1. In his application dated April 4, 2022, the applicant seeks the following orders:
 - i. That the Applicant be granted leave to appeal out of time against the whole judgement of Judge Boaz N. Olao at Bungoma delivered on 4th November, 2021 without notice to the applicant nor his counsel.
 - ii. That there be a stay of execution of decree and or judgment issued in Bungoma ELC case No. 17 of 2009 on 4/11/2021 in absence of the applicant pending hearing and determination of this application inter parties.
 - iii. That there be a stay of execution of decree and or judgment issued in Bungoma ELC Case No. 17 of 2009 on 4/11/2021 in absence of the applicant and his counsel or without notice pending hearing and determination of the intended appeal.
 - iv. That the costs of this application be provided for.



2. The application is brought under Rule 4 of the Court of Appeal Rules and is supported by an affidavit sworn by the applicant on April 4, 2022. The grounds in support of the application as set out on its face and the affidavit in support are that the judgment was scheduled for delivery on October 5, 2021. However, judgment was delivered on November 4, 2021. The applicant was not aware of the new date for delivery of the judgment after it had been deferred on October 5, 2021. The new delivery date was not communicated either to the applicant or his Counsel.
3. That the judgment had been delivered only came to the knowledge of the applicant on March 31, 2022. By then, the 30 days within which he ought to have filed his appeal had lapsed. He avers that he risks being evicted from the subject premises as he had been given six months to vacate the premises, and the grace period lapsed on April 4, 2022. He wishes to challenge the judgment delivered on November 4, 2021 and since the 30 days within which he ought to have filed the appeal had lapsed, there is need for leave to file his appeal out of time in exercise of his constitutional right of appeal.
4. The applicant further avers that there is need to grant stay of execution of the decree pending the hearing and determination of this application and the intended appeal. If the orders sought are not granted, the appeal will be rendered nugatory. In the applicant's view, the respondents will suffer no prejudice if the orders sought are granted as they will be granted an opportunity to be heard in the intended appeal.
5. According to the applicant, the delay in filing his appeal is excusable and not inordinate. Further, his annexed draft memorandum of appeal clearly shows that he has an arguable appeal against the decision of the trial court.
6. There was no response to the application, nor did any of the parties file submissions in respect thereof.
7. The applicant seeks extension of time to file his appeal as well as stay of execution of the decision of the trial court. I will address myself first to the application for stay of execution. The jurisdiction to grant orders of stay is vested in this Court by section 5(2)(b) of the [Court of Appeal Rules](#). This Rules 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).
8. As the applicant seeks extension of time to file his appeal, and has not averred that he has filed a notice of appeal or attached a copy of such a notice to his application, it is safe to conclude that none has been lodged. That being the case, the application for stay of execution is premature: only when a notice of appeal has been properly lodged before the Court can the Court exercise jurisdiction under Rule 5(2)(b). The prayer for stay of execution must accordingly fail.
9. In order to succeed in an application under Rule 4 of this Court's Rules, an applicant must bring himself within the principles set in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA. In its decision in that case, the Court held that in exercising its discretion to grant or refuse orders for extension of time, the Court must consider the length of the delay, the reasons for the delay, the



prejudice likely to be suffered by the respondent if the orders are granted, and (possibly) the chances of success of the appeal.

10. The judgment in this matter was rendered on 4th November 2021. The applicant avers that he was aware that it was scheduled for delivery on 5th October 2021, but neither he nor his advocates were notified when it was rescheduled to November 4, 2021. He only learnt that judgment had been rendered on March 31, 2022 when he visited the Registry. The present application is dated April 4, 2022. There was therefore a delay of approximately four months between the delivery of the judgment and the filing of the application for extension of time.
11. The question is whether the applicant has placed before the Court a plausible reason for his failure to file his notice of appeal and record of appeal in time. The applicant was aware that judgment was to be delivered on October 5, 2021. It was delivered a month later, as the 'Explanatory note' at the foot of the judgment annexed to the application indicates. The trial Judge explained in the note the failure to deliver the judgment on the date scheduled on the fact that he had been unwell.
12. The applicant asks the Court to accept his averment that despite knowing that the judgment was due on October 5, 2021, neither he nor his advocates on record sought to find out the position until four months later. This, it seems to me, is not a plausible or acceptable explanation. The trial court indicated in its judgment that all the defendants, including the applicant, were represented by Counsel. Of note is that the Advocate representing the applicant, indicated in the judgment as Ms. Ratemo, has not sworn an affidavit to support the applicant's assertion that neither he nor his advocates were aware of the delivery of the judgment.
13. The applicant's explanation is further undermined by the Certificate of Delivery of Judgment via Email dated November 4, 2021, also attached to the application. Signed by the Deputy Registrar of the Court, it indicates that the judgment was delivered electronically to the law firms of J. O. Makali for the plaintiff, Paul Juma Advocate for the 2nd defendant and Situma & Co. Advocates for the 3rd defendant.
14. While the Certificate does not indicate that the judgment was emailed to the applicant's advocate, the applicant's own assertions in his application further call to question his reasons for filing this application four months after the judgment. He asserts on behalf of the 2nd respondent in the Certificate of Urgency that the 2nd respondent's wife interred in the suit parcel is likely to be exhumed, thereby causing the 2nd respondent great damage and mental anguish. The Certificate of the Deputy Registrar indicates that the firm of Paul Juma Advocates for the 2nd defendant, the 2nd respondent in this matter, had been sent the judgment on email. It is hard to conceive that the applicant was aware of the threat to the 2nd respondent but was not aware of the decision until April 2022. I am not satisfied, therefore, that the explanation offered by the applicant is plausible.
15. Two further matters to be considered in a matter such as this is the prejudice to be suffered by the respondent, and the chances of the appeal succeeding. Regarding the prejudice to the respondent, I note that this matter began in the High Court in 2009. The 1st respondent, the plaintiff in the case, has been kept out of the suit land for a period exceeding 10 years. The argument by the applicant that the 1st respondent will not suffer prejudice because he will be heard by the appellate court does not adequately address the prejudice that the 1st respondent will continue to suffer in the circumstances of this case.
16. The final issue for consideration is, possibly, the success of the appeal. The applicant has annexed a draft memorandum of appeal containing some six grounds. Having taken a cursory look at these grounds vis a vis the judgment of the trial court, and without making a definitive conclusion on the possibility of success of the appeal, I am not satisfied that they constitute sufficient reason to exercise discretion in favour of the applicant.



17. I accordingly find no merit in the application dated March 4, 2022, and it is hereby dismissed. As there was no response to the application, there shall be no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

