Hezekiah v Gor Construction and Hardware Limited (Miscellaneous Application E010 of 2023) [2024] KEELC 3492 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3492 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

MISCELLANEOUS APPLICATION E010 OF 2023

SO OKONG'O, J

APRIL 25, 2024

BETWEEN

ONG'UDI OKUMU HEZEKIAH ..... APPLICANT

AND

GOR CONSTRUCTION AND HARDWARE LIMITED ..... RESPONDENT

RULING

1. What is before me is the applicant's application dated 30th April 2023 in which the applicant has sought leave of the court to file an appeal out of time against the judgment of Hon. W. K. Onkunya SRM delivered on 26th June 2019 in Kisumu CMCC No. 25 of 2017 and a stay of execution of the said judgment pending the hearing and determination of the intended appeal. The application was filed on 3rd May 2023; almost 4 years after the delivery of the judgment sought to be appealed.

2. The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the applicant on 30th April 2023. The applicant contended that on the date the said judgment was delivered, the applicant was in court but was sick having been diagnosed with various ailments. The applicant contended that due to his state of health, he did not understand the judgment and the consequences thereof. The applicant contended that he left the court without a copy of the judgment.

3. The applicant averred that he was sick for the better part of 2019 which sickness extended to 2020 when COVID-19 was declared a pandemic in Kenya. The applicant averred that due to his sickness and restrictions associated with COVID-19, he was unable to file an appeal against the said judgment within 30 days provided by the rules. The applicant averred that as a result of his sickness which was on and off, he was drained financially and as such he was unable to obtain the services of an advocate to obtain a copy of the said judgment and advise him on the same.

4. The applicant averred that it was not until 26th April 2023 when the agents of the respondent came to the suit property, Kisumu West/Karateng/1282 and threatened to forcefully evict the applicant

together with his family from the property that the applicant asked one of his sons to go to court and get for him a copy of the judgment. The applicant averred that it was upon obtaining a copy of the said judgment and seeking advice regarding the same that he learnt that the learned magistrate had erred on various issues which should be reconsidered by this court on appeal. The applicant averred that it was upon obtaining the said advice that he brought the present application. The applicant averred that the intended appeal raises very serious issues for determination by the court. The applicant annexed to his affidavit in support of the application among others, a copy of the judgment of the lower court and a draft memorandum of appeal.

5. The application was opposed by the respondent through a replying affidavit sworn on 1st July 2023. The respondent averred that the judgment sought to be appealed was made 4 years ago in the presence of the applicant. The respondent averred that the respondent thereafter filed a bill of costs which was opposed by the applicant. The respondent averred that after the said bill was taxed, the applicant paid the respondent's costs. The respondent averred that the applicant was represented in the lower court by an advocate and that the application before the court was an afterthought. The respondent averred that although the applicant claimed that he was sick from the time the judgment was delivered until he brought the present application, the applicant filed several applications in the lower court. The respondent termed the application a waste of judicial time and urged the court to dismiss the same.

6. The applicant filed a further affidavit sworn on 11th February 2024 in which he denied that he was represented by an advocate in the lower court. He also denied that he had filed an application similar to the one before the court in the lower court. The applicant reiterated that the judgment was delivered while he was sick and that he was still under medication.

7. The respondent filed a supplementary affidavit sworn on 15th February 2024 in which it reiterated that the applicant's application was an afterthought. The respondent averred that the medical records produced by the applicant showed that the applicant became sick in 2021, two years after the delivery of the judgment. The respondent averred that the alleged sickness could not therefore have prevented the applicant from filing the appeal.

8. The application was argued by way of written submissions. The applicant filed submissions dated 4th March 2024 while the respondent filed submissions dated 12th March 2024. I have considered the applicant's application together with the supporting affidavits. I have also considered the respondent's affidavits filed in opposition to the application and the submissions by the parties. The applicant's application has two limbs. The first limb is seeking an extension of time within which to file an appeal against the decision of the lower court while the second limb is seeking a stay of execution of the said decision pending the hearing of the intended appeal.

9. Section 16A (1) of the *Environment and Land Court Act*, 2011 provides that all appeals from subordinate courts and local tribunals shall be filed within 30 days from the date of the decree or order appealed against. Section 16A (2) of the said *Act* provides that:

> " An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time."

10. Sufficient cause was defined in *Attorney General v. Law Society of Kenya & another* [2017]eKLR as follows:

> " Sufficient cause or good cause in law means:
>
> > ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary*, 9th Edition, page 251
>
> Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

11. This court's power to extend the time within which to file an appeal from a decision of a lower court is discretionary. A party approaching the court for an extension of time must demonstrate that he deserves the exercise of the court's discretion. The judgment sought to be appealed was delivered on 26th June 2019. The appeal against the same should have been filed by 26th July 2019. The present application was filed on 3rd May 2023 after a lapse of almost 4 years from the time when the applicant was supposed to file the appeal.

12. A delay of over 3 ½ years to file an appeal or an application for an extension of time is inordinate. From the material before me, I find no reasonable explanation for this delay. The applicant's claim that he was not aware of the content and effect of the judgment of the lower court until 26th April 2023 is not supported by the evidence on record. It is common ground that the applicant was present in court when the judgment was delivered. The respondent placed evidence before the court showing that soon after the judgment, the applicant filed an application for a stay of execution in the lower court dated 11th September 2019. The application was supported by the applicant's affidavit to which he annexed a copy of the judgment of the lower court and a draft memorandum of appeal. This means that the applicant was aware of the content of the judgment and had intended to appeal against the same by 11th September 2019. The applicant claimed that he was prevented from filing the appeal due to ill health. The medical records placed before the court by the applicant show that he was sick and was admitted as an in-patient at Kijabe Level 5 Hospital on 13th March 2021. He had been treated as an outpatient in that hospital on 29th January 2020 and 17th May 2020. The applicant's sickness which started in 2020 could therefore not have prevented him from filing the appeal in July 2019. I agree with the respondent that the applicant's application for an extension of time is an afterthought and amounts to an abuse of the process of the court. For the foregoing reasons, I find no merit in that limb of the application.

13. The limb of the application seeking a stay of execution was dependent on the outcome of the first limb that sought an extension of time within which to file an appeal against the lower court judgment. Having ruled that no good grounds exist to warrant the extension of time to appeal, the application for stay pending the hearing of the appeal equally fails since astay of execution order cannot be made in a vacuum. Since the applicant has no appeal or an intended appeal, an order for stay pending appeal is not available to him. The limb of the application seeking a stay of execution would not succeed even if it was considered independent of the limb of the application seeking an extension of time. Order 42 Rule 6 of the *Civil Procedure Rules* provides that an application for a stay of execution must be brought without unreasonable delay. The application before me was brought almost 4 years after the judgment sought to be stayed. I have already found that such a delay was unreasonable. The application would fail on that ground alone even if other conditions for granting a stay of execution are not considered.

14. In conclusion, the court finds no merit in the applicant's application dated 30th April 2023. The application is dismissed with each party bearing its costs.

DELIVERED AND DATED AT KISUMU ON THIS 25TH DAY OF APRIL 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Applicant in person

Mr. Sala for the Respondent

Mr. Oguta-Court Assistant