



**Odwar v Orengo (Environment and Land Appeal E42 of 2023)  
[2024] KEELC 3592 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3592 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E42 OF 2023**

**E ASATI, J**

**APRIL 25, 2024**

**BETWEEN**

**DAVID ODHIAMBO ODWAR ..... APPELLANT**

**AND**

**JOSIA OGALO ORENGO ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion application dated 18<sup>th</sup> December, 2023 brought by the Appellant pursuant to the provisions of sections 2 and 10 of the Judicature Act, sections 8 and 9 of the Law Reform Act, sections 1A, 1B, 3, 3A and 95 of the Civil Procedure Act, Order 42 Rule 6 and Order 51, Rule 1 Civil Procedure Rules and Rule 3(1) and (2) of the High Court (Practice and Procedure) Rules. The application seeks for orders that;
  - a. the honourable court be pleased to stay the execution of the Judement of Kisumu MC. ELC NO.168 of 2918l Josia Ogalo Orengo –vs- David Odhiambo Odwar delivered on 26<sup>th</sup> September, 2023 pending hearing and determination of the appeal.
  - b. the honourable court be pleased to grant leave to the applicant to appeal out of time against the judgement in Kisumu MC ELC NO.168 of 2018, Josia Ogalo Orengo –vs- David Odhiambo Odwar delivered on 26<sup>th</sup> September, 2023.
  - c. The memorandum of appeal annexed be deemed as properly filed.
  - d. Cost of the application be provided for.
2. The application was opposed vide the averments in the Replying Affidavit of Josiah Ogalo Orengo sworn on 22<sup>nd</sup> January, 2024 and the annextures thereto. The Respondent’s case is that the application constitutes an abuse of the process of the court, is frivolous, vexatious and ought to be dismissed. That the applicant had not shown sufficient or plausible cause for his failure to file the appeal within



the required time. That the application does not meet the conditions for grant of an order of stay of execution under Order 42 of the Civil Procedure Rules.

3. An application for enlargement of time within which to file appeal is anchored on the proviso to section 79G of the Civil Procedure Act. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order

Provided 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.”

4. The grounds for leave to appeal out of time includes good and sufficient explanation as to why the appeal was not filed within time. The explanation given by the appellant for not filing the appeal within time is that at the delivery of the judgement, he requested for a certified copy of the judgement and typed proceedings and subsequently wrote a letter dated 4<sup>th</sup> October, 2023 requesting for a certified copy of the said judgement and proceedings but that he is yet to be supplied with the same. That unless the time within which to file the appeal is enlarged, he stands to suffer substantial and irreparable loss.
5. The application was argued orally and I have taken into account submissions made by Counsel for the parties.
6. I have considered the prayer for leave to appeal out of time. The applicant has demonstrated that he applied for proceedings to enable him file the appeal. To the application the applicant attached a draft Memorandum of Appeal. I find that in the interest of justice and to allow the applicant exercise his right of appeal, the application for extension of time within which to file appeal is merited.
7. The prayer for stay of execution is based on the grounds that the applicant has an arguable appeal and that the appeal will be rendered nugatory if stay of execution is not granted. Taking into account the grounds of the application, the Replying Affidavit and submissions made by Counsel, I find that the prayer for stay of execution is merited.
8. For the foregoing reasons, I allow the application as follows:
- i. The applicant is hereby granted leave to appeal against the judgement dated 26/9/2023 in KSM MC ELC NO 168 OF 2018 out of time.
  - ii. The draft Memorandum of appeal annexed to the application is hereby deemed to have been filed within time.
  - iii. There be stay of execution of the judgement pending hearing and determination of the appeal on condition that the applicant deposits Kshs.100,000/=, as security for due performance of such decree or order as may ultimately be binding on him, in an interest earning account in the joint names of Counsel for the applicant and Counsel for the Respondent within 30 days hereof, failing which the order of stay of execution granted herein shall lapse.
  - iv. Costs to the Respondent.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 25<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**



**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen- Court Assistant.

Tazita h/b for Kangogo for the Applicant.

Odah for the Respondent.

