



Keeping v Joreth Limited & 2 others (Enviromental and Land Originating Summons 618 of 2015) [2024] KEELC 3562 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3562 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 618 OF 2015**

AA OMOLLO, J

APRIL 11, 2024

BETWEEN

PETER KAMAU KEEPING PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

TRUPHENA OMUNGALA 2ND DEFENDANT

KENNETH LW AKIDE 3RD DEFENDANT

RULING

1. The Plaintiff/Applicants brought the application dated 18th March 2024 seeking several orders *inter alia*; that the court do grant an order of stay of execution of the judgment delivered on 12 June 2023 and that leave be granted to file a notice of appeal out of time with the notice of appeal filed on the 30th of June 2023 be deemed as duly filed. He also sought for the cost of this application we provided for.
2. The application is premised on several grounds listed on its face for instance, that the applicant is dissatisfied with the judgement of the court delivered on 12th June 2023 and wishes challenge it. He also stated that the reasons for delay in filing the appeal was due to circumstances beyond his control. The plaintiff argues that if the orders of stay is not granted then the appeal will be rendered nugatory. Further, that the plaintiff will suffer irreparable damage unless the execution is stayed. Finally, he asserts that the appeal has high chances of success.
3. The application is opposed vide the replying affidavit of Kenneth Akide, the 3rd Defendant sworn on the 5th of April, 2024. The 3rd respondent deposes that it appears the notice of appeal filed out of time was done by the advocates previously on record with instructions from the plaintiff. Mr. Akide deposes that it is noteworthy the notice of motion was filed with the imminent threat of execution looming over the plaintiff. Further, there is eight-month delay in taking any steps towards lodging the appeal which is inexcusable. That the power to grant an extension of time under Section 7 of the [Appellate Jurisdiction](#)



Act is discretionary and the plaintiff does not deserve this court's discretion. The respondent added that the application is an abuse of the process of the court and ought to be dismissed.

4. Learned counsels on record orally submitted on the application on 8th of April 2024. Mr. Githinji advocate submitted that already on record is a notice of appeal which was filed 4 days late. That the plaintiff was not aware about the judgment and he is asking that the court does extend time under the provisions of Section 7 of the Appellate Jurisdiction Act (CAP). He is also seeking for stay of execution under the provisions of Order 42 of the Civil Procedure Rules. On account that unless the stay is given, the appeal will be rendered nugatory. Mr. Githinji continued that the plaintiff has detailed numerous attempts he made to trace his then advocate, which explains the delay. He urged the court to exercise discretion and allow the application as sought.
5. Mr. Muriithi for the Respondents in opposing the grant of the prayer sought submitted that it is an untruthful for the Plaintiff to say that the he has just learnt of the judgment yet the previous advocate had filed a notice of appeal. Counsel argues that there's no evidence presented that the previous advocate acted without instruction. He also submitted that the application was only filed after the Plaintiff realized there was looming proclamation. That the 2nd and 3rd defendants are the ones who are in possession of the land, and therefore there is no danger that the plaintiff will suffer even if the order sorted are not granted. He also added that the plaintiff has brought the application after delay of eight months and there has been no explanation given. That parties must be vigilant and should not be entertained when they run to court after inordinate.
6. To grant or not to grant an order for stay of execution is a discretion of the court which must be exercised judiciously and where the party has demonstrated that it is well deserved. In this case, the plaintiff is saying that he was not aware of the judgment hence the delay in bringing the present application. I have perused the affidavit in support of the application but I did not find any paragraph explaining how the Plaintiff tried to contact his advocate to get to know the position of the case. It is obvious that cases belongs to parties and not to advocates, therefore the plaintiff having instructed his previous advocates to represent him was under duty to make follow-ups on the stages of the case.
7. There is no evidence of correspondence with the previous advocates and or information of visiting this previous advocate's office. Mr Githinji, learned counsel for the Plaintiff does not disclose explicitly what hindered the communication between the Plaintiff and his then advocate. The Plaintiff was only woken up when the Defendants commenced the execution process to realize the sum that was awarded to them and costs of the suit.
8. Be that as it may, parties have a right to exhaust all the avenues they would want to use for dispute resolution including filing an appeal to the Court of Appeal which right is anchored in Article 50 of the Constitution of Kenya, 2010. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 gave guidance on how a court should exercise discretion and held inter alia that:
 - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings."
9. The plaintiff indicated that he is willing to abide by any conditions that may be set by this court. Indeed, order 42 rule 6 sub rule 2 provides that the court can order for provision of security where it deems just in the circumstances. In *Gianfranco Manenti & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR as cited in *HGE v SM* (*supra*) where the Court stated;

“...Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree.”
10. In this circumstance, I am satisfied that the plaintiff having come to court after the respondents had taken steps to execute the decree in their favour, it is thus imperative to balance the interest of both parties to meet the justice and fairness and which then in my view calls for the grant of a conditional stay. Consequently, the Applicant shall deposit the decretal sum as security as he pursues his right of appeal. I hereby direct that the plaintiff shall deposit the amounts contained in the warrant of execution (Kshs 1,595,561) in a joint interest earning account to be opened in the names of the advocates on record. The said sum of money shall be deposited within 90 days of this order, in default, the orders of stay granted lapses.
11. On the prayer for extension of time, I note that the notice of appeal was lodged four days late which in my view is not inordinate. In any event, if time is extended for the plaintiff, the defendant will not suffer any prejudice. Consequently, I grant the leave to file the notice of appeal out of time and that the notice of appeal filed on the 30th of June 2023 is deemed as duly filed. The same to be served upon the respondents within seven days of today.
12. The cost of this application is to the 2nd and 3rd Respondents in any event.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2024.

A. OMOLLO

JUDGE

