



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kitonga v Kamau (Environment and Land Appeal E003 of 2023)  
[2024] KEELC 4464 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4464 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**YM ANGIMA, J**

**MAY 30, 2024**

**BETWEEN**

**JOSEPH MWATHI KITONGA ..... APPELLANT**

**AND**

**CHRISTOPHER KIMANI KAMAU ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The record shows that vide a plaint dated 23.07.2018 the Appellant sued the Respondent in Nyahururu CM ELC No. 211 of 2018 seeking, inter alia, an order for cancellation of the Respondent's title deed over Parcel No. Nyandarua/Ol'Kalou Salient/344 (the suit property); his registration as the owner thereof; a permanent order restraining the Respondent from trespassing or entering upon, encroaching, charging, alienating or dealing with the suit property; and costs of the suit.
2. The material on record shows that upon a full hearing of the suit the trial court dismissed the Appellant's suit with costs on the basis that the Appellant had failed to prove his claim against the Respondent on a balance of probabilities. Being aggrieved by the said judgment the Appellant filed the instant appeal.

**B. Appellant's Application**

3. Vide a notice of motion dated 19.12.2023 expressed to be brought under Order 51 rules 1, 3 & 10, Order 42 rule 6 of the of the *Civil Procedure Rules* (the Rules) and Sections 1A, 1B, 3A, 6 and 95 of the *Civil Procedure Act* (Cap.21) the Appellant sought, inter alia, leave to appeal out of time and stay of proceedings in Nyahururu CM ELC No. 211 of 2018 pending the hearing and determination of the appeal.



4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 19.12.2023. The Appellant contended that he had filed his memorandum of appeal out of time due to financial constraints and the delay of about one and a half months was not inordinate. It was further contended that the Respondent had embarked upon execution of the judgment of the trial court with the risk that his intended appeal might be rendered nugatory. It was also his case that he stood to suffer irreparable loss and injury in the absence of a stay.
5. The record shows that vide a notice of motion dated 25.03.2024 the Appellant filed another application for stay of execution under certificate of urgency. He stated that the Respondent had already entered the suit property, taken possession thereof and constructed a temporary structure thereon. He further stated that the Respondent had ploughed the suit property with a tractor in preparation for planting in the process of which he had destroyed his crops thereon which were ready for harvesting. There is, however, no indication on record if the suit application was ever served upon the Respondent.

### **C. Respondent's Response**

6. The Respondent filed a replying affidavit sworn on 12.04.2024 in opposition to the application dated 19.12.2023 on several grounds. First, that the application was incompetent and fatally defective. Second, that there was no plausible explanation for the Appellant's failure to file his appeal within the prescribed period. Third, that the Appellant's suit was dismissed by the trial court upon a full hearing hence his only remedy was to prosecute the appeal. Fourth, that the application was misleading since the Appellant was not the one in occupation of the suit property in the first place. As a consequence, he prayed for dismissal of the application with costs.

### **D. Directions on Submissions**

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. As a consequence, the parties were granted timelines within which to file and exchange their respective submissions. However, by the time of preparation of the ruling, none of the parties had filed submissions.

### **E. Issues for Determination**

8. The court has considered the Appellant's two applications on record, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the key issues for determination herein are as follows:
  - a. Whether the Appellant has made out a case for extension of time to appeal out of time.
  - b. Whether the Appellant is entitled to a stay of proceedings or stay of execution of the decree of the trial court.
  - c. Who shall bear costs of the application.

### **F. Analysis and Determination**

#### **a. Whether the Appellant has made out a case for extension of time to appeal out of time**

9. The court has considered the material on record on this issue. The record shows that the judgment of the trial court was delivered on 16.10.2023 and that the Appellant lodged his memorandum of



appeal on 15.11.2023 but paid for it on 27.11.2023. It was the Appellant's case that the delay was not inordinate and that he was unable to pay for the appeal on time due to financial constraints.

10. The factors to be considered in such application for extension of time were summarized in the case of *Thuita Mwangi v Kenya Airways* [2003] eKLR as follows:

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted”.

11. The court is of the view that the period of delay in the instant appeal was just over one month hence it was not excessive or unreasonable in the circumstances of the case. The court has also considered the reasons for the delay in payment of the filing fee as well as the possible prejudice the Respondent may suffer by allowing the appeal out of time. The court has noted that in his replying affidavit the Respondent did not demonstrate what prejudice he stands to suffer by allowing the appeal out of time which cannot be adequately compensated by an award of costs. Even though the issue of inability to pay filing fee, taken alone, cannot be a valid justification for enlargement of time the court is of the opinion that taken together with other factors, the Appellant is entitled to extension of time to enable him ventilate his intended appeal on merit. As a result, the court is inclined to grant the Appellant the extension of time sought.

**b. Whether the Appellant is entitled to a stay of proceedings or stay of execution of the decree of the trial court**

12. The court has considered the material on record on this issue. It is clear from the record that the suit before the trial court was concluded and a judgment delivered on 16.10.2023 dismissing the Appellant's suit with costs. There is thus no suit or 'proceedings' pending before the trial court capable of being stayed. There is even no indication on record to demonstrate that the Respondent has taken out a certificate of stated costs and initiated execution proceedings for recovery of his costs. In the premises, the court finds no justification for seeking a stay of proceedings.
13. In his second application dated 25.03.2024, the Appellant purported to seek a stay of execution of the decree of the trial court pending the hearing and determination of the appeal. As indicated before, all the trial court did vide its judgment dated 16.10.2023 was to dismiss of the Appellant's suit. The court takes the view that the dismissal order was a negative order which is incapable of execution in the ordinary manner. It is thus not capable of being stayed as contemplated under Order 42 rule 6 of the Rules.
14. In *Western College of Arts and Applied Sciences v Orange & Others* [1976] KLR 63 it was held that:

“But what is there to be executed under the judgement, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in



respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a church to make a payment out of the fund. In the instant case the High Court has not ordered any parties to do anything or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for stay, to enforce or restrain by an injunction...”

15. The court has taken the view that there is nothing arising out of the judgment of the trial court which gave rise to a positive order capable of execution or stay. As such, there is nothing in the decree capable of execution since it simply dismissed the Appellant’s suit. In the premises, the court is not inclined to grant either a stay of proceedings or stay of execution of the decree of the trial court.

**c. Who shall bear costs of the application**

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons – v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Although the Appellant has partly succeeded in his application, he was the one who defaulted in filing his appeal within the prescribed period. Consequently, the court is of the view that the Appellant should bear costs of the application. As a result, the Respondent shall be awarded costs of the application.

**G. Conclusion and Disposal Order**

17. The upshot of the foregoing is that the court is satisfied that the Appellant is entitled to an extension of time to lodge his appeal out of time. However, the court is not satisfied that the Appellant is entitled to a stay of proceedings or the decree of the trial court. As a consequence, the court makes the following orders for disposal of the Appellant’s applications:
  - a. The Appellant is hereby granted an extension of time to lodge an appeal out of time.
  - b. The Appellant’s memorandum of appeal dated 15.11.2023 is hereby deemed as duly filed within time.
  - c. The Appellant’s prayers for stay of proceedings and stay of execution pending appeal are hereby declined.
  - d. The Appellant shall bear costs of the application.
  - e. Mention on 23.07.2024 to confirm the filing of the record of appeal.

Orders accordingly.

**RULING DATED AND SIGNED AT NYANDARUA THIS 30<sup>TH</sup> DAY OF MAY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

N/A for the Appellant

Ms. Waweru holding brief for Mr. Gachomo for the Respondent

C/A - Carol

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**Y. M. ANGIMA**



## JUDGE

