



Kipkurui v Kipkurui & another (Suing as the Administrator of the Estate of David Kipkorir Kipkurui - Deceased) (Environment & Land Case 877 of 2012) [2024] KEELC 3870 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 877 OF 2012**

**EO OBAGA, J
MAY 16, 2024**

BETWEEN

MICHAEL CHELIMO KIPKURUI PLAINTIFF

AND

JULIUS KIPROP KIPKURUI 1ST DEFENDANT

STANLEY ROTICH KORIR 2ND DEFENDANT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAVID KIPKORIR
KIPKURUI - DECEASED**

RULING

1. This is a ruling in respect of Notice of motion dated 3/3/2023 in which the Judgment Debtor/ Applicant seeks the following orders:-
 - a. Spent
 - b. That the firm of Mathai & Company Advocates be granted leave to appeal and represent the plaintiff herein in place of Joseph C. K. Cheptarus & Co. Advocates after judgement has been delivered.
 - c. That the Honourable court be pleased to grant to leave of enlargement of time for filing of appeal and that the notice of appeal filed on 6th day of December, 2018 be deemed proper, duly constituted and filed.
 - d. Spent.



- e. That this Honourable court be pleased to stay the execution of the judgment delivered on the 13th October, 2018 and its consequential orders in its entirety pending the hearing and determination of the intended appeal.
- f. That the costs to and incidental to this application be provided for.

Background;

2. The Judgement Debtor/Applicant is brother to the Decree Holders/Respondents. On 30.5.2012 the Applicant filed a suit against the Respondents in which he sought for an injunction restraining them from interfering with LR No. Moiben/Moiben Block 3 (Kapsilat)/90 measuring 7.200 hectares (suit property).
3. The Respondents filed a defence and raised a counter-claim in which they sought for 6 acres from the Applicant. The suit property had been demarcated in two portions of 9 acres each. The case was fully heard and in a judgment delivered on 13.10.2018 the court dismissed the Applicant's claim and entered judgment in favour of the Respondents in the counter-claim where it was ordered that the Respondents were entitled to 3 acres each with the Applicant remaining with 3 acres.
4. The Respondents moved to execute the decree and their 3 acres each were demarcated on the ground. This is what prompted the Applicant to file the present application.

Applicant's contention;

5. The Applicants contend that he had instructed his erstwhile Advocates M/s Joseph C.K. Cheptarus & Co. Advocates to act for him. He fully paid the Advocates fees. The case proceeded to hearing until completion. The Applicant waited for his advocate to inform him about the outcome of the case but the Advocate did not do so.
6. The Applicant only came to learn of the judgment when he was summoned to Moiben Police station where he was told that he was a trespasser on to 6 acres belonging to the Respondents. He was also shown an eviction order. He tried to call his Advocate who was not picking his calls. He went to the Advocates office where he inquired about the judgment but the Advocate became hostile to him.
7. The Applicant went and instructed his current Advocates who went to the registry and perused the court file. The Advocate realized that judgement was delivered on 13.10.2018 in the presence of an Advocate who was holding brief for his erstwhile Advocate. He also noticed that the Advocate had filed a Notice of Appeal on 6.12.2018 but he never informed him or made any step to prosecute the Appeal.
8. It is for this reason that he seeks for stay of execution and for extension of time to file an appeal. He also prays that the notice of appeal which was filed be deemed as having been properly filed. He states that if his prayer for extension of time is not allowed, he will lose his land and that the application is brought in good faith.

Respondent's Contention;

9. The Respondents opposed the Applicant's application based on a replying affidavit sworn on 19.4.2023. The Respondents contend that the application lacks merit. They state that the Applicant's application is only meant to delay the finalization of this case and that in as far as stay of execution is concerned, the application has been overtaken by events in that the surveyor has gone to the ground and excised 3 acres each for the Applicant and the Respondents.



10. On the issue of enlargement of time, the Respondents state that the application has been brought almost four and half years later and that the delay has not been explained. At the time of delivery of judgment, the Applicant's erstwhile Advocate was represented by counsel.

Analysis and determination;

11. The parties agreed to dispose of the application by way of written submissions. The Applicant filed his submissions on 30.5.2023. The Respondents filed theirs on 29.3.2023. The Applicant basically reiterated the facts in his supporting affidavit. He also quoted the relevant sections of law. He relied on the case of *Mbaka & others v Macharia & another* (2005) 2 EA 206 and the Tanzanian case of Civil Application No. 33 where it was held among others that right to hearing is not only constitutionally entrenched but is also the cornerstone of the rule of law. The Applicant consequently argued that his right of appeal will be threatened if his application for extension of time is not allowed.
12. The Respondents submitted that the Applicant is guilty of unexplained delay. They submitted that the Applicant has been indolent. They relied on the case of *Attorney General of Uganda v Omar Awadh & 6 others* (2013) eKLR where it was held as follows:-
- “Both justice and equity abhor a claimant's indolence or sloth. Stale claims at any stage along court process prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for timelines is to protect the system from the prejudice on the twin principles of legal certainty and of response.”
13. The Respondents also relied on the case of *Paul Musili Wambua v Attorney General & 2 others* (2015) eKLR where it was held as follows:-
- “In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
14. I will first deal with the issue of extension of time because all other prayers are predicated on this one. The factors to be considered in an application for extension of time were well captured in the Paul Musili Wambua case (Supra). In the instant case, judgment was delivered on 13.10.2018. This application was brought over 4 years later. The delay has not been explained. The Applicant attempted to explain the delay by claiming that he was not informed of the judgment by his lawyer. A case belongs to a litigant and not the lawyer.
15. The Applicant cannot expect the court to believe that a party who has taken his case to court, prosecuted it to conclusion and a judgment date is set will fail to inquire what the outcome was. The Applicant is being economical with the truth. He knew that his case had been dismissed as there was a lawyer holding brief for his erstwhile lawyer. He was only awoken when a decree for execution was given.
16. If the Applicant was to be given extension of time, this will greatly prejudice the Respondents who have partially executed the decree in their favour.

Disposition;

17. From the above analysis, I find that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondents.



It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 16TH DAY OF MAY, 2024.

E. O. OBAGA

JUDGE

In the virtual absence of parties who had been given notice of delivery of judgement.

Court Assistant –Laban

E. O. OBAGA

JUDGE

16TH MAY, 2024

