



Gikonyo v Wairimu & another (Environment and Land Miscellaneous Application E014 of 2023) [2024] KEELC 4081 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E014 OF 2023**

JO OLOLA, J

MAY 9, 2024

BETWEEN

ROBERT KANYEKI GIKONYO APPLICANT

AND

GLADYS WAIRIMU 1ST RESPONDENT

PURITY WANJIRU NJIRU 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 21st June 2023, Robert Kanyeki Gikonyo (the Applicant) prays for orders:
 2. That the Applicant be granted leave to file (an) Appeal against the Ruling and Order of Nyeri BPRT E047 of 2021 out of time;
 3. That there be a stay of execution pending the hearing and determination of this application and the substantive Appeal.
 4. That in the alternative there be an order of status quo pending (the) hearing and determination of this application and (the) substantive Appeal; and
 5. That the costs be provided for.
2. The Application is supported by an Affidavit sworn by the Applicant wherein he deposes at Paragraphs 2 to 7 as follows:
 - “2. That (the) Ruling was delivered on 5th May, 2023 without my knowledge or that of my Advocate;



3. That I was aware that the Ruling was slated on 5th May, 2023 as I was logged in Court (sic) and the same was not delivered, only to learn that it was delivered the same day through the Respondents' Counsel directing that I should vacate my business premises (attached hereto and marked RKG-1 is a letter indicating the same).
4. That having been dissatisfied with the Ruling of the Business Premises Rent Tribunal, I intend to file an appeal against the same (Attached and marked RKG-2 is a copy of a letter requesting for certified copies of proceedings and Ruling delivered on 5th May, 2023 and a draft memorandum of appeal);
5. That time for filing the appeal from the tribunal has since lapsed hence the need to file the instant application;
6. That it is only in the wider interest of justice that the orders sought be granted; and
7. That no prejudice will be occasioned to the Respondent.”

3. Gladys Wairimu and Purity Wanjiru Njiru (the Respondents) are opposed to the Application. In a Replying Affidavit sworn on their behalf by the 1st Respondent on 6th July 2023, the Respondents aver that the Application is incompetent, fatally and incurably defective and that the same amounts to a gross abuse of the Court process.
4. The Respondents further aver that the Application is bad in law for misjoinder of Prayers 2, 3 and 4 thereof and that Prayers 3 and 4 are pre-mature, incompetent and improperly before the Court as no Appeal has been preferred.
5. The Respondents assert that the Intended Appeal has no chances of success as the subtenancy had already expired and that the Application has been filed for the sole purpose of denying the Respondents the fruits of their Judgment.
6. I have carefully perused and considered both the Applicant's Motion as well as the response thereto by the two Respondents. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties herein.
7. By this Application before the Court, the Applicant prays for leave to issue to enable him to file an Appeal against the Ruling and Order of the Business Premises Rent Tribunal. The Applicant further prays for an order of stay of execution of the said orders pending the hearing of the Appeal. In the alternative, the Applicant craves an order of status quo to issue pending the hearing and determination of the Appeal.
8. In respect of the time within which to file an Appeal, Section 79G of the Civil Procedure Act, Cap. 21, provides as follows:

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date 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 or 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 good and sufficient cause for not filing the appeal in time.”



9. Considering the principles that ought to be considered for extension of time in *Nicholas Kiptoo Arap Korir Sallat - v- IEBC* (2014) eKLR, the Supreme Court of Kenya held as follows:
- “(i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - (ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
 - (iii) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - (iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - (v) Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 - (vi) Whether the application has been brought without undue delay; and
 - (vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
10. In support of his quest for leave to file the Appeal out of time, the Applicant avers that he was aware that the Ruling was slated to be delivered on 5th May, 2023 and that he had accordingly logged in on the Tribunal’s Teams Platform but the same was not delivered. It is his case that he later came to learn from a letter dated 9th May, 2023 from the Respondents’ Advocates that the Ruling was indeed delivered on the said 5th day of May, 2023. It is the Applicant’s case that he thereafter wrote to the Court seeking to find out the terms of the Ruling and hence the delay in filing the Appeal in time.
11. As it were, the Respondents do not deny that the Ruling was not delivered on the Tribunal’s Teams Platform as was scheduled. They indeed offer no explanation as to how they came to the knowledge that the Ruling had been delivered. From a perusal of a copy of the Ruling delivered on 5th May, 2023 as aforesaid, it is clear that the same was delivered in the absence of all the Parties. In the circumstance, I think it is only fair that the Applicant be given the benefit of the doubt, that he was unaware of the same and hence his failure to file an appeal in time.
12. In regard to the issue of stay of execution pending Appeal; Order 42 Rule 6(2) of the *Civil Procedure Rules* stipulates as follows:
- “(2) No order for stay of execution shall be made under subrule (1) unless-
 - (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
13. The above provisions thus require an Applicant seeking orders of stay of execution to establish that he/she has a sufficient cause for seeking orders that he/she stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree.



14. From a perusal of the Applicant's Affidavit in Support of the Motion as seen hereinabove, there was no reference whatsoever as to whether or not the Applicant stands to suffer any loss in the event the orders of stay are not granted. As was stated in *James Wangalwa & Another - v- Agnes Naliaka Cheseto* (2012) eKLR:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. From a perusal of the brief Supporting Affidavit, there was nothing much from which one could conclude that the Applicant stands to suffer any loss. A perusal of the Tribunal's Ruling reveals that the Applicant had entered into a sub-tenancy agreement with the Respondents. By his own Application dated 13th December, 2021 whose determination formed part of the Ruling, the Applicant had sought to have the tenancy agreement to be deemed to have terminated and that thereafter he be allowed to enter into a formal tenancy with the landlord. The Court granted his request to have the agreement terminated and I was unable to find any basis for his Application for stay of execution and the same is hereby declined.

16. In the premises, I allow the Motion dated 21st June, 2023 in terms of Prayer No. 2 and hereby grant the Applicant 21 days within which to file the Appeal.

17. The costs of this Application shall be in the Appeal.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 9TH DAY OF MAY, 2024**

In the presence of

Mr. Muthee for the Applicant

Mr. Kahiga for the Respondents

Court assistant - Kendi

J. O. OLOLA

JUDGE

