



Opany & another v Okech (Suing as the Legal Representative of the Estate of the Late Martin Okech Oyange) & another (Environment & Land Miscellaneous Case E003 of 2023) [2024] KEELC 4860 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2023**

AY KOROSS, J

JUNE 20, 2024

BETWEEN

MICHAEL ODIPO OPANY 1ST APPLICANT

MAURICE ODUOR OPANY 2ND APPLICANT

AND

JOSEPH JUMA OKECH (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MARTIN OKECH OYANGE) 1ST RESPONDENT

JANET AWINO OKUMU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JAMES ADUR OYANGE & JOSHIA OGANGO PAMBA) 2ND RESPONDENT

RULING

1. By a notice of motion dated 26/02/2024 that was filed by the applicants, they sought the following reliefs: -
 - a. Spent.
 - b. The court does grant leave for the firm of Achieng Yvonne & Co. Advocates to come on record for the applicants in place of Maxwell. O. Ogonda and Associates Advocates.
 - c. The court does grant leave for the applicant to appeal out of time against the judgment delivered by Hon. J.P. Nandi, PM on 27/10/2023.
 - d. The Hon. Court be pleased to issue an order of a stay of execution of the judgment delivered on 27/10/2023 pending a hearing and determination of the intended appeal.
 - e. Costs of the motion abide by the outcome of the appeal.



2. The motion was supported by several grounds on the face thereof and the 1st applicant's affidavit deposed on 26/02/2024. Materially, the applicants stated that in Bondo ELC No. E047 of 2021, they were represented by Maxwell. O. Ogonda and Associates Advocates and leave for counsel to come on record was a prerequisite and the delay was not inordinate.
3. They contended the delay in filing the appeal on time was occasioned by a chain of events- the matter was due for judgment on 29/09/2023 unfortunately it was not delivered and their counsel notified them that in due course, he would notify them of the rescheduled judgment date. However, that was not to be.
4. They stated it was only on 29/01/2024 when the 1st respondent started cutting down their crops that were due for harvesting that he informed them the matter had been determined.
5. He averred that on conferring with their advocate, he informed them he had been away on holiday and was not aware of the suit's outcome hence they quickly moved to this court and filed the instant motion. They averred the respondents would not be prejudiced, they had an arguable appeal and if the stay was not granted, the appeal would be rendered nugatory.
6. In a supplementary affidavit deposed on 4/04/2024 by the 1st applicant, a copy of the judgment, its quorum of attendance, and payment for a copy of the judgment was availed.

Respondents' case

7. In opposition, the 1st respondent's undated affidavit filed on 21/03/2024 made several averments. In essence, he stated the applicants' counsel was improperly on record as she had not sought leave of the court to come on record or sought consent from their counsel.
8. Further, he admitted judgment was deferred in the presence of both counsels to 27/10/2023 and the onus was on the litigants to follow up with their counsel on the outcome of their decision and that their counsel even participated in the taxation of a bill of costs and a draft memorandum of appeal had not been tendered to this court. He asserted he would be prejudiced if the motion was allowed.

Parties' submissions

9. On the hearing date, the motion was canvassed by oral submissions, and Miss. Ochieng, counsel for the applicants, urged this court to allow the motion as prayed and relied on the grounds therein and the affidavits in support thereof and she submitted the applicants were apprehensive the taxed costs would be executed and relied on the case of *Charles N. Ngugi v. ASL Credit Ltd* (2022) eKLR.
10. Mr. Odongo, counsel for the respondents submitted there was an inordinate delay in filing the motion and costs had been assessed and decree issued therein, the applicants were privy to the judgment, conditions for stay of execution had not been met and urged the court to dismiss the motion.

Issues for determination, Analysis, and Determination

11. Having carefully given thought to the motion, its grounds, affidavits, and rival submissions, the issues that arise for resolution and shall be addressed consecutively are: -
 - a. Whether leave is required for the firm of M/s. Achieng Yvonne & Company Advocates to come on record.
 - b. Whether an extension of time should be granted.
 - c. Whether orders of stay of execution should be granted.



d. What orders should this court issue including an order as to costs?

a. Whether leave is required for the firm of M/s. Achieng Yvonne & Company Advocates to come on record.

12. Order 9 Rules 9 and 10 of the *Civil Procedure Rules* provide that post-judgment, any change of advocate has to be carried out with leave of the court.
13. In my considered view and as has been held in various court decisions, the intent of Order 9 Rules 9 and 10 of the *Civil Procedure Rules* was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court to hear and determine the matter, I would not have hesitated to uphold that once judgment has been rendered, leave has to be sought from the trial court.
14. However, the scenario is different in the instant case, this court is sitting as an appellate court. In my view, Order 9 Rules 9 and 10 of the *Civil Procedure Rules* do not apply in instances of an appeal because the then applicants' counsel's instructions in a lower court were exhausted after the suit concluded. At an appellate stage, the applicants had a right to representation of their choice. I am persuaded by the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR which held thus;
- “Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”
15. The firm of M/s. Achieng Yvonne & Company Advocates are properly on record and they did not need to seek leave at this stage. This prayer by the applicants is misplaced.

b. Whether an extension of time should be granted.

16. As evident from the face of the motion, Section 79G of the *Civil Procedure Act* provides that appeals originating from the lower court should be filed before this court within 30 days from the date of the decree or order appealed against.
17. However, in occasions of delay, parties can by Section 95 of the *Civil Procedure Act*, move this court to exercise its judicious discretion based on good and sufficient grounds and the court may extend the time as it deems fit even if the time originally fixed has expired. Section 79G of the *Civil Procedure Act* states;
- “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 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 good and sufficient cause for not filing the appeal in time.”

While Section 95 of the *Civil Procedure Act* provides as follows: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



18. The principles that guide this court when faced with a prayer for an extension of time have been dealt with in a line of court decisions notably the recent decision of the Supreme Court of Kenya of *Non-Governmental Organizations Coordination Board v EG & 5 others* (Petition (Application) 16 of 2019) [2023] KESC 78 (KLR) (22 September 2023) (Ruling) which summarized the non-exhaustive principles thus: -

“The guiding principles in considering an application for extension of time were:

- a. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
- b. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
- c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
- d. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. whether there would be any prejudice suffered by the respondents if the extension was granted;
- f. whether the application had been brought without undue delay; and
- g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

19. In rendering this decision, the apex court cited with approval several authorities including the well-cited decision of *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997 (unreported) which stated: -

“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.”

20. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its judicious discretion anchored on reason, material, and evidence placed before it. Since the circumstances of each case are unique as even a singular day could be tantamount to delay, each case has to be considered on its set of conditions.

21. In addition, this court must also consider its principal objective of facilitating the just, expeditious, proportionate, and accessible resolution of disputes as provided for in Section 3 of the *Environment and Land Court Act*.

22. On the principle of delay, the impugned decision was rendered on 27/10/2023 and the instant motion was filed on 7/03/2024- a period of slightly over 4 months which this court does not consider to be inordinately late.



23. As to the reasons for the delay, both counsels agree the judgment was reserved for a certain date which the applicants' counsel disclosed was 29/09/2023. However, it was not rendered on the said date and instead, it was deferred until 27/10/2023.
24. It is uncertain if the then counsel on record for the applicants was privy to the postponed judgment date but what is certain is that the then counsel did not attend court on the rescheduled judgment and may not have been aware of the outcome.
25. The applicants' explanation that they were surprised when they saw the 1st respondent utilizing the land in dispute in January and were taken aback when he informed them judgment had already been rendered is plausible.
26. In my view, a deferred judgment, especially without proper notice on the parties, may lead to the chain of events as explicated by the applicants especially if their counsel fails to adequately be notified and at times, blunders happen. On discovery of the existence of a judgment, the applicants promptly moved this court and I am satisfied with the reasons for the delay.
27. On the grounds of the arguability of the appeal, the applicants did not tender a draft memorandum of appeal and in my view, this error albeit significant does not impede this court since it can examine other supportive facts that have been tendered to establish the grievances the applicants intend to raise on appeal. This position was taken by the court of appeal decision of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR.
28. The applicants contended the appeal is arguable and meritorious and a glimpse of the judgment demonstrates the matter was heard on merits and the court upheld the respondents' claim and dismissed the applicants' counterclaim.
29. However, the mere existence of a judgment does not mean the appeal is meritorious but in the interests of justice, this court is reluctant to lock out parties who may not have been privy to a deferred judgment which was not of their own doing. I, therefore, find the relief on leave to appeal out of time is merited.

c. Whether orders of stay of execution should be granted.

30. This court is guided by Order 42 Rule 6 (2) of the *Civil Procedure Rules* which provides as follows:
 - “No order for stay of execution shall be made under sub rule (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.”
31. By this rule, an applicant who seeks a stay of execution pending appeal has to satisfy that;
 - (i) he will suffer substantial loss
 - (ii) he has moved the court without unreasonable delay and
 - (iii) furnish security for due performance.
32. Being an appellate court, in addition to these principles, it is settled law this court will consider additional principles such as arguability of the appeal, substantial loss, and the appeal being rendered



nugatory. The list is non-exhaustive and these principles were enunciated by the Court of Appeal decision of *Butt vs Rent Restriction Tribunal* [1979] as thus: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, 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 the appeal court reverse the judge's discretion.
 - c. Thirdly, 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.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.”
33. The issue of the arguability of the appeal was dealt with earlier in this ruling. As evidenced by the impugned judgment, the trial court issued positive orders of permanent injunction and mandatory orders compelling the applicants and their agents to vacate land parcel no. North Sakwa/Abom 1916 (suit property) within 90 days.
34. Generally, the purpose of a stay pending appeal is to preserve the substratum of the case and one has to bear in mind the unsuccessful party's constitutional right of appeal and that of the successful party's right to enjoy the fruits of his judgment.
35. Even though this court is uncertain of the current execution stage as the applicants did not elucidate on this, it is obvious by the applicants' admission that circumstances have changed since the delivery of the judgment as the 1st respondent has already entered the suit property.
36. In fact, it is only based on this entry that they discovered judgment had been rendered against them. Therefore, the appropriate order would be an order of status quo pending a hearing of the appeal and not of a stay of execution.
37. Utmost, I find the notice of motion dated 26/02/2024 merited and issue the following final orders:
- a. Leave to file an appeal out of time is hereby granted and the appeal shall be filed and served within 14 days from the date of this ruling.
 - b. Failure to comply with the order (a) above shall lead to the automatic vacation of the order.
 - c. Costs of the motion shall abide by the outcome of the appeal.
 - d. That an order of status quo obtaining in land parcel no. North Sakwa/Abom/1916 as of the date of this ruling does remain in force pending the hearing and determination of the intended appeal.
 - e. The file is hereby marked as closed.



It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 20TH DAY OF JUNE 2024.

HON. A. Y. KOROSS

JUDGE

20/6/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Miss Achieng for the applicants

N/A for the respondents

Court assistant: Ishmael Orwa

