



**Obunga & another v Owiti (Miscellaneous Civil Application  
E014 of 2023) [2024] KEELC 4840 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4840 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E014 OF 2023  
SO OKONG'O, J  
JUNE 19, 2024**

**BETWEEN**

**JOSEPHINE OKUTO OBUNGA ..... 1<sup>ST</sup> APPLICANT**

**GEORGE OKUTO OBUNGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PATRICIA ATIENO OWITI ..... RESPONDENT**

**RULING**

1. What is before me is the applicants' application dated 3<sup>rd</sup> October 2023 in which the applicants have sought leave of the court to file an appeal out of time against the judgment of Hon. W. K. Onkunya SRM delivered on 14<sup>th</sup> September 2021 in Kisumu CMC ELC No. 123 of 2018 and a stay of execution of the said judgment pending the filing, hearing, and determination of the intended appeal. The application was filed on 6<sup>th</sup> October 2023, 2 years after the delivery of the judgment sought to be appealed.
2. The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the applicants' advocate Harriet N. Khisa on 3<sup>rd</sup> October 2023. It is unclear why the said advocate who did not act for the applicants in the lower court decided to swear an affidavit on contentious issues that were not within her knowledge. The applicants contended that after the said judgment was delivered, they were dissatisfied with the same and intended to appeal against the same to this court. The applicants averred that they requested for typed proceedings and a certified copy of the said judgment for the intended appeal.
3. The applicants averred that before they filed the said appeal, they were approached by the respondent who expressed an intention to pay them a sum of Kshs. 500,000/- for the land parcel Title No. Kisumu/ Nyalenda "B"/601("the suit property") so that they could abandon the intended appeal which offer was accepted by the applicants. The applicants averred that one, Elsa Ayugi Ouko who posed as an



- advocate committed herself in writing to pay the said amount of Kshs. 500,000/-. The applicants averred that the said payment was never made. The applicants averred that it was when they were summoned to the Land Control Board to consent to the transfer of the suit property to the respondent that they learnt that the transfer of the property to the respondent was imminent.
4. The applicants averred that the delay in the filing of the appeal was excusable and that the intended appeal had a high chance of success. The applicants averred that they were willing to furnish such security as the court may order for the performance of the decree of the lower court.
  5. The application was opposed by the respondent through two affidavits sworn by the respondent, and Elsa Ayugi Ouko on 7<sup>th</sup> November 2023 and 6<sup>th</sup> November 2023 respectively. The respondent averred that in the judgment sought to be appealed, the lower court had held that the 2<sup>nd</sup> applicant who was the sole registered proprietor of the suit property held a portion thereof measuring about  $\frac{1}{4}$  of an acre in trust for the respondent. The respondent averred that the 2<sup>nd</sup> applicant was required to survey the suit property and transfer to the respondent the said portion thereof. The respondent averred that the 2<sup>nd</sup> applicant cooperated in the execution of the said judgment by allowing a surveyor who had been engaged by the respondent to enter and carry out the subdivision of the suit property. The respondent averred that the 2<sup>nd</sup> applicant also signed the mutation form and the application for consent of the Land Control Board for the subdivision and provided all the necessary documentation for the exercise.
  6. The respondent averred that on 21<sup>st</sup> April 2022 when she went to the suit property for the survey exercise, she was accompanied by a friend, Elsa Ayugi Ouko who expressed interest in the portion of the suit property that was to remain with the 2<sup>nd</sup> applicant. The respondent averred that Elsa Ayugi Ouko engaged the 2<sup>nd</sup> applicant and they agreed that the 2<sup>nd</sup> applicant would sell to her the portion of the suit property that would remain in his name at a consideration of Kshs. 500,000/-. The respondent averred that Elsa Ayugi Ouko made a commitment to the 2<sup>nd</sup> applicant in writing that she would pay the said amount. The respondent averred that the applicants' claim that the commitment that was given to the 2<sup>nd</sup> applicant by Elsa Ayugi Ouko that she would pay the 2<sup>nd</sup> applicant a sum of Kshs. 500,000/- was in consideration of the applicants not pursuing an appeal against the lower court judgment in favour of the respondent was not true. The respondent averred that the subdivision exercise was carried out successfully and what was remaining was the consent of the Land Control Board for the portion of the suit property that the court had found to belong to the respondent to be transferred to her.
  7. The respondent averred further that the reason given by applicants for the delay in the filing of the intended appeal was not genuine or plausible since the applicants requested for typed proceedings and a copy of the judgment on 19<sup>th</sup> April 2022, almost 7 months after the judgment. The respondent averred that the applicants had voluntarily participated in the execution of the lower court judgment and should not be allowed to disturb the remaining part of the execution process. The respondent averred that the intended appeal was an afterthought. The respondent averred that the application was brought after unreasonable and unexplained prolonged delay.
  8. In her replying affidavit, Elsa Ayugi Ouko corroborated the averment by the respondent concerning the commitment that she (Elsa Ayugi Ouko) made to pay the 2<sup>nd</sup> applicant a sum of Kshs. 500,000/-. She stated that the said sum of Kshs.500,000/- was for the portion of the suit property that was to remain for the 2<sup>nd</sup> applicant part of which the 2<sup>nd</sup> applicant had agreed to sell to her. She stated that the commitment had nothing to do with an appeal that the applicants intended to lodge against the respondent.
  9. The application was argued orally on 22<sup>nd</sup> January 2024 when Ms. Akinyi appeared for the applicants while Mr. Ragot appeared for the respondent. I have considered the applicants' application together



with the supporting affidavit. I have also considered the respondent's affidavits filed in opposition to the application and the submissions by the advocates for the parties. The applicants' application has two limbs. The first limb is seeking an extension of time within which to file an appeal against the decision of the lower court while the second limb is seeking a stay of execution of the said decision pending the hearing of the intended appeal.

10. Section 16A (1) of the *Environment and Land Court Act*, 2011 provides that all appeals from subordinate courts and local tribunals shall be filed within 30 days from the date of the decree or order appealed against. Section 16A (2) of the said *Act* provides that:

“An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

11. Sufficient cause was defined in *Attorney General v. Law Society of Kenya & another* [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary, 9th Edition, page 251.*

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”

12. This court's power to extend the time within which to file an appeal from a decision of the lower court is discretionary. A party approaching the court for an extension of time must demonstrate that he/she deserves the exercise of the court's discretion. The judgment sought to be appealed was delivered on 14<sup>th</sup> September 2021. The appeal against the same should have been filed by 14<sup>th</sup> October 2021. The present application was filed on 6<sup>th</sup> October 2023 after a lapse of almost 2 years from the time when the applicant was supposed to file the appeal.
13. A delay of 2 years to file an appeal or an application for an extension of time to file the appeal out of time is inordinate. From the material before me, I find no reasonable explanation for this delay. The applicants did not file an affidavit in support of the application. I have found the affidavit sworn by their advocate in which the advocate deponed to contentious matters deficient in material facts that would support the grant of the orders sought. The applicants claimed that they had intended to appeal against the impugned judgment of the lower court. It is not clear from the affidavit in support of the application as to when the applicants applied for typed proceedings and a certified copy of the judgment. The letter placed before the court to prove such application is dated 19<sup>th</sup> April 2022, 7 months after the judgment.
14. The applicants also claimed that they did not file the appeal on time because the respondent had agreed in writing to pay them a sum of Kshs. 500,000/- for the portion of the suit property that the court had ordered the 2<sup>nd</sup> applicant to transfer to the respondent. The alleged agreement was in the form of a commitment allegedly given by one, Elsa Ayugi Ouko. The alleged commitment is not dated. The applicants have not stated as to when the commitment was given and why it was given by Elsa Ayugi Ouko rather than the respondent against whom the appeal was to be filed. The commitment does not also refer to the respondent or the intended appeal. Elsa Ayugi Ouko swore an affidavit in which she explained that the written commitment that she gave to the 2<sup>nd</sup> applicant that she would pay him a sum of Kshs. 500,000/- concerned a piece of land that the 2<sup>nd</sup> applicant had agreed to sell to her and



that the commitment had nothing to do with the appeal that the applicants intended to file against the respondent. The statement in this affidavit that corroborated the respondent's explanation of the said commitment was not rebutted by the applicants. I therefore find no evidence in support of the applicants' claim that the respondent had promised to pay them Kshs. 500,000/- as a consideration for them not pursuing the appeal against the judgment of the lower court. The applicants' inordinate delay in the filing of the appeal and the application before the court has therefore not been explained. The possibility of the intended appeal being an afterthought as alluded to by the respondent cannot be ruled out. Sufficient cause has therefore not been shown why the applicants should be granted an extension of time to file the intended appeal. I therefore find no merit in that limb of the application.

15. The limb of the application seeking a stay of execution was dependent on the outcome of the first limb that sought an extension of time within which to file an appeal against the lower court judgment. Having ruled that no sufficient cause has been shown to warrant the extension of time to appeal, the application for a stay pending the hearing of the intended appeal equally fails since a stay of execution order cannot be made in a vacuum. Since the applicants have no appeal or an intended appeal, an order for stay pending appeal is not available to them. The limb of the application seeking a stay of execution would not succeed even if it were considered independent of the limb of the application seeking an extension of time. Order 42 Rule 6 of the [Civil Procedure Rules](#) provides that an application for a stay of execution must be brought without unreasonable delay. The application before me was brought 2 years after the judgment sought to be stayed. I have already found that such a delay was inordinate. The application would fail on that ground alone even if other conditions for granting a stay of execution were not considered.
16. In conclusion, the court finds no merit in the applicants' application dated 3<sup>rd</sup> October 2023. The application is dismissed with costs to the respondent.

**DELIVERED AND DATED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

**S. OKONG'O**

**JUDGE**

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

Ms. Khisa for the Applicants

Mr. Ndolo h/b for Mr. Ragot for the Respondent

Ms. J. Omondi-Court Assistant

