



Kotecha v Highway Commodity Stores Limited & 3 others (Environment & Land Case 458 of 2015) [2024] KEELC 4751 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 458 OF 2015**

**AA OMOLLO, J
JUNE 13, 2024**

BETWEEN

SHASHIKANT SAMJI KOTECHA PLAINTIFF

AND

HIGHWAY COMMODITY STORES LIMITED 1ST DEFENDANT

DIRECTOR OF SURVEYS 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

ALPHA GRAIN MILLERS LIMITED 4TH DEFENDANT

RULING

1. The 4th Defendant filed a notice of motion dated 2nd February 2024 supported by an affidavit sworn by Mohamednur Ibrahim Khalif on the same date seeking for the following orders
 - a. Spent
 - b. Spent
 - c. That this Honourable court do extend time for filing the Notice of Appeal to the Court of Appeal.
 - d. That this Honourable Court do grant stay pending the filing of a substantive Application for stay pending Appeal at the Court of Appeal.
 - e. That the Court do extend the 60 days granted by the court on 28/9/2023 for a further 60 days from the date of the determination of this Application
 - f. That the costs of this application be in the Appeal.



2. The application was based on the grounds that the 4th Defendant was not served with the Notice of judgment delivered on 28/9/2023, lost the 60 days' stay granted by the Court without fault on their part, they have a right of Appeal and intends to Appeal against the judgement.
3. They averred that on 31/1/2024 they learnt from their Advocates that judgment had been delivered on 28/9/2023 in their absence as they were not served with the Notice for the date of the judgment. That on 24/10/2022 the court directed that the judgment would be delivered on notice but Honourable Justice Okong'o who heard the case then proceeded on transfer and was to notify the parties of the date of judgment.
4. That their Advocates on record only learnt on 18/1/2024 when they were served with the Notice of Taxation of the Plaintiff's Bill of Costs that judgment had been delivered and by their letter dated 29/1/2024 requested both the court and Plaintiff's Advocates for a copy of the same.
5. That on 31/1/2024 the Plaintiff's Advocates forwarded a copy of the judgment to their Advocates and upon perusing the judgment noted that the court ordered the 4th Defendant to vacate the premises within 60 days or be evicted.
6. They said that the six days granted by the court lapsed on 27/11/2023 without the knowledge or benefit of the 4th Defendant thus it is only fair that this Court upholds the right of stay of 60 days which was granted to the 4th Defendant.
7. They stated that they intend to Appeal against the judgment on the ground of denial of an opportunity to adduce evidence when it sought time to avail its witnesses and documents and that the subject land reference numbers on which the judgment is based are non-existent. The Applicant stated that the Plaintiff will not suffer any prejudice since it has never taken possession of the suit property whereas the 4th Defendant who is in possession stands to suffer irreversible loss.
8. In opposition, the Plaintiff filed grounds of opposition dated 16th February 2024 and replying affidavit sworn by Shashikant Samji Kotecha on 5th March 2024. He stated that the application is misconceived, bad in law and an abuse of court process. That this Court having rendered final orders and judgment in the matter was thereby functus officio, it has no jurisdiction to entertain the present application.
9. Further, that the Court having already made orders of stay in accordance with order 42 rule 6 of the Civil Procedure Rules, this court cannot revisit the same issue and cannot exercise its inherent powers under Section 3A of the *Civil Procedure Act* as there is a specific statutory provision which covers the relief sought being Order 42 rule 6 of the Civil Procedure Rules.
10. The Plaintiff contended that the inherent jurisdiction of this court cannot be invoked where it lacks the requisite jurisdiction to grant the relief sought and further without prejudice to the foregoing, the application does not meet the threshold set out by the law for this Court to exercise its discretion in favour of the Applicant. He added that the inordinate delay in filing the application herein has not been plausibly explained by the Applicant and the same is made with a view of denying him access to the fruits of judgment.
11. The Plaintiff stated that from onset the 4th Defendant was not been keen in pursuing the case in fact, during the hearing after being granted leave to substitute its witness on 02/19/2020, it sought for another adjournment on 16/11/2020 which the court granted.
12. He argued that the 4th Defendant went to sleep after the directions of 22/06/2022 because they have not shown any efforts they made to inquire if Judgment had been delivered in almost two years. That



if the Applicant/4th Defendant are granted any stay it will amount to extending an illegality and perpetuating a fraud.

Submissions.

13. The 4th Defendant/Applicant filed submissions dated 24th February 2024 and in opposition the Plaintiff filed submissions dated 21st March 2024. The 4th Defendant outlined the application and the Plaintiff's response and cited the authorities in support of its application as follows;
 - a) Rabeccah Mwikali Jacob v Peter Nicholas Mutuku & 2 Others [2020] eKLR; Jurisdiction granted by Section 7 of the Appellant Jurisdiction Act
 - b) Stephen Wakhu and 2 Others v George Alfred Chituyi ELC Appeal No. 15 of 2015; Where parties were not present at the delivery of the ruling time was extended
 - c) David Okongo Obilo v Dipen Hasmukhlal Faldu [2022] Eklr; The grounds of Appeal was arguable and not frivolous thus stay and leave was granted.
 - d) Sokoro Savings and Credit Cooperative Society v Abeid Mwamburu [2023] KECA 381 KLR cited with approval the Supreme Court Case of Nicholas Salat which laid down the principles on extension of time
14. The Plaintiff also relied Supreme court decision of Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, and submitted that the 4th Defendant/Applicant has not met the principles set out in granting an extension of time to filing a notice of appeal. He stated that there was inordinate delay of 127 days in filing the application from the date the judgement was rendered on 28/9/2023. While the 4th Defendant's Advocates were not present on the date of delivery of the Judgment, the Plaintiff served them with a letter forwarding the draft decree dated 31/10/2023 which was duly filed and served.
15. Further that the 4th Defendant's Advocates having being notified that the judgement would be delivered on 28/9/2023, their absence was as a result of sheer indolence and negligence. In support he cited the case of *County Executive of Kisumu vs County Government of Kisumu & 8 others, SC Civil Appl. No 3 of 2016*; [2017] eKLR, where the Supreme Court held that extension of time is not a right of a party, but an equitable remedy only available to a deserving party at the discretion of the Court, and that the applicant bears the burden of demonstrating to the satisfaction of the Court the cause of the delay.
16. The Plaintiff submitted that he is a man of advanced age, being 83 years old, and has been saddled with the burden of shouldering seemingly endless litigation on property that he has had uninterrupted possession of for 29 years and an extension of the time within which to file an appeal would only drag out the dispute herein, extending and further perpetuating the 4th Defendant's fraud and illegality. They relied in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2007] eKLR.
17. He added that this court having already made orders of stay in accordance with Order 42 Rule 6 of the Civil Procedure Rules, cannot revisit the same issue as that would be tantamount to sitting on an appeal over its own decision. In support of this argument the Plaintiff cited the case of Charles Mwangi Gitundu v Charles Wanjohi Wathuku [2021] eKLR and Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLR.
18. There is no dispute that judgement was delivered in the absence of the Applicant and the Respondent has not indicated when they notified the Applicant with the same other than forwarding a draft decree



on 31st October 2023. The explanation offered by the Defendant on delay in my view is satisfactory and considering that by time the application was filed the decree had not been executed.

19. The conditions to be met to enjoy the orders of stay of execution of a decree has already been discussed by the parties as contained in the summaries hereinabove. A perusal of the decree extracted that is sought to be stayed required of the 1st and 4th Defendant/applicant to vacate the suit properties listed thereunder known as L.R. No. 20264 and the alleged subdivisions thereof within sixty (60) days of the judgement or they be evicted. In the event they are evicted before their intended appeal is heard and determined, they are likely to suffer substantial loss underlying the process of eviction and the fact of their appeal being rendered academic.
20. On merits of the orders sought, the Respondent has not shown that he will suffer prejudice if time is extended to the Applicant to file appeal out of time. Further, the Applicant is seeking a stay of execution for a limited period of time (for 60 days) from the date of determination of this application. This court appreciates the sentiments of the Respondent that he is elderly at 83 years old and that he should be allowed to enjoy the fruits of his judgement.
21. This court is persuaded that a delay of execution by a further period of 60 days will not cause any harm to the Respondent. Thus, the time for lodging the appeal to the Court of Appeal is extended by a period of Seven (7) days from today. Further, a stay of execution of the decree is granted for a period of sixty (60) days from the date hereof but it is conditional to the execution of decree not stay of proceedings. Thus, the Plaintiff is granted liberty to prosecute the pending bill of costs before the Deputy Registrar forthwith. shall proceed.

DATED, SIGNED, & DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024

A. OMOLLO

JUDGE

