Irungu v Wairimu (Environment and Land Case E041 of 2023)
[2024] KEELC 4583 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4583 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND CASE E041 OF 2023

JG KEMEI, J

JUNE 6, 2024

BETWEEN

ERIC MUIYURO IRUNGU ..... APPELLANT

AND

GEORGE KINYUA WAIRIMU ..... RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion dated 18/9/2023 expressed under Sections 29 and 30 of the *Physical Planning Act* and Sections 1A, and 3A of the *Civil Procedure Act* seeking orders that;

    a. Spent.

    b. The Appellant/Applicant be granted leave to file appeal out of time and draft Memorandum of appeal attached herein be deemed to have been filed with the leave of Court.

    c. Pending the hearing and determination of this Application inter partes there be a stay of execution of the Judgement and Order delivered on 13th October 2022 in MCE & L E025 of 200 in the Senior Principal Magistrate Court at Ruiru and any further consequential orders.

    d. Pending the hearing and determination of this Appeal there be a stay of execution of the Judgement and Order delivered on 13th October 2022 in MCE & L E025 of 200 in the Senior Principal Magistrate Court at Ruiru and any further consequential orders.

    e. Costs of the Application be provided for.

2. The Application is based on the grounds on the face of it that there was ex parte Judgment delivered on 13/10/2023 which the Applicant unsuccessfully attempted to set aside *vide* an Application dated 27/10/2022. That the Ruling declining his Application was delivered on 23/3/2023. The Applicant further accuses his Advocate for failing to inform him of the trial Court hearing and attendant ex parte

Judgment. That it was not until the Auctioneers came to his house that he learnt of the impugned ex parte Judgment hence the Application.

3. The Application is supported by an Affidavit of even date of Eric Muiyoro Irungu Njuguna, the Applicant. Reciting the aforementioned grounds, the Applicant annexed copies of the impugned trial Court Judgment and Ruling dated 13/10/2013 and 23/3/2023 as EMI1 and EMI2 respectively. Further he attached copies of the Decree, Certificate of Costs and Warrants of Attachment as EMI3a-d and a bundle of his pleadings filed in the trial Court as (EMI5a-c).

4. Opposing the Application, the Respondent George Kinyua Wairimu swore his Replying Affidavit on 26/11/2023. He deponed that in the process of executing the trial Court judgment, he was informed by the Mwihoko Officer Commanding Station (OCS) that there is a pending Application before this Court. That he engaged his Advocates and learnt of the instant Application which despite the Court directing that he be served, the Applicant never served him. Rejecting the Motion, he averred that the Applicant was well aware of the Judgement and infact changed his Advocates post – judgement and filed an Application for stay and setting aside of the Judgment. That initially the Applicant was represented by the firm of Kabathi & Co. Advocates before appointing M/s Njoroge Jimnah & Co. Advocates to act for him. That the hearing date was taken by consent in the presence of all parties and their Counsel but the Applicant and his Advocates failed to attend the hearing prompting the Respondent to proceed with his case. He accused the Applicant of failing to follow up on his case and attend Court thus the instant Application is frivolous and an abuse of the Court process fit for dismissal with costs.

5. Further the Respondent filed his Grounds of Opposition dated 5/12/2023 raising the following grounds, that the instant Application is incompetent, misplaced and an abuse of Court process; it offends the provisions of Sections 1A, 3A of the *Civil Procedure Act* and Order 42 rule 6 of the *Civil Procedure Rules*; that his appeal was overtaken by events when he filed the Application dated 27/10/2023 which was dismissed; the Respondent is entitled to enjoy the fruits of his Judgment, litigation must come to an end and as such the Application ought to be dismissed with costs.

6. Pursuant to Court directions issued on 22/2/2024, the Application was prosecuted by way of written submissions.

7. The firm of MM Wafula & Co. Advocates field submissions dated 21/3/2024 while the Respondent's submissions dated 8/4/2024 were filed by KBN Associates.

8. The Applicant reiterated this Court's jurisdiction to determine the matter as donated by Article 162 (2) of the *Constitution* of Kenya and affirmed his right to a fair hearing as provided under Article 50 of the *Constitution* of Kenya. He urged the Court to grant him leave to appeal out of time submitting that his former Counsel were unprofessional in discharging their duties. That despite filing his pleadings in the trial Court, the Court failed to take them into consideration hence condemning him unheard.

9. Regarding the prayer for stay of execution pending appeal, the Applicant stated that justice is best served when a matter is heard on merit without locking a party from the seat of judgement. That his appeal is not frivolous but raises substantial questions of law. That unless an order of stay of execution is granted, the intended appeal will be rendered nugatory as compliance of the Court orders would result in an irreversible state of affairs that cannot be cured by an award of damages.

10. Conversely the Respondent framed four issues for determination; whether the instant Application is incompetent and an abuse of Court process, whether the appeal is overtaken by events on account of the dismissal of the Applicant's Application dated 27/10/2023; Was the Applicant's right to a fair hearing abused and whether stay of execution and/or leave to appeal out of time can be granted.

11. On the first and second issues, the Respondent maintained that the Applicant was fully aware of the trial Court proceedings and actively participated in them. That he engaged Advocates who acted for him and despite knowledge of the hearing date, neither the applicant nor Advocate attended Court. Upon delivery of the trial Court Judgment, the Applicant filed for Review of the Judgment vide Application dated 27/10/2022 which was dismissed on 23/3/2023. That the Application for Review having been dismissed the option of appeal is not available to him. In support of this proposition Order 45 of the *Civil Procedure Rules* and the case of *The Chairman Board of Governors Highway Secondary School v William Mmosi Moi* Civil Application No. 277 of 2005 were cited.

12. Denying that the Applicant's right to a fair hearing was breached in the trial Court, the Respondent submitted that the trial Court record will bear witness that the Applicant was aware of the proceedings and even sought leave to amend his defence and Counter claim but failed to turn up for hearing. That such failure to attend Court is actually a denial of other litigants' right to justice and an affront to Section 1A of the *Civil Procedure Act*.

13. Lastly it was argued that it is in the interest of justice that litigation must come to an end. That no plausible reason has been given to explain the one-year delay in filing the instant Application but if the Court is persuaded to grant stay of execution, then the Applicant should be ordered to deposit kshs. 5M being the value of the subject property in a joint interest earning account as security.

14. Having considered the rival pleadings and submissions filed before the Court, the issues fall for determination are;

    a. Whether the applicant is entitled to leave to appeal out of time.

    b. Whether applicant is entitled to an order of stay of execution.

    c. Who bears costs?

Leave to Appeal out of Time

15. Enlargement of time is a discretionary power of the Court provided under Section 95 of the *Civil Procedure Act*. Relevantly, Section 79G thereof requires appeals from subordinate Courts to be filed within thirty days; 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.

16. In the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR the Court of Appeal in considering an Application for extension of time and leave to file Notice of Appeal out of time stated thus;

> " ... it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the Court must act upon reason(s) not based on whims or caprice. 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."

17. The Supreme Court devised principles to be considered in an Application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 Others* [2014] eKLR as follows;

> " 1. 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;
>
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
>
> 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
>
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
>
> 5. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted;
>
> 6. Whether the Application has been brought without undue delay; and
>
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time." See also *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231."

18. Has the Applicant satisfied the criteria set out above? To answer this, it is imperative to analyze the chronological history of the gist of the Application. The Applicant seeks leave to appeal out of time pursuant to the draft memorandum of appeal which is annexed to his Supporting Affidavit. Be that as it may the draft Memorandum of Appeal in the Court file is dated 18/9/2023. It impugns the trial Court Ruling in Ruiru SPMC MCL&E Case No. E025 of 2021 rendered on 23/3/2023. That immediately thereafter on 24/3/2023, the Applicant was served by an eviction order (EMI-4). Despite the service of the eviction notice, the Applicant did not take any steps to protect his interests if any. He waited until 22/9/2023 a period of six months later, to lodge the instant Application.

19. Being a discretionary remedy, the burden fell on the Applicant to satisfactorily convince the Court why the Application was not timeously filed. In his motion, the Applicant stated that the delay in filing the appeal was due to mistake of his Advocate to inform him on time. That it was not until the Auctioneers came to the Applicant's house when he leant of the ex parte judgement and the Ruling. There is no evidence by way of the Advocate's Affidavit to prove the said allegations. Even if the blame on his Advocates was to stand, by the Applicant's own concession he learnt of the adverse orders when auctioneers came into the house but failed to take any steps thereto.

20. Further the Respondent in his Replying Affidavit averred that the Applicant was well aware of not only the proceedings but the trial Court Judgment as well. That the applicant attempted to set aside the Judgment but on the hearing date, he failed to show up. As a result, the Applicant's Application was dismissed with costs. These averments have not been rebutted by the Applicant and thus remain uncontroverted.

21. The Court of Appeal *Sakiri v Anyumba* (Civil Application E170 of 2021) [2022] KECA 521 (KLR) reiterated that, solely blaming one's advocate is not enough to unlock the Court's discretionary favor. The applicant must avail any evidence of the actions he took, as the litigant and owner of the appeal,

to have it lodged in time. Similarly, in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR Waki JA stated that;

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by Counsel."

22. That position was recently affirmed by Odunga JA in *Carla v Marelli & 2 Others* [2023] KECA 1385 KLR and cited with approval by the SC holding in *Daniel Kimani Njihia v Francis Mwangi & Another* [2015] eKLR that:

> " Even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a Court of law and not mercy. It is also bound by the law and more so the Constitution which binds all."

23. The upshot of the forgoing is that the applicant has not proffered a cogent explanation for the delay of six months after the notice for eviction was served upon him. The first issue herein is thus answered in the negative.

Stay of Execution Pending Appeal

24. Having reached the above finding, this issue is moot for consideration but it is considered on merit as hereunder.

25. The substantive prayer in the instant motion seeks stay of execution of the trial Court Judgement delivered on 13/10/2022. In his Supporting Affidavit the applicant annexed the assailed Judgment alongside copy of the Ruling dated 23/3/2023 (EMI-2) which inter alia dismissed the Applicant's motion dated 27/10/2022 seeking to set aside the ex parte Judgment. Despite the forgoing substantive prayer for stay of execution of the Judgment, the Memorandum of Appeal alludes to the Ruling dated 23/3/2023. Consequently, whereas the Applicant seeks to stay execution of the impugned Judgment, he went ahead to draft a Memorandum of Appeal against a different Court order being the Ruling dated 23/3/2023. As a result of the contradictions, it is doubtful to the mind of this Court which Court order the Applicant wishes to stay and which order he ultimately wishes to appeal against.

26. That said, the legal provisions for stay of execution are anchored in Order 42 rule 6 of the *Civil Procedure Rules* that;

> " 6. Stay in case of appeal [Order 42, rule 6.]
>
> (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose

decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) 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."

27. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss, timely filing of the Application and the furnishing of security. An order for stay of execution is discretionary upon proving sufficient cause by satisfying the aforesaid conditions.

28. Has the Applicant established substantial loss that he stands to suffer? Am afraid not. Other than stating that he was served with warrants of attachment, the Applicant has not demonstrated any tangible substantial loss he stands to suffer if the Order of stay of execution was denied. In the case of *James Wangalwa & Anor. v Agnes Naliaka Cheseto* [2012] eKLR the Court held that the process of execution on its own does not amount to substantial loss. Further in *Machira T /A Machira & Company Advocates v East African Standard* (No 2) 2002 2 KLR the Court held that substantial loss must be specified, details or particulars thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further.

29. On timeous filing of the Application, the answer is in the negative as aptly discussed under Issue I above. Lastly no offer for security was tendered by the Applicant.

30. In the end the Application before Court is bereft of merit.

31. It is for dismissal with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Ochieng HB Ms. Amuka for the Appellant

Kyobika for the Respondent

Interested Party - Absent

Court Assistants – Phyllis & Oliver