Mwalukumbi v Mkirema (Land Case Appeal E011 of 2024)
[2024] KEELC 5840 (KLR) (Environment and Land) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5840 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

LAND CASE APPEAL E011 OF 2024

EK WABWOTO, J

JULY 31, 2024

BETWEEN

DEBORAH WAKESHO MWALUKUMBI ..... APPELLANT

AND

ALLOYSIUS MWASARU MKIREMA ..... RESPONDENT

RULING

1. Before this Court for determination is an application dated July 23, 2024 seeking for the following reliefs;

    1. The Appellant be granted leave to appeal out of time against the judgment of Hon. Sinkiyian delivered on July 21, 2023.

    2. The court be pleased to stay the resultant decree pending the hearing and determination of this application and the Appeal.

2. The Application was supported by the affidavit sworn by Deborah Wakesho Mwalukumbi on the 15th July 2024. The Applicant averred that she was not informed of the judgment by her then Advocate on record Mr. Mwanyumba who had the conduct of the matter on her behalf and she only became aware of the same from the grapevine in the village that the Respondent had obtained judgment in her favour which judgment was delivered on 21st July 2023 upon which she was to be evicted. It was also averred that she should not be thrown out from the seat of justice but be granted an opportunity to appeal against the same.

3. The Application was canvassed by way of written submissions pursuant to the directions issued by this court. The Applicant filed written submissions dated 6th August 2024 while the Respondent filed two sets of written submissions dated 16th and 17th August 2024 against the said application.

4. Citing the provisions of section 79 G of the *Civil Procedure Act* and the case of *Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi* (Civil Application E032 of 2022) [2023] KECA 381 (KLR) (31 March 2023) (Ruling) the Applicant submitted that the court has jurisdiction to admit the appeal out of time and that the reasons given for the delay are sufficient.

5. It was also submitted that the Applicant has an arguable appeal, she had been living in the said parcel for over 30 years and no prejudice will be occasioned by the Respondent if the reliefs sought in the application are granted.

6. The Respondent submitted that the application violates the mandatory provisions of Order 9 Rule 9 of the *Civil Procedure Rules* 2010 since it has been filed by an Advocate who is not properly on record. It was submitted that the firm of Kienga & Odhiambo Advocates did not seek any leave to act for the Applicant herein after the judgment had been delivered by the subordinate court.

7. It was also submitted that the Appellant has not given any sufficient cause for the delay to warrant this court grant the extension of time. Reliance was made to the cases of *Mombasa County Government v Kenya Ferry Services* [2019] eKLR and *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR.

8. On whether this court should grant stay of execution, the Respondent submitted that the same should be in the negative since no substantial loss has been demonstrated by the Applicant and further that there has been unreasonable delay in moving the court. The court was urged to dismiss the application with costs.

9. The Court has now carefully read and considered the application together with the written submissions filed by the Applicant and is of the view that the salient issues for determination herein are as follows;

    i. Whether the law firm of Kienga & Odhiambo Advocates are properly on record for the Appellant.

    ii. Whether leave to appeal out of time ought to be granted.

    iii. Whether stay of execution ought to be granted.

10. Order 9 Rule 9 of *Civil Procedure Rules* stipulates that;

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
>
> (a) upon an application with notice to all the parties; or
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> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

11. In my considered view and as has been held in various court decisions the intent of Order 9 Rule 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 of call, I would not have hesitated but upheld that once judgement has been rendered, leave has to be sought from the same court.

12. However, the scenario is different in the instant case, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? It is my view that Order 9 Rule 9 and 10 of the *Civil Procedure Rules* does not apply in instances of an appeal because the advocate's instructions in a lower court are

exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an Appellant a right to legal representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute. The court is further persuaded by the following decisions; *Magereza Savings & Credit Co-operative Society Limited v Samuel Gachini Wahiu & 881 others* [2014] eKLR, *Martin Mutisya Kiio & another v Benson Mwendo Kasyali* Machakos High Court Misc. Application No 107 of 2013, *Tobias M. Wafubwa v Ben Butali* [2017] eKLR, *Kenya Pipeline Company Limited v Lucy Njoki Njuru* [2014] eKLR and *Tobias M. Wafubwa v Ben Butali* [2017] eKLR.

13. In view of the foregoing I am not persuaded to hold otherwise and I find that the firm of Kienga & Odhiambo Advocates are properly on record for the Applicant.

14. On the second issue for determination, Section 79G of the *Civil Procedure Act* provides that:

> "Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) 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."

15. The application for leave to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal during the specified time.

16. Judgment before the trial court was delivered on 21st July 2023 the present application was filed on 29th July 2024 and hence the reason why the Applicant is before the court seeking for extension of time within which to file her appeal out of time. Be that as it may, it is evident that the application beforehand and wherein the Applicant is now seeking for extension of time has been made and filed after a duration of more 12 months from the date when the Judgment was delivered. the Applicant has explained that the delay was caused by her previous advocate who never notified her that the judgment had been delivered. Arising from the foregoing, the question that does arise is whether or not the time taken prior to and before the filing of the application 12 months is reasonable or otherwise. To my mind, the duration which has been taken by the Applicant herein prior to and or before the filing of the application beforehand is not only unreasonable, but same is extremely inordinate. Inordinate delay has been defined to mean unusually or disproportionately large or excessive.

17. Having found and held that the duration of time that was taken prior to and before the filing of the subject application is inordinate, the next question that merits discussion relates to whether the Applicant has tendered and placed before the court any plausible and cogent explanation for the delay.

18. The Applicant contends that the failure to file the appeal was because of the mistake or inaction of the erstwhile Counsel. According to the Applicant the erstwhile Counsel never notified her when judgment was delivered. The Applicant stated that she only came to know of the judgment from the grapevine in the village that the Respondent had obtained judgment against her and she contends that she stands to suffer substantial loss and damages upon execution since she has been staying in the land for over 30 years. However, the Applicant herein has neither exhibited nor attached a copy of the letter/ correspondence, if any that was ever sent to her erstwhile advocates inquiring on the judgment.

19. Consequently, and in the absence of any correspondence addressed to the Applicant's erstwhile Counsel, it is difficult to authenticate whether any instructions, if at all, were ever issued to the Applicant's erstwhile Counsel. Other than the foregoing, it is also not lost on the court that it behooves

the Applicant as the party in the suit to act diligently and take proactive measures in her matter. In this regard, a party to a suit, the Applicant not exempted, cannot take a back seat in her own matter and thereafter be heard to cry wolf that her counsel did not notify her on the judgment.

20. To my mind, it is not enough for a litigant, the Applicant not exempted to throw blame on her erstwhile Counsel in a bid to partake of discretionary jurisdiction whilst same Applicant is not demonstrating any diligence on her part. Reliance is made to the Court of Appeal in the case of *Habo Agencies v Wilfred Odhiambo Misingo* [2015]eKLR, where the court stated and observed as hereunder;

> " 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."

21. Similarly, the Court of Appeal in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR, the court stated and observed thus;

> " While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude."

The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.

22. In my humble view, it behooved the Applicant to place before the court some plausible, cogent and believable reasons. Notably, such a reason must be one that can persuade the mind of a reasonable person and not one that leaves doubt in the mind of a reasonable person. In this regard, I am afraid that the Applicant has neither tendered nor placed before the court any sufficient cause, comprising of a plausible and believable reasons or at all. Instructively, in the absence of sufficient cause, the Applicant herein cannot partake of and benefit from the equitable discretion of the court.

23. Before departing from this issue, I beg to adopt and reiterate the holding in the case of *Attorney General v The Law Society of Kenya & another* Court of Appeal Civil Appeal No 133 of 2011 [2013]eKLR, where Musinga JA, stated as hereunder;

> " 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."

24. 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.

25. Flowing from the foregoing analysis, it is evident that the subject application has been mounted with unreasonable and inordinate delay. Secondly, the delay beforehand has neither been accounted for nor sufficiently explained and in the absence of such explanation, the Applicant is disentitled from partaking of and benefiting from the equitable discretion of the court. See the holding of the Court

of Appeal in the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling)].

26. In respect to the stay of execution pending appeal. The grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant part of which states as follows:-

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (1) unless—
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> 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
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> 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. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

28. In *Butt v Rent Restriction Tribunal* [1979] eKLR it was stated that 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. 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. 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

29. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

> "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 *CPR*.

> 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."

30. In the instant case, it is the Applicant's case that she is aggrieved with the decision and the appeal will be rendered nugatory if an order of stay is not granted pending the hearing and determination of this appeal as she stands to be evicted. It is her case that the Judgment was delivered on 21st July 2023 and she was never notified of the same by her previous advocate on record. However, it has taken the Applicant 12 months from the date of judgment delivered in the trial court and the time when she filed the instant application. It is therefore my considered view and as stated earlier that the said delay of 12 months not plausible, and therefore not excusable.

31. On whether the applicant has an arguable case I am unable to say that the intended appeal is arguable. The arguability or otherwise of the intended appeal is merely a possible consideration. It is not a mandatory requirement.

32. On security of costs, the purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR the court stated: -

> "The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

33. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The Applicant has not offered any security for the performance of the decree duration as to when the judgment was delivered by the trial court.

34. The court is called upon to look at the interests of both parties. The circumstances in which an application for leave to appeal out of time and for stay of execution have been prayed for have been referred to already and the Applicant has not shown sufficient cause for grant of the orders sought. Having found that the Applicant has not satisfied the requirements of extension of time to appeal and that she has failed to meet the threshold for grant of stay pending appeal, I reach the conclusion that this application must fail.

35. From the foregoing, the end result is that the application is not merited and the same is hereby disposed of as follows;

    i. The application dated July 23, 2024 is hereby dismissed.

    ii. Each party to bear own costs.

    iii. The file is closed.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF AUGUST 2024

E.K. WABWOTO

JUDGE

RULING DELIVERED BY WAY OF ELECTRONIC MAIL AS WAS DIRECTED BY THE COURT ON 31ST JULY 2024.

Right of Appeal.

E.K. WABWOTO

JUDGE