



REPUBLIC OF KENYA



KENYA LAW
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Tulienge & another v Wafula & 2 others (Environment & Land Case 70 of 2012) [2025] KEELC 912 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 912 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 70 OF 2012
EC CHERONO, J
FEBRUARY 20, 2025

BETWEEN

ALFRED MACHIMBO TULIENGE 1ST APPLICANT

SALANGU TULIENGE 2ND APPLICANT

AND

PAUL WAFULA 1ST RESPONDENT

DICKSON TOM WANJALA 2ND RESPONDENT

FRANCIS WANJALA SITATI 3RD RESPONDENT

RULING

1. Vide a Notice of Motion application dated 16th September 2024, the 2nd Defendant/Applicant is seeking the following orders;
 - a. (Spent)
 - b. That the Honourable court be pleased to stay execution of the judgment in this suit given on the 20th day of February 2024, the decree thereof and all consequential orders arising from the said judgment pending hearing and determination of this application.
 - c. That this Honourable court be pleased to grant the Applicant leave to appeal out of time against the judgment of Hon. Justice E.C. Cherono delivered at Bungoma on 20th February, 2024.
 - d. That the attached copy of the Notice of Appeal by the Applicant be deemed as duly filed and served.



- e. That the Honourable court be pleased to stay execution of the judgment in this suit given on the 20th day of February 2024, the decree thereof and all consequential orders arising from the said judgment pending hearing and determination of the intended appeal.
 - f. That the cost of this application be provided for.
2. The application is based on grounds that at the time the impugned judgment was delivered on 20th February 2024, the Applicant was appearing in person and being aggrieved by the said judgment, the Applicant wishes to prefer an appeal and since time has lapsed, he seeks the leave of this Honourable court to file appeal out of time. He averred that failure to file the appeal in time is not his fault but was occasioned by delay in being supplied with certified copies of typed proceedings and lack of legal representation. He argued that he wrote a letter to the court requesting to be supplied with certified copies of proceedings but the same is yet to be supplied. He stated that he has an arguable appeal with high chances of success. He stated that if the stay order and leave to appeal out of time are not granted, the decree may be executed at any time and the application and the intended appeal will be rendered nugatory. In conclusion, the Applicant stated that the application herein has been brought without undue delay. A copy of a draft Notice of appeal and a letter dated 11/03/2024 are annexed to the supporting affidavit
 3. The application is opposed with a Replying affidavit by the Respondent sworn on 28th November, 2024. In the said replying affidavit, the Respondent deposed that the judgment in this case was delivered on 20/02/2024 in the presence of the parties including the 3rd Defendant/Applicant and that the Applicant who was previously represented by an Advocate fully understood the proceedings. He deposed that the fact that the Applicant was not represented cannot be relied on for his duty in filing a letter for proceedings. He further stated that from the proceedings, each party occupies his own portion of land and therefore the Applicant will not suffer any prejudice if a stay is not granted. He deposed that the Applicant has not shown that he will suffer any substantial loss and damage if the said stay is not granted and that failure to grant a stay will not render the appeal nugatory and that the Applicant has no arguable appeal. In conclusion, the Respondent stated that leave to file an appeal out of time can only be granted by the court where the appeal is being preferred which is the court of Appeal.

Applicants Submissions.

4. The Applicant through the Firm of M/S Markpeter M. Khisa & Company Advocates submitted on the following two issues;
 - a. Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time?
 - b. Whether the Applicant has satisfied the conditions for stay of execution pending appeal?
5. On the first issue, the learned Counsel submitted that it is on record that the Applicant was acting in person and after judgment was delivered, he wrote to the court seeking to be supplied with proceedings to enable him prefer an appeal against the said judgment but unfortunately, the said proceedings has never been supplied. He submitted that it was after he sought legal counsel that he discovered that time to file appeal had lapsed. It was submitted that it is prudent to consider that the Applicant who was acting in person had the intention of appealing but he reasonably believed that he required typed proceedings before instituting the said appeal, which as a result led to the delay thus lapse of time. They submitted that the power to extent the time to appeal is purely the discretion of the court which is exercised on a case to case basis and that it is logical that the court be fair enough to exercise its discretion in favour of the Applicant. It was further submitted that the Respondents will not suffer any prejudice



as they are in occupation and utilizing the suit property. Reliance was placed in the following cases; Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others (2014) KLR; KISUMU Civil Appeal NO. 71 of 2004 (UR) & Section 79G CPA Cap.21 Laws of Kenya;

6. On the second issue, the learned counsel submitted that the conditions for stay of execution is set out under order 42 Rule 6 CPR and that matters relating to land are sensitive and that litigants should be given a chance to exhaust all the avenues as provided by law and that denying the Applicant a chance to institute the appeal will amount to denying him access to justice.
7. On the issue of security, the learned Counsel submitted that the Respondents continue to occupy the suit property and utilizing it and that the Applicant has no authority to evict them which stands to be enough security. Alternatively, they submitted that the Applicant is ready to deposit the title deed the suit property in court as security pending hearing and determination of the intended appeal.

Respondents Submissions.

8. The Respondents through the Firm of M/S Omukunda & Co. Advocates submitted that the application lacks merit, incompetent and is an abuse of the court process as no security for costs has been given. He submitted that the prayer for leave to appeal out of time ought to be directed at the court hearing the appeal and not this court. He submitted that this court has no jurisdiction to examine whether the intended appeal is arguable. Finally, it was submitted that the application was brought to court with undue delay as it was already after eight months had elapsed that this application was brought to court.

Legal Analysis and Decision

9. I have considered the application under review, the affidavits both in support and in opposition thereto, the rival submissions and the applicable law. The first prayer in the application is for stay of execution pending the intended appeal. The applicable law for stay pending appeal is Order 42 Rule 6 CPR which sets out the following conditions;
 - i. The Applicant will suffer substantial loss unless the order is made.
 - ii. The application is made without unreasonable delay and
 - iii. The Applicant gives such security as the court orders for the due performance of the Judgment/ Decree as may ultimately be binding on him.
10. On the first condition, the Applicant is required to demonstrate how he will suffer substantial loss unless the stay order is granted. The superior courts have discussed what constitutes substantial loss in numerous decisions. In the case of James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR, the court observed as follows;

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 factor 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.”



11. I agree with the above decision. In this case, the Applicant has not shown how he will suffer substantial loss unless the stay of execution order is granted. I also note that the impugned judgment was delivered by this court on 20/02/2024 and the present application was filed on 1st October, 2024. It took the Applicant more than eight months to bring the application. In my view, a period of more than eight months without explanation is inordinate and unreasonable delay. To succeed in an application for stay pending appeal, the applicant must surmount all the three conditions sequentially. Having failed the first two conditions, I find that the Applicant has not satisfied this court that he deserves the grant of stay pending appeal.
12. Regarding leave to appeal out of time, I agree with counsel for the Respondent that the delay in bringing this application is inordinate and unreasonable. The applicant was to prefer the appeal within the statutory period of 30 days from 20/02/2024 when the impugned judgment/decreed was delivered but waited for more than eight (8) months to bring the present application. I also agree with the submissions by Counsel for the Respondent that this Honourable court is bereft of jurisdiction to grant such an order. An application for leave to file appeal out ought to be made before the Court of Appeal under Rule 4 of the Court of Appeal Rules.
13. The upshot of the foregoing is that the Notice of Motion application dated 16th September 2024 lack merit and the same is hereby dismissed with costs.
14. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 20TH FEBRUARY, 2025.

E.C CHERONO

ELC JUDGE

In the presence of;

1. 1st Applicant-present
2. 2nd Applicant-present
3. 2nd Respondent-present.
4. Bett C/A.

