



**Busienei v Alphax Collge Limited; Kenya Forest Service & another (Interested Parties)
(Environment & Land Case 159 of 2015) [2024] KEELC 5399 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 159 OF 2015**

**JM ONYANGO, J
JULY 18, 2024**

BETWEEN

DANIEL KIPLIMO BUSIENEI PLAINTIFF

AND

ALPHAX COLLEGE LIMITED DEFENDANT

AND

KENYA FOREST SERVICE INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. Before me for determination is a Notice of Motion dated 6th November, 2023 brought under Sections 3 and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. The said application seeks an order of stay of execution of the judgment of this court delivered on 28th September 2023 together with all consequential orders thereto pending the hearing and determination of the appeal arising therefrom. The application also seeks that the appeal be admitted out of time.
2. The application is predicated on the grounds set forth on the body of the Notice of Motion and the Applicant’s Supporting Affidavit sworn on 6th November 2023. Primarily the Applicant alludes to the fact that he was aggrieved by the judgment of this court and that he has filed a Notice of Appeal in respect thereof. A perusal of the documents filed however reveals that though the Applicant mentions at paragraph 5 the Applicant avers that he has annexed a copy of the Notice of Appeal, none is infact annexed to his affidavit. I however hasten to add that there is a Notice of Appeal in the court file. The Draft Memorandum of Appeal refers to “An Appeal from the ruling of Hon. J.M Onyango dated and delivered in Eldoret ELC Case No. 159 of 2015” this is erroneous.



3. In the Supporting affidavit the Applicant further avers that he is apprehensive that the Respondents will proceed with execution and that he stands to suffer substantial loss if that happens. He adds that he is willing to deposit the certificate of title of the suit property in court as security.
4. The application is vehemently opposed by the Respondents. The 1st and 2nd Interested Parties filed a Notice of Preliminary Objection in which they state that the firm of Koech Lelei & Co Advocates is not properly on record and secondly that the Notice of Motion does not establish the threshold under Order 42 Rule 6 of the *Civil Procedure Rules*.
5. On its part, the 1st Defendant/Respondent filed a Replying Affidavit sworn by Kevin Kenneth Okwara in which he deposed that the application is a non-starter, an afterthought and devoid of merit. He faults the Applicant for filing the application in the absence of an appeal and states that there are no reasons advanced for failing to file the appeal within time. He adds that the judgment dismissed the Applicant's suit which means that the decree emanating therefrom is a negative decree which is incapable of execution. Consequently, he argues, there is nothing to stay as granting the orders sought would amount to reversing the judgment and orders of this court when there is no appeal filed, contrary to the law. The 1st Respondent faults the application for offending the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* and argues that it fails to meet the requirements of Order 42 Rule 6 of the *Civil Procedure Rules, 2010*.
6. The application was canvassed by way of written submissions and the parties duly complied by filing their submissions which I have carefully read and considered.
7. This being an application for stay of execution pending appeal, the issues for determination are twofold:
 - i. Whether the appeal should be admitted out of time
 - ii. Whether a stay pending appeal ought to be granted.
8. On the first limb, I will consider if the appeal ought to be admitted out of time. The principles for granting an application for leave to appeal out of time are now well settled. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR, it was held that:

“... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

 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 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. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;



5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. Whether the application has been brought without undue delay;”
9. In an application for extension of time the Applicant must explain the delay in filing the appeal to the satisfaction of the court.
10. In the case of *Odera Obar & Co Advocates v Acquva Agencies Limited* (2021) eKLR where the court held as follows:
- “The law does not set out any minimum or maximum period of delay. All it states is that the delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”
11. In the instant case the Applicant’s delay of 2 months though not inordinate, has not been adequately explained. Furthermore, although the Applicant alleges that he has filed a Notice of Appeal, none has been annexed to the Supporting Affidavit. I am therefore not persuaded to admit a non-existent appeal against an non-existent “ruling” ostensibly delivered by this court on 28th September 2023.
12. The second limb of this application concerns stay pending appeal. Order 42 Rule 6 of the *Civil Procedure Rules* sets out the principles that should guide the court in considering an application for stay pending appeal. The said provision stipulates as follows:
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.
 - (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



13. I will now proceed to determine whether the Applicant has met the three conditions stipulated in the above-mentioned provisions of the [Civil Procedure Rules](#).
14. With regard to substantial loss, Miss Lelei learned counsel for the Applicant referred the court to the case of [Tropical Supplies Ltd & 2 Others v International Credit Bank Ltd](#) (2004) EA 331 where the court defined substantial loss not to represent any particular amount or size and stated that it cannot be quantified by any particular mathematical formula. It refers to any loss great or small of real worth or value as distinguished from a loss (that is merely nominal).
15. However, the court in [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] eKLR, 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 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.”
16. In the present application, the Applicant has in his supporting affidavit stated that unless a stay is granted, the pending appeal shall be rendered nugatory and that he stands to suffer substantial loss and/or irreparable injury although the nature of the alleged loss or injury is not substantiated.
17. Quite apart from the fact that the alleged substantial loss is not elaborated by the Applicant, Miss Odwa, learned counsel for the 1st defendant submitted that the court in its judgment dismissed the Applicant’s suit resulting in a negative decree and there is therefore nothing to stay.
18. The Court has on numerous occasions pointed out that a negative order is not capable of being stayed. In the case of [Milcah Jeruto Tallam t/a Milka Faith Enterprises v Fina Bank Limited & Another](#) (2013) eKLR the court relied on the case of [Ndungu Kinyanjui vs Kibicho Kugeria Services & Another](#) Civil Application No Nai 79 Of 2007 (unreported) in the Re Sonalux case where the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”
19. I concur with the above decision and find that the dismissal of the Applicant’s suit is a negative order which cannot be stayed.
20. The second condition that one must satisfy in order for the court to grant a stay is that the application for stay must be filed without undue delay. The judgment herein was delivered on 28th September 2023 and the court granted a 30 days stay at the Applicant’s request. The instant application was subsequently filed on 6.11.23. As I have pointed out elsewhere in this ruling, the delay of slightly over a month is not inordinate. What stands out is that the delay has not been explained. In [Nicholas Kiptoo Arap Salat v IEBC & 7 Others](#) (*supra*) the Supreme Court clearly laid out the principles that should guide the court in considering an application for stay pending appeal. One of the principles outlined in



the said decision is that where there is any delay, the same should be explained to the satisfaction of the court. My understanding of this principle is that no matter how short the delay is, the Applicant should explain why he was not able to file his appeal within the statutory time-lines. It cannot be assumed that if the delay is short or insignificant, the Applicant can get away without explaining it.

21. As was stated in *Odera Obar & Co Advocates v Acquva Agencies Limited* (*supra*)

“... A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”

22. In the absence of any explanation for the delay in filing the appeal, the court is disinclined to exercise its discretion in the Applicant’s favour.

23. With regard to the third condition which requires an applicant to furnish security for costs, the Applicant has offered to deposit the title deed of the suit property in court as security. Whether such security is adequate is neither here nor there.

24. Before I pen off, let me say something about whether the firm of Koech- Lelei & Co is properly on record. It is common ground that the said firm came on record after judgment had been delivered.

Order 9 Rule 9 of the *Civil Procedure Rules* provides as follows: -

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
- (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”

25. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi vs Veronica Muehlmann* [2019] eKLR where the court observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the *CPR* was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

26. I note that in the instant suit, the Applicant has annexed a consent dated 24th October, 2023 between the firm of Koech-Lelei & Company Advocates and Mac Law Advocate LLP to his supporting affidavit as annexure “DKB 1”. What is missing is the order of the court adopting the said consent as envisaged by the *Rules*.

27. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JULY 2024.

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J.M ONYANGO



JUDGE

In the presence of;

1. Mr. Koech for Mrs. Lelei for the Plaintiff/Applicant
2. Miss Odwa for the 1st Defendant
3. No appearance for the Interested Parties0

Court Assistant: Brian

