



**Ngure & another v Kabiru & 2 others (Land Case Appeal
E011 of 2023) [2024] KEELC 5871 (KLR) (20 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5871 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
LAND CASE APPEAL E011 OF 2023
AK BOR, J
AUGUST 20, 2024**

BETWEEN

NATHAN WARUTERE NGURE 1ST APPELLANT

PETER MG KARIUKI 2ND APPELLANT

AND

WAMUGUNDA KABIRU 1ST RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 2ND RESPONDENT

DISTRICT LAND REGISTRAR 3RD RESPONDENT

RULING

1. Through the application dated 11/10/2023, the Appellant seeks stay of execution of the judgment delivered in Nanyuki CM ELC Case No. 153 of 2018 and to have the appeal admitted out of time. The application was made on the grounds that judgment was delivered by the trial court on 17/8/2023 and the 1st Respondent had issued verbal threats that he would demolish the 2nd Appellant's house yet he had been on the land since 26/8/2014 when he purchased it from the 1st Appellant and took possession. He added that he had nowhere else to live and the acts of the 1st Respondent would cause him substantial loss.
2. The 2nd Appellant swore the affidavit in support of the application in which he explained that the application for stay of execution of the judgment and decree was made without unreasonable delay and that the delay was occasioned by the previous advocate who failed to file it within time. He maintained that his appeal stood high chances of success and offered the suit property as security for the possible satisfaction of the decree.
3. After the filing of the application, the 1st Respondent unfortunately passed away and an application was made by his personal representative for substitution. Another application dated 8/2/2024 was



made to remove the Cooperative Bank of Kenya Limited from the proceedings. Both applications were allowed by the court with the consent of the parties.

4. The 1st Respondent swore the replying affidavit in opposition to the application and reiterated what the court needs to consider in an application for stay of execution pursuant to Order 42 Rule 6 of the [Civil Procedure Rules](#). He added that as a successful litigant he was entitled to enjoy the fruits of his judgment and that if the court were minded to grant stay of execution, then the Appellant ought to deposit a sum of Kshs. 200,000/= as security for the due performance of the decree that may ultimately be binding upon him.
5. Parties filed submissions which the court has considered. The Appellants submitted that the enlargement of time and stay of execution pending the outcome of an appeal were discretionary remedies to be granted to be considered and decided based on the merits and peculiar circumstance of each case. They relied on various decisions in support of the position that an applicant has to explain the delay and whether there were any extenuating circumstances that would enable the court exercise its discretion in favour of an applicant. The other point is that the delay should be satisfactorily explained without the law setting any minimum or maximum period of delay. He added that the mistake of counsel should not be visited on a client. He maintained that he had an arguable appeal and that the appeal would be rendered nugatory if stay were not granted since there was real danger of his being evicted from the suit land. He added that he stood to suffer substantial loss if execution by the Respondent were to proceed as it would result in deprivation of an irreplaceable asset which is the land on which he resides with his family. He maintained that security did not have to come in monetary terms and that the court could exercise its discretion and order security in other forms. He concluded that he was willing to offer the suit land as security.
6. The 1st Respondent submitted that no explanation had been given for the failure to file the appeal within time. Further, that the Appellant had failed to satisfy the requirements of Order 42 Rule 6 to warrant the grant of stay of execution. The 1st Respondent adverted to Section 79(G) of the [Civil Procedure Act](#) and added that the Appellant moved this court almost two months after the time for lodging the appeal had lapsed and they had failed to explain that delay satisfactorily. They also relied on Order 42 Rule 6 and decisions on the point that the court had to weigh the merits of granting stay against the rights of a successful litigant who should not be deprived of the fruits of their judgment. He maintained that he was entitled to the fruits of his judgment and that the Appellant had not demonstrated exceptional circumstances to justify suspending his enjoyment of the fruits of the judgment delivered on 17/8/2023. He reiterated that the court ought to direct the Appellant to deposit the sum of Kshs. 200,000/= in court as security for the due performance of the decree.
7. The issue for determination is whether the court should grant the order sought by the application dated 11/10/2023 by granting stay of execution of the decree by the trial court and admitting the appeal out of time. The Appellants explanation for the failure to lodge the appeal within time is that they were made to believe that their previous advocate had lodged an appeal only to learn later that that was not the true position. They urged the court not to visit the mistake of their previous counsel on them.
8. The court has considered the application, response and the written submissions filed by the parties. The court is satisfied that the delay in lodging the appeal on time has been explained.
9. The court grants the Appellants leave to file their appeal out of time.
10. The court stays execution of the decree issued pursuant to the judgment of the Learned Magistrate delivered on 17/8/2023 in Nanyuki CM ELC Case No. 153 of 2018 on condition that the Appellants deposit the sum of Kshs. 200,000/= in court as security for the due performance of the decree that may ultimately be binding upon them within 30 days of the date of this ruling.



The 1st Respondent is awarded the costs of the application.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Ms. Wangu Karunyū for the Appellants

Ms. Wakarura Irungu for the 1st Respondent

Court Assistant: Diana Kemboi

No appearance for the 2nd Respondent

