



REPUBLIC OF KENYA



Muniko & another v Mahindi & 2 others (Environment and Land Miscellaneous Application 4 of 2023) [2024] KEELC 6305 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 4 OF 2023
GMA ONGONDO, J
SEPTEMBER 24, 2024**

BETWEEN

JOSEPH MUNIKO 1ST APPLICANT

**PAMELA MAKAKA (SUING AS THE PERSONAL REPRESENTATIVE OF THE
ESTATE OF SABATIAN MWITA MWERA - DECEASED) 2ND APPLICANT**

AND

TITUS MAHINDI 1ST RESPONDENT

MWITA MARWA 2ND RESPONDENT

ISAAC RIOBA 3RD RESPONDENT

RULING

1. The present ruling is in regard to an application by way of notice of motion dated 26th October 2023 by the applicants' through Bochaberi and Company Advocates for the orders infra; .
 - a. That the Honourable court be pleased to substitute the name of Sabastian Mwita Mwera (Deceased) with the name of Pamela Makaka as the legal representative of the deceased estate.
 - b. That the Honourable court be pleased to issue orders of stay of execution against the Applicants pending the hearing and determination of the intended appeal.
 - c. That the Honourable court be pleased to grant the Applicants leave to appeal out of time against the judgment delivered on 9th March 2023 by Honourable Moses Oyoko Obiero (SPM) in Kehancha Senior Magistrate's court, ELC No. 31 of 2019.
 - d. That the Appellants Draft Memorandum of Appeal be deemed as duly filed upon payment of the requisite court fees.
 - e. That costs of this application be provided.



2. The anchorage of the application is the 1st applicant's affidavit of thirteen paragraphs together with documents marked 'PM1, PM2 and PM3' being copies of death certificate, the grant and the memorandum of appeal respectively annexed to the same. It is also based on grounds (a) to (o) stated on the face of the application.
3. Briefly, the applicants' lamentation is that judgment in Kehancha Senior Principal Magistrate's Court Environment and Land case number 31 of 2019, was delivered on 9th March 2023 and their advocate did not update them of the same. That on consultation, they were informed of the judgment and it's effect on their livelihood and economic repercussions. That unfortunately, an applicant, Sebastian Mwita Mwera (Deceased) passed on which was not foreseen and the time for lodging an appeal from the trial court's judgement has lapsed. That the draft memorandum of appeal (PM 3) contains serious triable issues and that the application be allowed in the interest of justice.
4. In a replying affidavit of nineteen paragraphs sworn on 9th February 2024 by the 1st respondent, Titus Mahindi through Abisai and Company Advocates, the application is opposed. It is averred, inter alia, that it was the duty of the applicants to follow up on their matter and that by the time the deceased died, the time for filing of an appeal had already lapsed. That the respondents are the rightful owners of the suit land, plot No. 76 B Ntimaru Market and found that the applicants had trespassed and unlawfully erected structures thereon.
5. Further, the 1st respondent averred that the trial court issued an eviction order and a permanent injunction against the applicants from interfering with the suit land and awarded damages of Kshs. 300,000/- against the applicants. That the trial court issued negative orders hence the same are incapable of stay. That the appeal has no high chances of success and that the application is not meritorious.
6. On 15th November 2023, the court directed that the application be heard by written submissions.
7. In the submissions dated 10th January 2024, learned counsel for the applicants referred to the orders sought on the face of the application and identified three issues for determination including whether the orders for substitution, stay and leave to appeal out of time, should be granted. Counsel analyzed the issues in favour of the applicants and relied upon section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 24 Rule 4 (4) of the Civil Procedure Rules 2010 on the meaning and joinder of 'Legal Representative' in a suit respectively. Further, reliance was made on Order 42 Rule 6 of the Civil Procedure Rules 2010, sections 1A and 79G of the Civil Procedure Act Chapter 21 Laws of Kenya, Absolom Dova-vs-Tarbo Transporters (2013) eKLR and Thuita Mwangi-vs-Kenya Airways Ltd (2003) eKLR, to fortify the submissions.
8. By the submissions dated 20th February 2024, learned counsel for the respondents stated the orders sought in the application, the history of the trial court's suit and the judgment rendered on 9th March 2023. Counsel submitted that the parties were given a fair hearing under Article 50 (1) of the Constitution of Kenya 2010 and that the respondents are entitled to the fruit of the judgment which should be implemented. To buttress the submissions, counsel cited Machira T/A Machira and Co. Advocates-vs-East African Standard (No. 2) (2002) 1 KLR 63 and Jasbir Rai-vs-Tarlochan Rai (2014) eKLR, among others.
9. In that regard, the following issues fall for determination;
 - i. Whether the instant application is merited.
 - ii. Subject to issue (a) hereinabove, what orders can the court issue herein, to meet the ends of justice?



10. It must be noted that the original 2nd applicant is deceased as disclosed the death certificate and grant (PM1 and PM2 respectively) thus, the 2nd applicant is mandated to substitute him; see section 2 of the *Civil Procedure Act* (supra), section 82 of the *Law of Succession Act* Chapter 160 Laws of Kenya and *Rajesh Chudasama-vs-Sailesh Chudasama* (2014) eKLR.
11. The conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) (Supra) which provides in part thus:
 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. (Emphasis added).
12. The question of whether or not to grant an order for stay and leave to lodge an appeal as sought herein, is a discretionary one which must be exercised judiciously. The court has to consider whether it is in the interest of justice to grant the orders, whether the appeal is arguable and whether if the application for stay is refused, the appeal, if successful, would be rendered nugatory; see *Lucy Waithera Kimanga & 2 Others vs John Waiganjo Gichuri* [2015] eKLR.
13. The draft Memorandum of Appeal dated 25th October 2023 contains triable issues which include; the ownership of the suit land, the county rules applicable to issuance, transfer and allocation of plots/land. Thus, the same lead this court to the conclusion that the appeal is indeed arguable and not frivolous.
14. This Court recognizes the applicants' unfettered right of appeal which they have sought to exercise. The respondents are likely to execute the decree against them hence, disrupting their livelihood. Therefore, the applicants be afforded an opportunity to be heard on the appeal pursuant to Articles 25 (c), 48 and 50 (1) of *the Constitution* of Kenya 2010; see also *Butt-vs-Rent Restriction Tribunal* (1979) eKLR.
15. The application was filed on 7th November 2023 and the Judgment the applicants intend to appeal against was delivered on 9th March 2023. The applicant delayed for close to eight months to initiate the application. The applicant asserted that counsel on record for them at the trial court did not update them about the judgment and mistake of counsel should not be visited upon them. That the death of the original 2nd applicant unforeseen and Limited grant of the estate of the Deceased, was issued on 24th October 2023. In the circumstances, the delay is explained and quite satisfactory.
16. It must be kept in mind that Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies while Section 79 G of the same Act provides for the time for filing of appeals from subordinate courts. Order 50 Rules 4, 6, 7 and 8 of the *Civil Procedure Rules*, 2010 stipulates when time does not run, power to enlarge time, enlargement of time and computation of days respectively.
17. It is established law that an application for extension of time must reveal good and substantial reasons for the delay. That the said extension is not a right of a party. It is an equitable remedy that is only available to a deserving party grantable at the discretion of the court; see *Nicholas Kiptoo Arap Korir Salat-vs-Independent Electoral and Boundaries Commission & 7 others* {2014} eKLR, by the Supreme Court of Kenya on the considerations to guide the court in exercising its discretion in such cases.



18. Security for the performance of the decree is a requirement within the discretion of the court; see also *Halai and another-vs-Thornton and Turpin (1963) Ltd* (1990) eKLR.
19. In the premises, it is my considered view that the 2nd applicant is entitled to substitute the deceased original 2nd applicant in the prospective appeal, pursue it and the same will be rendered nugatory, if orders for substitution, stay and leave to appeal out of time sought in the application are not granted. Also, the respondents may proceed to execute the trial court's judgment hence granting the orders sought in the application would safeguard the crux of the prospective appeal.
20. Wherefore, the application by way of Notice of motion dated 26th October 2023 is hereby allowed in the terms infra;
 - a. Prayers 2, 4, 5 and 6 in the application as set out in paragraph 1 (a) (b) (c) and (d) hereinabove respectively.
 - b. The applicants to formally file and serve the appeal within the next thirty days from this date failing which the orders granted shall lapse automatically without a further order of this court.
 - c. Costs of the application to abide the outcome of the prospective appeal.
2. It is so ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 24TH DAY OF SEPTEMBER 2024.

G.M.A ONGONDO

JUDGE

In Presence of;-

B. Bochaberi learned counsel for the applicants

A. Abisai learned counsel for the respondents

T. Maurice- Court Assistant

