



**Marungo v Mwaura & 4 others (Environment and Land Miscellaneous Application
34 of 2023) [2024] KEELC 6030 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6030 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 34 OF 2023
A OMBWAYO, J
SEPTEMBER 20, 2024**

BETWEEN

MARY WAMBUI MARUNGO PLAINTIFF

AND

ADAMSON MUKUNJA MWAURA 1ST DEFENDANT

MARY WANJIKU MUCHEMI 2ND DEFENDANT

MARTHA MWAURA 3RD DEFENDANT

JOSEPH NJENGA NJAU 4TH DEFENDANT

PRISCILLAH WAITHERA KAIRU 5TH DEFENDANT

RULING

1. Adamson Mukunja Mwaura, Mary Wanjiku Muchemi, Martha Mwaura, Joseph Njenga Njau and Priscillah Waithera Kairu have come to this court with an application that :-
 - a. Spent
 - b. Pending the hearing and determination of this application inter-partes, this honorable be pleased to stay the execution of the ruling delivered on 13th July, 2023 on an application dated 19th April 2021 in Nakuru Civil Case No.346 of 2014 and the execution of the consent order dated 4th December, 2019, and all other consequential orders and notices emanating therefrom.
 - c. This honorable court be pleased to grant leave to the 1st defendant/applicant to file an appeal out of time from the ruling of Honorable Elizabeth Juma delivered on 13th July, 2023 on an application dated 19th April 2021 in Nakuru Civil Case No.346 of 2014.
 - d. Upon granting prayer (c) above, the appeal to be deemed as duly filed.



- e. Pending the hearing and determination of the intended appeal, this honorable court be pleased to stay the execution of the ruling delivered on 13th July, 2023 on an application dated 19th April 2021 in Nakuru Civil Case No.346 of 2014 and the execution of the consent order dated 5th December 2019, and all other consequential orders and notices emanating therefrom.
- f. Costs of this application be provided for.
2. The grounds of the application are that The Honorable trial Court delivered it's ruling with respect to an application by the Defendants on 13th July, 2023 in which the said application was dismissed with costs to the Plaintiff/Respondent. Consequent upon delivering the said ruling, the trial Court ordered that there be a stay of execution for a period of 30 days from the date of the said ruling. The 1st Defendant/Applicant, being aggrieved by the said ruling, instructed his firm of advocates on or around 25th July, 2023, to appeal against the same and contemporaneously file an application for stay of execution pending the hearing and determination of the intended appeal.
 3. Upon receipt of the instructions, the said firm immediately caused a Memorandum of Appeal and an application for stay of execution to be prepared and instructed that the same should be filed forthwith and in any event not later than 10th August, 2023.
 4. However, due to recent human resource reshuffling in the 1st Defendant's/Applicant's advocates' office especially in the registry department, a fairly new clerk in the said department who was in charge of filling legal documents inadvertently omitted to file the said documents in time and filed them away with some other documents.
 5. It was only after a thorough record management exercise was conducted in the said office that the said documents were discovered, which necessitated the immediate filing of this application. The mistake at the Defendant's/Applicant's advocates' firm was unintended, unintentional and an honest human omission and the same shouldn't be meted upon the client who is an innocent litigant.
 6. The slight delay in filing the appeal was not deliberate but arose out of mere inadvertence and the same was occasioned by factors which were out of the 1st Defendant's/Applicant's control.
 7. The 1st Defendant/Applicant has an arguable appeal and should be allowed to ventilate it without the threat of execution. This Honorable Court is implored to consider the substantial loss/harm that stares in the face of the 1st Defendant/Applicant if the orders of stay are not granted.
 8. By a simple calendar-days application, the period of stay of execution lapsed on 11th August, 2023, therefore at the moment the same isn't in force and the 1st Defendant/Applicant has been exposed to threats of execution and actual execution. Indeed, the said applicant has already been cautioned of imminent execution.
 9. The 1st Defendant's/Applicants' appeal has high chances of success and raises weighty issues which shall be determined by this Honorable Court. The 1st Defendant's/Applicant's appeal will be rendered nugatory if the orders of stay are not granted. The 1st Defendant/Applicant is willing to abide by any reasonable condition that this Honorable Court may impose for grant of stay of execution provided the same is consistent with pendency of the said appeal. It is in the interests of fairness and justice that the application herein be heard on a priority basis and the orders sought granted.
 10. The application is supported by the affidavit of Kahiga Waitindi advocate that reiterates the grounds of the application.



11. In the replying affidavit, the respondent states that . . . the application is frivolous, vexatious and an abuse of the due process of this Honorable Court and an afterthought aimed at spinning the wheels of justice in unending circles. The applicants have been in possession and occupation of the Respondent's land since the year 2001 and the present Application is another attempt to extend the unlawful and illegal occupation. It should be noted that, the Applicants had filed a similar Application dated 19th April, 2021 in the Chief Magistrate's Court at Nakuru to wit, Nakuru CMCC No. 346 of 2014.
12. The said Application sought orders for stay of implementation of the consent order dated 5 December 2019 together with all consequential order pending the hearing and determination of the Application. The court delivered a Ruling on 13th July 2023 dismissing the said Application citing reasons that the same lacked merit. No good reason has been given for the delay in filing the Appeal. The applicants have not satisfied the conditions for grant of stay of execution and for leave to appeal out of time.
13. The consent dated 5 December, 2019 was entered by Applicants and Respondent both being represented by their advocates and at no instance was there fraud mistake, misrepresentation, coercion, undue influence or any other factor that may result to the varying of the consent.
14. The applicants have not demonstrated what substantial or irreparable loss/harm they stand to suffer in the event the order for stay herein are denied. Instead, the Applicants seem to rely more on the success of the Appeal. That if a stay of execution is granted, the Respondent herein would be greatly prejudiced as that would further delay the process of deriving benefit from the Judgment. All that remains in this case is for the Applicants to vacate the Respondent's portion of land or be evicted as per the Consent Order and Eviction Notice.
15. The application seeks this court to exercise its discretionary power to extend time to file an appeal. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* {2014} eKLR set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -"i. 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; ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; v. Whether there will be any prejudice suffered by the respondents if the extension is granted; vi. Whether the application has been brought without undue delay; and vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
16. I have considered the evidence on record and rival submissions and do find that the applicant seeks an order that he be granted leave to file an appeal out of time against the ruling delivered on 13th July 2023. The appeal ought to have been filed on or before 13th August 2023. The application is dated 19th December 2023, made 4 months after expiry of time. The reasons for delay are that the applicants advocate was reorganizing his office after he employed a new clerk. We are not told what happened to the old clerk. Moreover, it is not explained why it would take 4 months to re-organize an advocates office. I do find the explanation not plausible. I do find the delay to be inordinate and the explanation for delay is not plausible. Moreover, the court doubts that the appeal has merit because the consent being challenged did not include the appointment of a surveyor instructed by the applicant.
17. I do agree with the respondent that grant of this order will occasion prejudice as the consent was entered between the parties on 5th December 2019. The consent lays down the terms of settlement and gives the size of the respondents land as 0.23Ha. the consent was implemented. The next step is the respondent to be allowed to occupy his land.



18. The application seeks an order of stay of execution pending appeal. I have already found that the applicant does not deserve leave to appeal out of time due to the inordinate delay that he has not explained. I do find that the applicant does not deserve a stay of execution pending appeal for the said reason. Moreover, the ruling was negative and therefore cannot be stayed. It was a dismissal of an application. How does the court stay a dismissal? The application is misconceived on this prayer. Furthermore, there is no evidence of substantial loss. There is no evidence that the respondents will hived off more than they were given by the court. The applicants can recover any land that is likely to be hived off illegally by the respondent. The upshot of the above is that the application is dismissed with costs.

RULING DATED AND DELIVERED ELECTRONICALLY THIS 20TH DAY OF SEPTEMBER 2024.

A. O. OMBWAYO

JUDGE

