



Wasike (Suing on Behalf of Muju PEFA Church) (Environment and Land Miscellaneous Application E016 of 2024) [2024] KEELC 13289 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13289 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2024
EC CHERONO, J
NOVEMBER 21, 2024

IN THE MATTER OF
MARTIN N WASIKE RESPONDENT
SUING ON BEHALF OF MUJU PEFA CHURCH

RULING

1. The Applicant has moved this Honourable court vide a Notice of Motion dated 23rd August, 2024 seeking the following orders;
 1. (Spent)
 2. There be a stay of execution of the judgment, decree and all consequential orders issued on 24th July, 2024 by the trial Magistrate in Webuye ELC Case No. 030 of 2019 pending the hearing of this application interpartes.
 3. There be a stay of execution of the judgment, decree and all consequential orders issued on 24th July, 2024 by the trial Magistrate in Webuye ELC Case No. 030 of 2019 pending the hearing of the instant appeal herein.
 4. The Applicant be granted leave to file an appeal out of time.
 5. The draft Memorandum of appeal filed herewith be deemed to have been duly filed.
 6. The Costs of this application be provided for.
2. The application is premised on the following five grounds;
 - i. Judgment in the Honourable Magistrate's court was entered against Applicant/Appellant on 24th July, 2024.
 - ii. The Applicant requested for certified copies of the Judgment and typed proceedings which were not issued in time and consequently delayed and necessitated the instant application.



- iii. The Applicant wishes to move this Honourable court seeking, amongst other orders, an order of stay of execution of the Judgment and decree issued by the Magistrate court pending the appeal herein.
 - iv. The Respondent shall undertake to execute the decree they hold, to the detriment of the Applicant herein and the same is imminent, unless stopped by an order of this court.
 - v. The Applicant stands to suffer extensive harm if the instant application is not allowed and his appeal heard and determined on merit.
3. The application is further supported by an affidavit sworn by the applicant on even date where he reiterated the grounds on the face of the application, adding that he has an arguable appeal with high chances of appeal and that the delay in filing the appeal is due to the court's failure to supply him with certified copies of the Judgment and proceedings. He stated that this application has been filed without undue delay and that the Respondent will not be prejudiced if the orders sought are granted. The applicant annexed copies of the decree and draft Memorandum of appeal and marked as 'MNW-1 and MNW-2' respectively.
 4. The Respondents opposed the said application vide a Replying affidavit sworn by Shadrack Aradi Mugira on 6th September, 2024. While opposing the said application, the Respondents stated that the Applicants herein had sued them in Webuye SPM-ELC NO. E030 of 2019 for the surrender of Title NO. Ndivisi/Muchi/9777 & 9778 where the 1st plaintiff was one Joseph Wanjal Kutiri (now deceased) who was claiming Title NO. Ndivisi/Muchi/9777 which the Applicants could not explain how they acquired the same. They stated that the second Title NO. Ndivisi/Muchi/9778 is for PEFA Church but the Applicant never produced any evidence that the Title had been collected by the Respondents. They stated that during the hearing before the trial court, the Land Registrar Bungoma was summoned to produce the dispatch book and he indicated that the same could not be found and therefore, the person who collected the Title could not be confirmed.
 5. The Respondents also stated that the Applicant filed suit on behalf of PEFA Church is a society and did not produce evidence that he was a registered trustee authorized to sue and be sued in accordance with the *Societies Act*. As such, the Respondents contend that the Applicant has no locus standi and that the intended appeal is not arguable and no chance of success.
 6. The Respondents also stated that the Applicants' suit before the trial court was dismissed with costs and that the present application cannot be stayed since the dismissal of the former suit by the trial court was a negative order incapable of being stayed.
 7. They stated that the only execution against the decree is in respect to the award of Costs which is yet to be assessed. They stated that the Respondent has not demonstrated any substantial loss he stands to suffer if the stay of execution order is not granted and that the delay in filing appeal and this application is inordinate and no sufficient explanation has been given.

Applicants Written Submissions

8. It was submitted that the delay in filing the appeal within the prescribed time was occasioned by reasons that are excusable and beyond the control of the Applicant. It was also averred that the Applicant was unable to file the appeal within the statutory period due to the inadvertent delays in obtaining the certified copies of the proceedings and judgment which was yet to receive at the filing of these submissions. The applicant submitted that he took steps to secure these documents and file the appeal as soon as practicable. He stated that the delay in filing the appeal was exacerbated by the recent breakdown of the judiciary e-filing system.



9. The Applicant also submitted that he will suffer substantial loss unless the stay order is granted. He stated that the judgment of the lower court involves an award of costs to the Respondents, which he is sceptical that the Respondents may move to execute and the same will render the appeal nugatory. Reliance was made to the following cases; *Butt v Rent Restriction Tribunal* (1982) KLR 417, *Kenys Shell Limited v Benjamin Karuga Kibiru* (1986) KLR. The Applicant also cited Section 79G of the *Civil Procedure Act* in support of the application. was also cited in support of the application.

Respondents Written Submissions

10. The Respondents submitted that the application is bad in law and ought to have been made in the court which heard the matter in the first instance.
11. Secondly, it was submitted that the decree in the lower court is not capable of being stayed save for party & party bill of costs which cannot be stayed.
12. On the issue of leave, the Respondents submitted that a party must demonstrate that he/she has an appeal with high chances of success

Legal Analysis And Decision.

13. I have considered the application under review, the supporting affidavit, the Replying affidavit and the rival submissions as well as the relevant law. From a copy of the impugned judgment by the trial Magistrate annexed to the supporting affidavit and marked 'MNW-1', the plaintiff/Appellant's suit was found to be without merit and the same was dismissed with costs to the defendants/Respondents. It is trite that a dismissal order is a negative order. The trial court did not order/direct defendant/Respondent to do or refrain from doing anything. I agree with counsel for the Respondent Mr. Athun'ga that the order of dismissal by the trial court is incapable of being stayed since it is a negative order. Having said that, I find that the conditions for stay under Order 42 Rule 6 of the Civil Procedure Rules do not apply.
14. The only remaining issue is whether the leave to appeal out of time should be granted. Section 79G of the *Civil Procedure Act* gives a party who is aggrieved by the judgment of a magistrate court 30 days to appeal. The same provision also gives the courts power to allow an application for leave to appeal out of time where the applicant was not supplied with certified copies of the judgment and proceedings before the expiry of the statutory period. The Applicant at paragraph 4 of his supporting affidavit stated that he applied for certified copies of the judgment and typed proceedings. However, he did not annex a copy of the letter requesting for the same. In the absence of the alleged letter, it is difficult for this court to determine whether the delay is inordinate or not. That can only be done after establishing the date the request was made and that is when time starts to run. I also note that at paragraph 2 of his written submissions, the Applicant made spurious allegations that the delay in filing his appeal was exacerbated by the recent breakdown of the judiciary e-filing system. No report or any letter is annexures from the judiciary or any expert showing that the judiciary e-filing system broke down at any given time in the recent past. Those allegations in my view are baseless and only meant to mislead this court into granting the orders sought.
15. Given that the Applicant has an undoubted right of appeal, I will exercise the courts discretion and extend time for appeal on appropriate terms. Considering that the order being appealed against is incapable of being stayed, this appeal succeeds partially as follows;
 1. The prayer for stay of execution is declined.



2. The Applicant is granted leave to file appeal against the judgment of Hon. Viola Yator, PM delivered on 24/07/2024 within 7 days from the date of this Ruling.
3. The Applicant to compile, file and serve his record of appeal within 21 days from the date of this Ruling, failing which the proposed appeal shall stand dismissed.
4. The costs of this application shall abide the intended appeal.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 21ST DAY OF NOVEMBER, 2024

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Applicant-present.

Respondent/Advocate-absent.

Bett C/A.

