



Ndung'u v Githiora & Njuguna (Suing as the registered trustees of Christian Fellowship Church) & another (Environment and Land Miscellaneous Application E006 of 2023) [2024] KEELC 13255 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13255 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023
LN GACHERU, J
NOVEMBER 14, 2024

BETWEEN

KABUTI NDUNG'U ALIAS FRANCIS KABUTI NDUNG'U APPELLANT

AND

**PATRICK NGIGI GITHIORA & FRANCIS KINUTHIA NJUGUNA
(SUING AS THE REGISTERED TRUSTEES OF CHRISTIAN FELLOWSHIP
CHURCH) 1ST RESPONDENT**

GRACE COMMISSION GLOBAL CHURCH 2ND RESPONDENT

RULING

1. There are two Applications herein for determination filed by the Appellant/Applicant. The first one is the Chamber Summons Application, dated 9th January 2023, which is brought under Section 79G of the *Civil Procedure Act*, wherein the Appellant/Applicant has sought for leave to appeal out of time, against the decision of the trial Court (Hon. E.M. Mutungi, Pm At Kandara Law Courts), which was delivered on 6th September 2022, in MCL & E No.4 of 2021.
2. The prayers sought are;
 1. That this Court be pleased to admit the Appeal for hearing after the expiry of the statutory period for entering of appeal.
 2. The costs of the application be in the cause.
3. The Application herein is supported by the Supporting Affidavit of the Applicant, Kabuti Ndung'u Alias Francis Kabuti Ndung'u sworn on 9th January 2023. The Applicant contended that the trial Magistrate who delivered the decision dated 6th September 2022, proceeded on transfer, resulting in



- delay in terms of obtaining a typed copy of the said decision, and which only became available on 24th November 2022.
4. The second one is the Notice of Motion Application, dated 6th July 2023, brought under Order 51 and Order 42 Rule 6, of the Civil Procedure Rules, as read together with Section 3A of the [Civil Procedure Act](#). The Appellant/Applicant has sought for an order of stay of execution of the Judgment of the trial Court dated 6th September, 2022.
 5. The Appellant/Applicant sought for these orders; -
 1. That this Court be pleased to issue orders for stay of execution of the judgment delivered by the trial Court on 6th September, 2022.
 2. That this Court be pleased to issue an interim injunction prohibiting and/or restraining the Respondent, either by themselves, their servants and/or their agents from subdividing, alienating, transferring or in any other way dealing with the suit property being LOC.4/Ngararia/1934 until this matter is heard and determined.
 3. That this Court be pleased to issue an interim injunction prohibiting and/or restraining the County Survey, either by themselves, their servants and/or their agents from subdividing, alienating, transferring or in any other way dealing with the suit property being LOC.4/Ngararia/1934.
 4. That this Court be pleased to issue an interim injunction prohibiting and/or restraining the Land Registrar, Murang'a County either by themselves, their servants and/or their agents from subdividing, alienating, transferring or in any other way dealing with the suit property LOC.4/Ngararia/1934 until this matter is heard and determined.
 5. That the costs of the application be in the cause.
 6. The Application is also supported by the Affidavit of the Applicant herein, Kabuti Ndung'u Alias Francis Kabuti Ndung'u , sworn on 6th July, 2023, wherein the Applicant annexed a copy of the Certificate of official Search dated 20th November 2004, which shows that Kabuti Ndung'u is the registered proprietor of land parcel number LOC.4/Ngararia/1934 (the suit property) measuring approximately 0.44 Hectares.
 7. He further annexed a letter dated 29th June 2023, issued by the County-survey Office – Murang'a, wherein it was stated that a team from the said office and acting on Land Control Board's Consent Letters dated 18th December 2008, as well as the Court Order dated 8th May 2023, would visit the suit land on 20th July 2023, for the purpose of subdividing the said parcel of land.
 8. At the trial Court, the Respondent had laid a claim to the suit property on the basis of the doctrine of Adverse Possession. At the end of the trial, the trial Court held and found that the Respondent had established that he was entitled to the suit property pursuant to the doctrine of Adverse Possession, having proven his entry into the suit land in year 2004, and the execution of a sale agreement with the Appellant/Applicant in respect of the suit property dated year 2008.
 9. This Court, through a Ruling delivered on 7th March 2024, allowed the Appellant/Applicant's application dated 7th August 2023, which sought for the reinstatement of the two applications herein on the condition that the Appellant/ Applicant do pay throw away costs in the tune of Kshs.5,000/=, to the Respondent herein.



10. The court directed that the two Applications be canvassed together by way of written submissions, and the parties herein complied accordingly.

The Appellant/applicant's Submissions

11. The Appellant/Applicant filed his written submissions dated 18th July 2024, through the Law Firm of Wanjiru Mwangi Advocates, and submitted on the issue of leave to appeal out of time, wherein he submitted that the delay in filing the Appeal against the decision of the trial Court was not due to his indolence, but resulted from the transfer of the trial Magistrate who delivered the decision dated 6th September 2022.
12. Further, that the trial Court had not communicated to the parties the date of delivery of the impugned Judgment, which was read out in open Court and in the absence of the parties.
13. Further that as the trial Court's Judgment was delivered on 6th September 2022, any appeal in respect of the said Judgment ought to have been filed on 6th October, 2022; therefore, the Appellant/Applicant's intended Appeal having been instituted on 9th January 2023, the delay in filing the same was only two (2) months long.
14. Further, that the Decree of the trial Court had not been extracted as at 9th January 2023. He relied on the holding of the Court in the case of APA Insurance Limited Vs Michael Kinyanjui Muturi [2016] eKLR, to buttress the argument that a delay of four (4) months in respect to the filing of an Appeal was adjudged not to have prejudiced the Respondent. Further reliance was sought in the decision of the Court in the case of Charles N. Ngugi V ASL Credit Limited [2022] Eklr, in support of the proposition a delay of two (2) months in terms of lodging an appeal is not inordinate.
15. Further reliance was placed sought in the cases of Kamlesh Mansukhalal Damki Patni V DPP and 3 Others [2015] eKLR; and, Stecol Corporation Limited V Susan Awuor Mudemb [2021] eKLR, to undergird the proposition that the Court should allow the Appellant/Applicant to file his Appeal out of time because it is meritorious with a high chance of success.
16. On the issue of stay of execution as set out the Notice of Motion Application, dated 6th July 2023, the Appellant/Applicant sought reliance in the provisions of order 42 Rule 6 of the Civil Procedure Rules, as well as in the decision of the Court in the cases of Winfred Nyawira Vs Peterson Onyiego (Civil Case no. 576 of 2022); and, [*Samvir Trustee Limited VS Guardian Bank Limited Nairobi \(HCCC 795 OF 1997\)*](#) to anchor the proposition that the Court's power to grant a stay of execution is a discretionary one.
17. Further, that in the event the Court determines that the instant Application was brought after inordinate delay, the Court should consider the fact that the Appellant/Applicant will suffer substantial loss, if the suit property is subdivided and registered in the Respondent's name, as the suit land will have been put beyond the Applicant's reach by the time his appeal is heard and determined.
18. On the question of interim injunction orders, reliance was placed in the holding of the Court in the case of Giella Vs Cassman Brown & Co. Ltd [1973] EA 358, on the requirements which an applicant must satisfy for the grant of an interim injunction. Further reliance was placed in the decision of the Court in the case of Suleiman Vs Amboseli Resort limited [2004] 2 KLR 589.
19. Further, the Appellant/Applicant submitted that he resides on the suit property together with his family, and which property the Respondent is seeking to subdivide pursuant to the Judgment of the trial Court.



20. On the question of costs, the Appellant/ Applicant submitted that costs follow the event, and costs is granted to the successful party in a suit. Further, the Applicant submitted that the costs of the two applications should follow the final award of costs in respect of the appeal.

The Respondent's Submissions

21. The Respondent filed his written submissions on 9th August 2024, through the Law Firm of Kanyi Kiruchi & Co. Advocates, wherein after setting out the history of the dispute between the parties, the Respondent identified three (3) issues for determination by this Court being:
1. Whether the Court should allow the appeal to be filed out of time?
 2. Whether the Court should grant a stay of execution of the trial Court's Judgment?
 3. Who shall bear the cost of both Applications?
22. Further, the Respondent submitted that pursuant to the provisions of Section 79G of the [Civil Procedure Act](#), the period allowed for the lodging of an Appeal is thirty (30) days; However, the Chamber Summons Application dated 9th January 2023, which sought for leave to Appeal out of time was filed about four (4) months after delivery of the trial Court's Judgment dated 6th September 2022.
23. It was further submitted that the Court when adjudicating upon an application for leave to appeal out of time, it needs to strike a balance between the interests of the parties before it, and that the Respondent should be allowed to enjoy the fruits of a successful judgment. Reliance was place on the reasoning of the Court in the cases of [Omar Shurie V Marian Rasbe Yafar \(Civil Application No. 107 of 2020\)](#); and, Susan Ogutu Oloo & 2 others V Doris Odindo Omolo (2019) eKLR.
24. The Respondent argued that a delay of four (4) months in filing his appeal was too long, and that the Applicant has failed to offer any reasons for the delay which is inexcusable and deliberate.
25. Responding to the Applicant's application for stay of execution, the Respondent reiterated the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, and submitted that a Decree was issued following delivery of the trial Court's decision on 6th September 2022, and that the Applicant should not be allowed to frustrate the execution of the same.
26. Reliance was sought in the holding of the Court in the case of Burnet vs Francis Industries, which was cited in the decision of the court in Kamaliza Security Guards V Zakem Constructions (K) Limited [2001] eKLR, to anchor the argument that once a case is heard and determined on the merits and a lawful Decree obtained, the Court should not allow a party to attempt to stop execution of the same.
27. On the question of costs, the Respondent urged the Court to dismiss the applications with costs. The Respondent relied on the holding of the Court in the cases of DMG VS EWG [2021] eKLR; Party of Independent Candidates of Kenya & Another VS Mutula Kilonzo & 2 others (2013) eKLR; and, Levben Products VS Alexander Films (SA) (PTY) 1957 (4) SA 225 (SR) at 227.
28. This court has carefully considered the two Applications, the relevant provisions of law, the rival written submissions and the cited authorities and finds the issues for determination are as follows; -
- i. Whether the Applicant entitled to the Orders sought in both Applications.
 - ii. Who shall bear the costs of both Applications?



29. The Applicant herein in the application dated 9th January 2023, has sought for stay of execution of the trial Court’s decision delivered on 9th September 2022, and/or to review, set aside or vary the said Judgement, which application was dismissed by the trial Court vide a Ruling dated 5th April, 2023.
30. In the instant suit, the Court needs to be satisfied that the filing of the application dated 9th January 2023, which seeks for leave to Appeal out of time was not attended by inordinate or unreasonable delay. In the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR), the Court held as follows:
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily 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.”
31. Further, in the case of Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR, the Court listed the principles to take to account in determining an application for leave to appeal out of time as follows:
- a)) the length of delay,
 - b) the reason for the delay which must be explained to the satisfaction of the court,
 - c) the chances of the appeal succeeding if the application is granted,
 - d) the importance of compliance with the prescribed time lines for the particular litigation,
 - e) the degree of prejudice to the respondent if the application is granted, and
 - f) the application was made without unreasonable delay.
32. Further, in the case of Absalom Dova V Tarbo Transporters [2013] eKLR, the Court reasoned as follows:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”
33. In the instant Application, the Judgment sought to be appealed against was rendered on 9th September 2022, while the Application seeking leave to appeal out of time was commenced on 9th January 2023. In explanation for the delay in lodging his appeal, the Applicant argued and submitted that the trial Magistrate who delivered the Judgement dated 9th September 2022, was transferred.
34. Further, that although the Judgment of the trial Court was read out in open Court on 9th September 2022, the said Judgment was made available for typing only on 24th November 2022, which meant that the Appellant/Applicant could not have had access to the said Judgement before the preceding date. That the Decree in respect of the said Judgment was obtained only after 9th January 2023.



35. The Court has perused the record of the proceedings before the trial Court, and it is noteworthy that the Magistrate who signed the Judgement dated 9th September 2022, is different from the one issuing the Ruling dated 5th April 2023, which ruling dismissed the Applicant’s application for stay of execution of the impugned Judgment.
36. It is trite that applications for review of Judgment, such the Applicant’s application filed before the trial Court dated 9th January 2023, are presented before the Court which rendered the decision sought to be reviewed, unless the said Magistrate is out of the said Jurisdiction or is unable to hear the said Application due to factors beyond his/her control. In the circumstances, the Court is persuaded by the Applicant’s contention that the Magistrate who delivered the decision dated 6th September 2022, proceeded on transfer, resulting in delay in terms of obtaining a typed copy of the said decision, and which only became available on 24th November, 2022.
37. Moreover, the delay of 46 days between 24th November 2022, and 9th January 2023, is not to be considered as inordinate in the circumstances herein. In light thereof, the Applicant is hereby granted leave to file his appeal within a period of 21 days from the date of this Ruling.
38. On the Application for stay of execution dated 6th July 2023, it is evident that the issue of stay of Execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules, which provides 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 appeal case of 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.”

39. In the case of RWW v EKW [2019] KEHC 6523 (KLR), which was cited by the parties herein, the Court declared as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”



40. Further, in the case of James Wangalwa & Another VS Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR), the Court addressed to issue of “substantial loss” 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.”

41. In the instant Application, the Applicant argued and submitted that he resides on the suit property, and that he has built his family home thereon. He further submitted that the balance of convenience tilts in his favour rather than the Respondent, because if the suit land is subdivided pending appeal, then he will lose his family home, whereas the Respondent does not stand to suffer any loss or prejudice if the suit property is not subdivided pending the determination of the appeal.

42. In the referred case of RWW v EKW [2019] KEHC 6523 (KLR), the court held as follows:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted...”

43. The Court has interrogated the Applicant’s Notice of Appeal, and is satisfied that it raises arguable issues. Further, in his written submissions, the Applicant expressed his readiness to offer whatever security the Court may direct, in performance of the Decree of the trial Court, and which must count as a sign of good faith on his part.

44. Having carefully considered all the factors herein, this Court is satisfied that the Applicant herein has satisfied the conditions for grant of a stay of execution of the trial Court’s Judgment dated 6th September 2022.

45. On the issue of the Applicant’s prayer for an interim injunction restraining the Respondent from alienating, sub-diving or interfering with the suit property pending Appeal, the Court is equally satisfied that there is need to preserve the suit property pending Appeal, for reasons that in the event the Applicant’s appeal is successful, then the same would not be rendered nugatory.

46. Further, the Applicant has established that he resides on the suit land parcel together with his family, and therefore, this Court holds and finds that an award of damages would not adequately compensate the Applicant in the event that the Respondent was to dispose the suit property before the appeal is heard and determined.

47. In light of the foregoing, it is clear that the two Applications dated 9th January 2023, and 6th July, 2023, are merited, and the Applicant is deserving of the orders sought thereon. Accordingly, this court allows prayer No. (1) in the Notice of Motion Application dated 9th January 2023.

48. Further, the Court also allows prayers Nos 2, 3, 4 and 5, of the Notice of Motion Application dated 6th July 2023, as prayed thereon.



49. On the issue of Costs, the court finds that costs of both Applications shall abide the outcome of the intended Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF NOVEMBER 2024

L. GACHERU

JUDGE

14 /11/2024.

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Ms Wanjiru for the intended Appellant/ Applicant

Mr Wachira H/B for the Respondent.

