



Osagi alias Khalwale v Ambani (Sued through his personal/Administratrix Gladys Maraga alias Maraka); Sakha & another (Interested Parties) (Environment & Land Case 25 of 2019) [2024] KEELC 13913 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 25 OF 2019
DO OHUNGO, J
DECEMBER 16, 2024**

BETWEEN

JOSEPHINE OSAGI ALIAS KHALWALE CLAIMANT

AND

**JAIRO SAKHA AMBANI (SUED THROUGH HIS PERSONAL/
ADMINISTRATRIX GLADYS MARAGA ALIAS MARAKA) RESPONDENT**

AND

**MICHAEL MUSUKU SAKHA INTERESTED PARTY
GLADYS SHANYISA W/O JOSEPH SHISAKHA INTERESTED PARTY**

RULING

1. By Notice of Motion dated 16th February 2024, the Interested Parties/Applicants seek the following orders:
 - a. That this application be certified urgent, heard on priority basis and service be dispensed within the first instance.
 - b. That Kakamega ELC No. 23 OF 2019 be consolidated with ELC Kakamega No. 24/2019 and 25/2019 for purpose of hearing and disposal of this application.
 - c. That pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of stay of the execution of the Ruling delivered on the 31st of October 2023.



- d. That upon hearing of this application, this Honourable Court be pleased to extend time and allow the Applicant herein to lodge its Notice of Appeal out of time against the Ruling of Hon. Justice D.O Ohugo (sic) delivered on the 31st October 2023 in this suit.
 - e. That the annexed Notice of Appeal dated and filed on 20th of November 2023 be deemed as duly filed and properly on record.
 - f. That upon hearing of this application, this Honourable Court be pleased to issue an order of stay of execution of the Ruling delivered on 31st October 2023 pending the hearing and determination of the intended appeal in the court of appeal.
 - g. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by Michael Sakha. He deposed that their advocate tried to get the date of the ruling in respect of Notice of Motion dated 31st May 2023 from the e-filing system in vain and only learnt of the ruling after the statutory period for filing an appeal had lapsed. He added that their advocate nevertheless filed Notice of Appeal on 20th November 2023.
 3. The Plaintiff/Claimant opposed the application through a Replying Affidavit which she swore. The Defendant also swore and filed a Replying Affidavit in opposition to the application. The collective position taken by the Plaintiff/Claimant and the Defendant is that the ruling of 31st October 2023 was delivered in the presence of Mr Owuor who was instructed by Mr Mshindi for the Interested Parties/Applicants and that it is therefore not correct for the Interested Parties/Applicants to claim that the date of the ruling was not communicated to them. That having filed a Notice of Appeal, the matter was beyond this Court and that the order sought to be appealed against being a dismissal, there is nothing to necessitate stay of execution.
 4. The application was canvassed through written submissions. The Interested Parties/Applicants filed submissions dated 23rd April 2024 while the Plaintiffs/Claimants filed submissions dated 12th June 2024.
 5. I have carefully considered the application, the affidavits and the submissions. The Interested Parties/Applicants seek extension of time to enable them file Notice of Appeal against the ruling delivered by this Court on 31st October 2023 and that the Notice of Appeal filed be deemed to be properly on record.
 6. The guiding principles in an application for extension of time were identified by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; ...
7. Notice of Motion dated 16th February 2024 was filed on 16th February 2024, some three and a half months after delivery of the ruling sought to be appealed against. The reason given by the Interested Parties/Applicants to explain the delay is that they were not aware of the date of delivery of the ruling. That explanation is not candid. The record shows that the date of ruling was set on 20th September 2023 in the presence of Mr Mshindi for the Interested Parties/Applicants. Later, the ruling was delivered as scheduled on 31st October 2023, in the presence of Mr Owuor who was holding brief for Mr Mshindi for the Interested Parties/Applicants. In those circumstances, I find that the delay of three and a half months was inordinate.
8. Further, in view of the misleading reasons given for failure to file the appeal on time, the Interested Parties/Applicants have failed the test which requires a litigant seeking equitable relief to make a full and frank disclosure. The Interested Parties/Applicants have not laid a basis to the satisfaction of the Court, to warrant exercise of discretion in their favour or to merit the relief of extension of time.
9. Regarding the Interested Parties/Applicants' prayer for stay of execution of the ruling pending hearing and determination of an intended appeal to the Court of Appeal, I note that stay is not available since the order of 31st October 2023 was simply a dismissal with no order on costs. It is a negative order which is incapable of execution, hence there is nothing to be stayed. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR and *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR. Further, stay cannot issue since the Interested Parties/Applicants have no valid appeal within the meaning of Order 42 rule 6 (4) of the *Civil Procedure Rules*.
10. In view of the foregoing discourse, Notice of Motion dated 16th February 2024 is bereft of merit. I dismiss it with costs to the Plaintiff/Claimant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF DECEMBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr J Mukavale for the Plaintiff/Claimant

Mr Balusi for the Defendant/Respondent

Mr Owuor holding brief for Mr Mshindi for the Applicants

Court Assistant: M Nguyayi

