



**Byegon & 2 others v Ngeno (Environment and Land Miscellaneous Application
E007 of 2022) [2023] KEELC 312 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2022
MC OUNDO, J
JANUARY 26, 2023**

BETWEEN

CHARLES BYEGON 1ST APPLICANT

KIPKOECH PETER BYEGON 2ND APPLICANT

ANDREW KIPYEGON ROGONY 3RD APPLICANT

AND

PAUL KIPNGENO NGENO RESPONDENT

RULING

1. The application dated the March 8, 2022 brought under the provisions of Section 1A, 3A, 79G & 95 of the *Civil Procedure Act*, Order 42 Rule 6 & 50 Rule 5 of the Civil Procedure Rules and all other enabling provisions of the law seeks for orders that leave be granted to the Applicants to Appeal the judgment in Kericho Civil Suit No. 22 of 2015 delivered on the January 7, 2022 out of time.
2. The Applicants further seek for orders of stay of execution of the said judgement dated the January 7, 2022 pending the hearing and determination of their intended Appeal.
3. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Charles Byegon the 1st Applicant on his behalf and on behalf of his co-Applicants herein, sworn on the March 8, 2022.
4. The Application is premised on the disposition that the matter in the trial court had been listed for judgment on the March 10, 2021. However, the court was temporarily closed and the judgment was not issued wherein parties had been given another date being May 31, 2021 for judgment but on which date, the judgment had not been delivered. That the matter had been listed again for the June 9, 2021 on which day parties had been informed that the Judgment was not ready and that the same would be delivered on notice.



5. Vide a letter dated December 8, 2021 addressed to the Chief Executive officer Kericho Law Courts, their Counsel had inquired on when the judgment would be delivered, but which letter was not responded to. (see “CB 1” and “CB 2” being a copy of the said letter and an email extract)
6. That notice for delivery of the judgment was not issued yet judgment had been delivered on the January 7, 2022 in the absence of all the parties wherein the Applicants had been made aware of the same on the March 1, 2022 when time for filing the Appeal had ran out.
7. That the intended Appeal had a high chance of success and unless the orders sought were granted, the Applicants were likely to suffer irreparable loss and damages.
8. The said Application was opposed by the Respondent’s Replying affidavit sworn on the June 14, 2022 to which the Respondent deponed that the application was bereft of any merit at all and was a manifest abuse of the court process which the court ought to halt in the interests of justice.
9. That Judgment of the court was delivered on the January 7, 2022 wherein the Applicants were coming to court to seek leave to Appeal out time after a period of two months, without any legal justification. That the Applicants had not annexed any draft Memorandum of Appeal to the application, and this rendered the application incompetent and devoid of any merit as no grounds of Appeal had been disclosed.
10. The Respondent further deponed that the Applicants were guilty of laches and delays in lodging the Appeal documents, and the application was just an afterthought which was veiled in an attempt to deny him his fruits of the judgment. That the Applicants’ actions had caused great loss to his property wherein the effects continued to be felt. That should the application be allowed, it would constitute a delay of justice. That the Applicants were bent on engaging the Court in endless litigation to avoid paying the amounts they had been ordered to pay.
11. That the Court’s discretion in granting the orders sought in the application including the stay of execution of the Judgment dated July 29, 2021 was to be exercised judicially and in deserving circumstances, and this matter was not one which was deserving. Further, that it was apparent from the face of the delay in filing the application, that the same attitude of laches, lackluster attitude will mar the Appeal which will result in delay of justice as the matter had been lying in court for over seven years and the intended Appeal, which has not been demonstrated to have any grounds of Appeal, will cause further delays.
12. By consent, parties took directions on July 20, 2022 that the Application be disposed of by way of written submissions.

Applicants’ submissions

13. The Applicant’s submission was based on three issues for determination to wit;
 - i. Whether the court should grant leave to the Applicants to Appeal out of time?
 - ii. Whether the court should grant a stay of execution pending the hearing and determination of the Application and Appeal?
14. On the first issue for determination, the Applicant relied on the provisions of Section 79G of the *Civil Procedure Act* to submit that an Appeal may indeed be admitted out of time. That the decision whether or not to grant leave to Appeal out of time or to admit an Appeal out of time was an exercise of discretion just like any other exercise of discretion by the court. That Some of the factors that would aid Courts in exercising the discretion as to whether to extend time to file an Appeal out of time were



suggested by the Court of Appeal in *Thuita Mwangi vs. Kenya Airways Ltd* [2003] eKLR, *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231 and in *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR.

15. They reiterated their reasons for the delay as was deponed in their affidavit and proceeded to submit that the delay in filing their Appeal was due to the judgment being read in the absence of the parties and the court not issuing a judgment notice having indicated that the same will be delivered on notice. That they had exercised due diligence in following up about the date of delivery of the judgment but there had been no information that was forthcoming from the court in terms of when the judgment in the matter could be delivered. That the delay in not filing the Appeal on time was occasioned by the mistake and or error from the court and the same should not be visited on the Applicants as the same would amount to driving them from the seat of justice unceremoniously, which would tantamount to a denial of justice.
16. On the issue of the length of the delay, the Applicants submitted and while relaying on the case in *Charles N. Ngugi vs ASL Credit Limited* [2022] eKLR that two (2) months after the delivery of the judgment was not inordinate.
17. On to whether the intended Appeal had high chances of success, their submission was in the affirmative for reasons that among other grounds for Appeal, the trial magistrate erred in law and fact in holding that the Applicants had trespassed into the Respondent's property, the trial magistrate erred in law and fact in failing to consider the Applicants' submissions in totality and hence placing more reliance on the Respondent's submissions and therefore arriving at an erroneous conclusion and that the learned trial magistrate erred in awarding general and mesne profits despite the clear guidelines in Order 21 Rule 13 of the Civil Procedure Rules and the precedent set by the case of *Karanja Mbugua & Another V Marybin Holding Co. Ltd* [2014] eKLR which had observed that mesne profits were special damages that ought not only be pleaded but also proved. It was the Applicant's submission that the Respondent would not suffer any prejudice.
18. That the jurisdiction of the court under Article 159 of the [Constitution](#) was unfettered especially where procedural technicalities posed an impediment to the administration of justice and therefor the court should be pleased to grant leave to file the Appeal out of time.
19. As to whether the court should grant a stay of execution pending the hearing and determination of the Appeal, the Applicant submitted that the principles that would guide Court when deciding on an application for stay of execution pending Appeal are clearly set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.
20. That in an application for a stay of execution pending hearing and determination of the Appeal, the Court of Appeal also set out the guiding principles in the case of *Butt vs Rent Restriction Tribunal* [1979] eKLR. The court was thus invited to exercise its discretionary power in granting of the stay and in accordance with the guidelines elaborated herein so as to administer justice.
21. On the issue as to whether there shall be substantial loss, the Applicant submitted that the court's determination of whether substantial loss/irreparable injury had occurred would be based on the parties' rights, which should be assessed in whole and in accordance with the provisions of the law. That should the court not grant a stay of execution, a state of affairs would arise that would irreparably affect or negate the Applicants' very essential core as the successful party in the Appeal, which would be a significant loss because there would be no purpose of success at Appeal.
22. The Applicants submitted while relying on the decided case by the Court of Appeal in *Florence Hare Mkaha vs Pwani Tawakal Mini Coach & Another* [2014] eKLR that unless stay of execution was



- granted, the Applicants would suffer substantial loss as the Respondent would proceed to execute the orders of the lower court to their detriment.
23. That the Respondent with all due respect was a man of straw who the Applicants were apprehensive might not be able to refund them the monetary damages after the intended Appeal is successful.
 24. That the intended Appeal was arguable and not frivolous and therefore the court be pleased to grant the Applicants an order for stay of execution or the Appeal will be rendered nugatory
 25. As to whether the Application was filed timeously, their submission while relying on the decision in *Direct line Assurance Company Ltd vs Michael Njima Muchiri & Another (2020) eKLR* was that the judgment which the Applicants intended to Appeal against was delivered on the January 7, 2022 and the present application was filed on the March 8, 2022 hence the Application herein was filed timeously.
 26. The Applicants finally submitted that pursuant to the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, they were ready and willing to offer security and abide by orders, conditions and/or directions that the Court may impose.
 27. The Respondent's submissions in opposition of the application was that the Applicants through a judgment dated January 7, 2022 had been condemned to pay to the Respondent herein General damages of Kshs. 100,000/=, Mesne Profits of Kshs. 100,000/=, costs as well interests germane there to and costs of the suit both jointly and severally. That although the judgment had been delivered in the absence of the parties, the same was communicated to the parties in due time wherein the Applicant filed the present application two months later seeking for an extension of time to file their Appeal out to the statutory period of 30 days as provided.
 28. That the Applicant's application had not set out a satisfactory account for their overdue delay in filing their Memorandum of Appeal under Section 76 of the *Civil Procedure Act*. That the letter dated December 8, 2021 addressed to the Executive Officer of the Chief Magistrate's Court was not duly received by affixing of the relevant receiving stamp. That the Applicants' application was an afterthought and should be struck out with costs.
 29. That there exists a plethora of decisions that seek to solve the debacle of extension of time to file an Appeal. The Respondent relied on the Supreme Court case in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* to submit that the said decision outlined the principles for extension of time to file an Appeal out of time and thus framed his issues for determination as follows:
 - i. Whether the Applicant has not laid a basis that is satisfactory enough to move court's discretion towards the extension of time of filing its intended Appeal.
 - ii. Whether the Applicants' delay to file Appeal is unreasonable.
 - iii. Whether the Applicant has an arguable Appeal.
 - iv. Whether the stay of execution be granted.
 - v. Whether the Respondent will be prejudiced if the Appeal is allowed.
 30. On the first issue for determination, the Respondent submitted that the Applicants' Advocate on record did not employ due diligence by making timely follow ups in the Court Registry to check on the delivery of judgment. That the annexed e-mail could have been a random e-mail that could have been sent by a busybody who did not wish to address the issues on the face of the e-mail. That the Applicant



was not candid enough to take into account the fact that e-mails were sometimes not timely delivered and in such circumstances one cannot blame the court. That were the objectives of the Applicants to have the letter brought to the attention of the Executive Officer, then it would only be moot to have filed the letter physically putting in mind that our courts have not metamorphosed well to the digital platform. The Respondent relied on the case in *Dilpack Kenya Limited v William Muthama Kitonyi* (2018) eKLR in support of his submissions.

31. On the second issue as to whether the Applicants' delay to file the Appeal was unreasonable, the Respondent submitted that the Applicants had waited for two months after delivery of judgment wherein they had filed the present application without filing a Memorandum of Appeal as per the provisions of Section 76 of the *Civil Procedure Act*, so as to give the court express position that they were unsatisfied with its judgment. That the Applicant was now dangling an application in this superior court whilst the trial Court is in limbo on whether the Applicant agrees with its Judgment or not. That the court should unearth a debacle of great jurisprudential importance to wit condemning fence sitters who want to have favorable orders from this court but are not keen in following laid down procedures. That the application was unreasonably delayed as was held in the case of *Jaber Mohsen Ali & Another vs Priscillah Boit & Another* E&L No. 200 OF 2012 [2014] eKLR.
32. It was their submission the Applicants' right of Appeal was extinguished once they failed to file a Memorandum of Appeal upon their receipt of the Judgment dated January 7, 2022. That the Application dated March 8, 2022 should have been preceded by a duly filed Memorandum of Appeal.
33. On the issue as to whether the Applicant had an Arguable Appeal, it was the Respondent's submission that had the Applicants had neither annexed their Memorandum of Appeal nor listed the grounds of Appeal to their Supporting Affidavit. That the failure to annex a draft Memorandum of Appeal principally rendered the Appeal bereft of any grounds of Appeal as was held in the case of *Flamingo Towers Limited and Another vs Homeland Media Group Limited* [2021]eKLR. That the failure to proffer to this court a draft copy of the Memorandum of Appeal which is a mandatory requirement was a defect not curable by the provisions of Article 159(2) (c) of the *Constitution*.
34. On the issue as to whether or not the stay of execution should be granted, the Respondent's submission was that there was no Appeal capable of being argued before the court on merit and subsequently, there was no ground upon which the stay of execution crystallized on.
35. That lastly although the Applicants were treating the Court to promises that they were willing to pay security for costs, they had not pleaded the same in their Application where they had sought for extension of time but had brought it up in their submissions. That this clearly portrayed their application as an afterthought which was only meant to militate against justice.
36. That the Applicants had not demonstrated what substantial loss they would suffer were the stay orders not granted and it was manifest that since they had no single ground of Appeal, they could not envisage any loss resultant.
37. That the Respondent would be prejudiced were the application be allowed as he would have been denied enjoyment of the fruits of his judgment and further delay was not justified. They sought for the Applicants' application dated March 8, 2022 to be dismissed with costs.

Determination.

38. I have considered, the Applicant's Application, the supporting affidavit as well as the written submissions of both the Applicants and the Respondents. I find two issues for determination arising therein namely:



- i. Whether or not to grant leave to Appeal out of time
 - ii. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
 - iii. What orders this Court should make.
39. Section 79G of the *Civil Procedure Act* which gives an appellate court discretion to extend time for filing an Appeal from the subordinate Court to the High Court.(read Land and Environment Court) stipulates as follows;

Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order Appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an Appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the Appeal in time.

40. In the case of Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR the court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the Respondent, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].

45. The same principles were enunciated in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, in Civil Application No. NAI 255 of 1997 (unreported) where the Court of Appeal held that:

“It is now well settled that the decision whether or not to extend the time for Appealing is essentially discretionary. It is also well settled that in general the matters which this



court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the Appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted”

Have the Applicants fulfilled the above requirements so as to be granted leave to file their Appeal out of time?

41. The 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. The gist of the matter in question is that the matter in the trial court had been listed for judgment on the March 10, 2021. However, the court was temporarily closed and the judgment was not issued wherein they had been given another date being May 31, 2021 for judgment but on which date, the judgment had not been delivered. That the matter had been listed again for the June 9, 2021 on which day the Applicants had been informed that the Judgment was not ready and that the same would be delivered on notice.
42. Vide a letter dated December 8, 2021 addressed to the Chief Executive officer Kericho Law Courts Counsel for the Applicants had inquired on when the judgment would be delivered but the letter was not responded to. That although notice for delivery of the judgment was not issued yet judgment had been delivered on the January 7, 2022 in the absence of all the parties wherein the Applicants had been made aware of the same on the March 1, 2022 when time to file an Appeal had run out.
43. The Application was opposed by the Respondent who submitted that the Applicants had not made a case to warrant this Court to exercise its discretion in their favour. That extension of time was not a right of a party, but is only available to a deserving party, and at the discretion of the Court. That in this case, the Applicants had failed to lay a basis to the satisfaction of the Court.
44. Upon considering the above captioned application and the peculiar circumstances of this case in that the judgment that is intended to be Appealed against was delivered in the absence of the Applicants and their Counsel, that there was no evidence that the said parties had been served with the notice of Judgment, and further that pursuant to the fact that upon the Judgment having been delivered on January 7, 2022 the Applicants had been condemned to pay to the Respondent herein General damages of Kshs. 100,000/=, mesne Profits of Kshs. 100,000/=, costs as well interests germane there to and costs of the suit both jointly and severally.
45. I find that the Applicants have satisfactorily explained the delay which was in fact caused by the Court and for which they cannot bear responsibility. In my view, the Applicants have shown a good and sufficient cause for not filing the Appeal in time as required by Section 79(G) of the [Civil Procedure Act](#). A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour.
46. On the second issue as to whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal, it is trite that the law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except 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 1st 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 1st Applicant .

47. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which;

- i. The Court is satisfied that substantial loss may result to the Applicants unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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 Applicants

48. I have considered the Applicant’s application in view of the aforementioned conditions. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), the Court held that:-

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

49. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A (2) and 1B of the [Civil Procedure Act](#).

50. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

51. On the first condition of proving that substantial loss may result unless stay order is made, the Applicants submitted that they would suffer substantial loss if stay of execution orders were not granted. That the Respondent was a man of straw who the Applicants were apprehensive might not be able to refund them the monetary damages after the intended Appeal is successful. That the intended Appeal was arguable and not frivolous and therefore the court be pleased to grant them the order for stay of execution or the Appeal will be rendered nugatory. It was incumbent upon the Applicants to demonstrate the kind of substantial loss they would suffer if the stay order was not made in their favour.



52. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs Abuoga (1988) KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
53. What amounts to reasonable grounds for believing that the Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the Respondent was a person of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success.
54. As was held in the case of Justus Kyalo Musyoka vs. John Kivungo [2019] eKLR.
- “Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgment. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.”
55. Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income. The Applicants have also not discharged their burden of proving that that the Respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree as was held in the case of Caneland Ltd & 2 Others vs Delphis Bank Ltd Nai Civil Application No. 344 of 1999 where it had been held that the burden was upon the Applicants to prove that the Respondent could not refund the same. There is therefore no evidence that the Applicants will suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of their Judgment.
56. On the second condition, the court had found that the Applicants had satisfactorily explained the delay which was in fact caused by the Court and for which they cannot bear responsibility.
57. On the last condition, I find that the Applicants have volunteered security for the due performance of such decree.
58. In the foregoing the Court orders as follows:
- i. The Applicants shall within 30 days from the date of this ruling, deposit Kshs.100,000/=(one Hundred Thousand) in Court. In default, the stay shall automatically lapse.
 - ii. If the Applicants have not been supplied with the documents required to prepare the record of Appeal, their Counsel shall liaise with the Deputy Registrar of this court and ensure that the same are supplied within fifteen (15) days of this order.
 - iii. The Applicants shall within forty-five (45) days from the date of this ruling compile, file and serve upon the Respondents a complete record of Appeal.
 - iv. If the Applicants do not file the Appeal within the time stipulated in (iii) above, the window granted to file the Appeal shall automatically lapse.

There shall be no Costs.

Dated and delivered at Kericho via Teams Microsoft this 26th day of January 2023

M.C. OUNDO



ENVIRONMENT & LAND – JUDGE

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