



**Miriti v Christian Foundation Fellowship Church Kathelwa (Suing through
Rev. Stephen Gitirime Regional Overseer) (Environment & Land Miscellaneous
Case E038 of 2022) [2023] KEELC 44 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 44 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND MISCELLANEOUS CASE E038 OF 2022**

CK NZILI, J

JANUARY 18, 2023

BETWEEN

STANLEY MIRITI APPLICANT

AND

**CHRISTIAN FOUNDATION FELLOWSHIP CHURCH KATHELWA
(SUING THROUGH REV. STEPHEN GITIRIME REGIONAL
OVERSEER) RESPONDENT**

RULING

1. Before the court is a notice of motion dated 17.10.2022 in which the applicant seeks for leave to appeal out of time against the judgment passed in Maua SPM ELC No. 250 of 2018. The second prayer is that the court stays execution of the decree issued on 8.9.2022, pursuant to the said judgment.
2. The notice of motion is supported by an affidavit of Stanley Miriti sworn on the even date in which the applicant averred that the suit was not heard on merits. That judgment was passed in his absence, and that he only came to know about it after a 30 days statutory notice of entry of judgment was served him. That if stay is not granted he will be evicted from the suit land and his structures demolished yet he has no alternative land to depend upon.
3. The notice of motion is opposed through a replying affidavit of Stephen Gitirime, the respondent filed on 3.11.2022. The first ground is that the application has failed to meet the threshold for a grant of stay of execution; that the applicant trespassed into the land and constructed shanty structures therein despite the court issuing a permanent injunction against him on 2.11.2009. That being dissatisfied with the order the applicant filed Civil Appeal No. 32 of 2010 which appeal was dismissed. He attached copies of the charge sheet and judgment marked as SG 3 (a) & 3(b) respectively. That the applicant was cited for contempt of court vide Criminal Case No. 3683 of 2009 and an application for stay and or variation of the orders was dismissed as per a ruling attached as SG - 4. That given the foregoing the



- applicant has come to court with unclean hands and therefore his application is a delaying tactic to deny him the enjoyment of fruits of his judgment.
4. A party seeking for an extension of time to file an appeal out of time has to demonstrate that the delay is not inordinate, explain the delay, establish there will be no prejudice to the opposite party which may not be compensated by way of costs and further, that it will be in the interest of justice to grant the orders sought. As regard stay of execution a party seeking for the same has to establish substantial loss, file the application without undue delay, furnish security for the due satisfaction of the decree should the appeal not succeed and lastly demonstrate that it is in the interest of justice to grant the orders sought.
 5. While expounding on the principles applicable in extension of time, the court in *Nicholas Kiptoo Arap Korir Salat vs IEBC & others* (2014) eKLR held that an applicant must bring material before the court so as to sway the court to exercise discretion to extend time after considering that the delay was not inordinate and if any, has sufficiently being explained to the satisfaction of the court, that no prejudice is to be occasioned by the opposite party; public interest or the interest of justice militates towards extending the time and that the application is being made in good faith.
 6. Further, the court held that extension of time is not as a matter of right and the burden lies on the applicant to make out the case including setting out any extenuating circumstances.
 7. In *Thuita Mwangi vs Kenya Airways Ltd* (2003) eKLR the court held that the arguability of the appeal, the importance of compliance with timelines and the effect on the administration of justice as some of the consideration in an application for extension of time.
 8. There is no set minimum or maximum of the period of the delay. The Court of Appeal in *Visbva Stone Suppliers Co. Ltd vs RSR Stone (2006) Ltd* (2020) eKLR, said that an applicant should however give a satisfactory explanation for the delay.
 9. On the aspects of stay of execution, the court in *James Wangalwa vs Agnes Naliaka Cheseto* (2012) eKLR held that it is not enough for a party to allege substantial loss without demonstrating it through cogent and tangible evidence.
 10. The cornerstone of stay of execution is substantial loss so that the substratum of the appeal does not dissipate. The intention is to preserve the subject matter so that in the event the appeal was to succeed the same is not rendered nugatory. In *RWW vs EKW* (2019) eKLR the court said that granting a stay of execution is a balancing act so that the undoubted right of appeal to the applicant is balanced against the right to enjoy the fruits of judgment in favour of the successful litigant so that none of the parties is prejudiced.
 11. Applying the foregoing guiding principles and case law to the instant case, the lower court judgment was delivered on 25.7.2022. The notice of entry of judgment was served upon the applicant on 29.9.2022 while this application was filed on 18.10.2022.
 12. The reasons given for the delay are that the advocate for the applicant then on record had lost contact with him; there were circumstances beyond the applicants control and that the advocate on record and the applicant were not aware of the delivery of judgment.
 13. There is no indication if the applicant went before the trial court to seek to overturn the judgment on account of the matter being heard ex parte. The advocate on record said to have lost contact with the applicant has not been disclosed nor has he sworn an affidavit to substantiate such a serious allegation. The applicant has not mentioned when he last attended court before the trial court or contacted his then advocates on record. The applicant has not mentioned when the suit was heard and determined.



The proceedings and judgment have also not been attached to this application for the court to establish the circumstances in which the matter is said not to have been heard on merits and or the arguability of the appeal. The suit belongs to the applicant and not the advocate.

14. The delay in filing the appeal is over three months and no sufficient explanation has been given. Similarly, the respondent has sworn an affidavit attaching copies of a decree and ruling in a previous suit Maua SPMCC No. 121 of 2009 on a charge of forceable detainer. The applicant has not countered those averments as to the prejudice likely to be occasioned to the respondent.
15. Further, the applicant has not given any specific details and particulars of the alleged substantial loss given the previous orders against him in 2009 stopping any further developments therein and the contempt of court proceedings following the breach of the clear court orders.
16. Given the foregoing, the court is of the considered view that the applicant has failed to demonstrate that he deserves the extension of time or stay of execution.
17. Consequently, I find the application lacking merits. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 18TH DAY OF JANUARY, 2023

In presence of:

C/A: Kananu

Kiyuki for respondent

Ondieki for applicant

HON. C.K. NZILI

ELC JUDGE

