



**Wilson v County Government of Bungoma & another (Environment and Land Miscellaneous Application E010 of 2022) [2023] KEELC 15925 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15925 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2022  
EC CHERONO, J  
FEBRUARY 28, 2023**

**BETWEEN**

**ELIAS WANAKWANYI WILSON ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF BUNGOMA ..... 1<sup>ST</sup> RESPONDENT**

**JIMMY JUMA KISOBO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant moved this honourable court *vide* the notice of motion application under certificate of urgency date January 12, 2022 seeking the following orders;
  - a. (spent)
  - b. Leave to appeal out of time to be granted to the appellant.
  - c. That there be a stay of execution as we wait for the appeal which proposed record of appeal is hereby annexed.
  - d. That the appeal hereby annexed be properly on record upon payment of the requisite fee.
  - e. That the interim orders be heard on the -----day of -----2022.
  - f. Costs be in the course.
2. The application is supported by the affidavit of the applicant and three (3) grounds apparent on the face of the said application.

**Applicant's Summary of Facts**

3. From the supporting affidavit, the applicant made the following depositions;



1. That on November 22, 2021, the judgment of this case was read out and the mandatory time of appealing to the High Court is spent
2. That I did apply for proceedings on the very day of the date of judgment
3. I was not given the same until January 7, 2022 during the stay of appeal had already elapsed.
4. I plead to the court to grant me leave to appeal out of time and give me stay of execution for 45 days.
5. That the memorandum of appeal is hereby annexed.

#### **The 1<sup>st</sup> respondent's Summary Of Facts**

4. The 1<sup>st</sup> respondent filed a replying affidavit in response to the application and made the following depositions;
  1. That the application is incompetent, misconceived, incurably defective, frivolous, and gross abuse of court process
  2. That the application violates the provisions of Oaths and Statutory Declarations Act part ii section 4(1) on the power of the Commissioner for Oaths
  3. That the application has been brought after unreasonable and unjustifiable delay.
  4. That it is clear that the applicant was supplied with certified copies of proceedings and judgment on the January 7, 2022 but intentionally chose to sleep and slumber on his right until April 21, 2022 when he filed this application ironically "under certificate of urgency".
  5. That the inordinate delay in filing this application shows that the applicant is indolent, guilty of laches and therefore does not deserve the discretion of this court
  6. That the annexed memorandum of appeal shows that the intended appeal is frivolous and not arguable.
  7. That in any event there is nothing to stay as dismiss of the suit was a negative order which cannot be stayed and there is nothing to be executed.
  8. That the applicant has failed to demonstrate that he is entitled to the orders sought.

#### **The 2<sup>nd</sup> Respondent's Summary Of Facts**

5. The 2<sup>nd</sup> respondent also opposed the application *vide* a replying affidavit sworn on May 27, 2022 and stated as follows;
  1. That the application is incompetent, misconceived, incurably defective, spurious, vexatious, frivolous and a gross abuse of the due court process
  2. That the application has been brought after an unreasonable, inexcusable, inexplicable and/or unjustifiable delay.
  3. That the applicant was supplied with certified copies of the proceedings and judgment on the January 7, 2022 but intentionally slept and slumbered on his right until April 21, 2022 when he filed this application ironically under "certificate of urgency".



4. That inordinate delay in filing this application shows that the applicant is indolent, guilty of laches and therefore does not deserve the discretion of this honourable court.
5. That the draft memorandum of appeal shows that the intended appeal is frivolous and not arguable.
6. That in any event there is nothing to stay as dismissal of the suit was a negative order which cannot be stayed as there is nothing to be executed.
7. That the applicant has failed to demonstrate that he is entitled to the orders sought.

### **Applicants Submissions**

6. The applicant through the firm of Nanzushi & Co Advocates submitted on the following two issues;
  1. Whether leave to appeal out of time should be granted to the applicant
  2. Whether the application has met the requisite grounds of stay.

### **Whether leave to appeal out of time should be granted to the applicant**

7. The applicant reiterated the contents of his affidavit in support and submitted he was supplied with certified copies of proceedings and judgment on January 7, 2022, long after the mandatory time of appeal had lapsed. He submitted that the delay in supplying certified copies of the proceedings and judgment was not attributed to him since he made the request the same day that his suit was dismissed by the trial magistrate on November 22, 2021. He cited the following cases in support;
  1. [\*Edward Kamau & Another v Hannah Muku Gichuki & Another \(2015\) eKLR.\*](#)
  2. Section 79G [\*CPA\*](#)

### **Whether the application has met the requisite grounds of stay.**

8. On this issue, the applicant submitted that he has met the three grounds for stay pending appeal under order 42 rule 6(2) CPR and cited the following cases in support;
  1. [\*Vishram Ravji Halai v Thornton & Turpin, Civil Application No Nai 15 of 1990 \(1990\) KLR 365\*](#)
  2. Bungoma High Court Misc Application No 42 of 2011- [\*James Wangalwa & Another v Agnes Naliaka Cheseto\*](#)

### **2<sup>nd</sup> Respondent's Submissions**

9. The 2<sup>nd</sup> respondent through the firm of M/s Were & Co Advocates submitted that an application to file an appeal out of time ought to be brought without unreasonable delay. He submitted that whereas the applicant admitted having applied for certified copies of proceedings and judgment the same day it was delivered, he failed to give any reason whatsoever as to why he did not file the appeal immediately after receiving certified copies of the proceedings and judgment on January 7, 2022. He submitted that the applicant slept on his rights for 3 and a half months owing to laches and indolence and this honourable court should not exercise its discretion in his favour.
10. In conclusion, the 2<sup>nd</sup> respondent submitted that the prayer for stay of execution is superfluous because the suit was dismissed with no order as to costs and that there is therefore nothing in the decree capable of being executed.



## Legal Analysis And Decision.

11. I have considered the notice of motion application dated January 12, 2022, the affidavits, both in support and in opposition thereto as well as the submissions by counsels for the disputants. The orders which the applicant is seeking from the present application is for leave to appeal out of time and stay of execution of the impugned judgment and decree by the trial magistrate pending hearing and determination of the intended appeal.
12. As regards the first prayer for leave to appeal out of time, section 79 of the [Civil Procedure Act](#) provides that a party who is dissatisfied with the judgment or order by a subordinate court may appeal to the High court or courts equal of status within thirty (30) days from the date of the decree or order appealed against, excluding 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.
13. The applicant deposed in the supporting affidavit that he applied for proceedings the same date judgment was delivered but was not supplied copies of the same until January 7, 2022. The applicant has not explained the delay to file this application until April 21, 2022. A delay of more than 3 months without explanation in my view is inordinate and inexcusable. Consequently, the prayer for leave to appeal out of time is without merit and the same is disallowed.
14. As regards the second prayer for stay pending appeal, order 42 rule 6 (2) [CPR](#) sets out the guiding principles for stay pending appeal. First, such an application must be brought without unreasonable delay. The second and very important requirement is that the applicant must demonstrate that unless the order is granted, he will suffer substantial loss and finally, the applicant must give security for the due performance of the decree as may ultimately be binding on him.
15. I have stated hereinabove that the applicant has not given reasonable explanation for the delay to bring this application from January 7, 2022 when he was supplied with certified copies of the impugned judgment and proceedings until April 1, 2022. The delay taken by the applicant to bring this application is therefore inordinate and unacceptable. On the second condition, the applicant has not deposed what substantial loss he will suffer unless this application is allowed. Substantial loss is the cornerstone of stay of execution pending appeal. Since the applicant has not demonstrated any substantial loss he will suffer if this application is not granted, the second condition equally fails.
16. The third and final condition is whether the applicant has given security for the due performance of the Decree that will be binding on him. Again the applicant has not given any security or undertaking to offer any security this honourable court may require.
17. Suffice to add that the impugned Judgment was a dismissal of the suit and is therefore incapable of execution. I wish to rely on the court of appeal decision in [Ndungu Kinyanjui v Kibicho Kugeria Services & Another \(2007\) KLR](#) where the superior court relied on its earlier decision in [David Thiong'o T/A Welcome General Stores v Market Fancy Emporium \(2007\) KLR](#) and held thus;

This court has repeatedly stated in previous decisions, among them, [David Thiong'o T/A Welcome General Stores v Market Fancy Emporium](#), Civil Application No Nai 47 OF 2007---that in an application under rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to refrain by injunction—the decision of February 9, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay



any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”

18 I agree with the above decision by the Court of Appeal which is binding on me.

19. The upshot of my finding is that the notice of motion application dated January 12, 2022 and filed in court on April 1, 2022 is without merit and the same is hereby dismissed with costs.

Orders accordingly.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28<sup>TH</sup>  
FEBRUARY, 2023**

**HON E C CHERONO**

**ELC JUDGE**

In the presence of

Mr.Ogaka H/B for were for respondent

applicant/Advocate--absent

Joy C/A

