



**Kenyariri v Kenyariri (Miscellaneous Application 9 of 2022)
[2023] KEELC 15752 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
MISCELLANEOUS APPLICATION 9 OF 2022**

M SILA, J

FEBRUARY 22, 2023

BETWEEN

EDWARD OBINO KENYARIRI APPLICANT

AND

CHRISTOPHER ORINA KENYARIRI RESPONDENT

RULING

(Application seeking extension of time to lodge an appeal out of time; matter having proceeded *ex parte* before the Magistrates' Court after the applicant failed to file appearance or defence; upon judgment, applicant filing an application to set aside the *ex parte* judgment which application was dismissed; applicant now opting to appeal the judgment but out of time thus application to enlarge time; principles to be applied; section 79G Civil Procedure Act; need to demonstrate good and sufficient cause for not filing appeal within time; this application coming more than one year and a half since his application to set aside judgment was dismissed; applicant not giving plausible explanation for the delay; application dismissed)

1. The application before me is that dated September 30, 2022 filed by the defendant in the suit Kisii CM/ELC No 154 of 2019. The substantive prayer in the application is for extension of time to lodge an appeal out of time, and if allowed, there be a stay of execution in respect of the costs assessed on September 2, 2022. The supporting affidavit is sworn by the applicant himself. He has averred that he only came to know about the proceedings and judgment when the respondent executed the decree by demolishing his dwelling house on the disputed property, Nyaribari Chache/Keumbu/6029. He perused the court file and discovered that the case proceeded *ex parte* in default of appearance and defence. He contends that he was never served with summons. He thereafter instructed the law firm of M/s Nyariki & Company Advocates to file an application dated August 6, 2020, to set aside the *ex parte* judgment. The application was struck out with costs in a ruling delivered on January 26, 2021. He avers that his advocate did not file submissions nor attend court on the ruling date and he was not made aware of the ruling. He was also unable to access the court file in order to peruse it which led him to write a letter of complaint dated March 18, 2022. Since his erstwhile counsel failed to protect his



interests, on August 2, 2022, he filed a notice of intention to act in person together with an application seeking to set aside the orders.

2. While his application, dated July 28, 2022, was pending, costs were assessed at Kshs 179,890/= as drawn by the respondent. He believes he has a good appeal and he wishes to be granted a chance to ventilate it. He contends that the land parcel Nyaribari Chache/Keumbu/6029 was illegally created out of the land parcel Nyaribari Chache/Keumbu/900 which was registered in name of their deceased father. He deposes that there is a prohibition order issued by the High Court, Kisii, on March 24, 2021, to preserve the title of the suit land arising out of Kisii High Court Succession Cause No 3 of 2018. He adds that mistake of counsel should not be visited upon him.
3. The application is opposed by the replying affidavit of the respondent. He asserts that the applicant was duly served with summons but the applicant never entered appearance nor did he file defence, and the matter proceeded for formal proof. He continues that the applicant thereafter appointed M/s Nyariki & Company Advocates and applied to stay the judgment but this was declined. He states that the judgment has since been executed save for costs which have been assessed at Kshs 179,890/=. He points out that judgment was entered on April 16, 2020 and to date no appeal has been filed. He is of the view that the applicant is guilty of inordinate delay. He avers that he is the registered proprietor of the suit land and the applicant is a trespasser. He contends that he (applicant) will not suffer any substantial loss since judgment has been executed and he (respondent) is in occupation of the suit property. He avers that all that is sought to be stayed is execution in respect of costs which cannot be stayed. He believes the intended appeal has very low chances of success. He also adds that the applicant has not undertaken to furnish security.
4. I invited both counsel for the applicant and counsel for the respondent to file written submissions to argue the application. I have taken note of the submissions filed.
5. What is before me is an application that seeks an extension of time to lodge an appeal out of time and also a stay of execution of the assessed costs in the event that time is enlarged. applications to lodge appeal out of time are addressed in section 79G of the Civil Procedure Act, cap 21, laws of Kenya, which provides as follows :-

"79G. Time for filing appeals from subordinate courts

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."

6. From the foregoing, it will be observed that appeals are supposed to be filed within 30 days, unless there is delay related to preparation of the decree or order which is not purported to be the case here. I have noted that the decree was issued on April 16, 2020 which is more than two years to the filing of the present application. The proviso to section 79G does allow the court to admit an appeal out of time if the applicant demonstrates good and sufficient cause for not filing the appeal within time. The reasons given by the applicant are that he was let down by his counsel. I can indeed see that the applicant spent considerable time in the Magistrates' Court trying to set aside the ex parte judgment but he did not succeed. His application was dismissed on January 26, 2021 following a preliminary objection raised by the respondent which was upheld. The applicant therefore had since January 26,



- 2021 to file this application. I note that he waited for more than a year and a half since this application was filed on October 3, 2022.
7. Within this application, the applicant also claims to have been ill hence not able to pursue the matter. I am not persuaded. I have gone through the treatment records he has provided. They are for the month of May 2022. That still does not explain why he could not file his application since January 2021, for between January 2021 and May 2022 is a period of more than one year, which is not explained at all. In any event, illness in the circumstances herein cannot be a ground, for I can see that the applicant was very active in the Magistrates' Court from January 26, 2021. His erstwhile advocate, Mr Nyariki, even appeared in court on his behalf on June 29, 2021 when the issue of assessment of costs to the respondent was alive. Mr Nyariki was also present in court on February 8, 2022 to receive the ruling on costs which was however not delivered on that day. The applicant was also very active in March 2022 for he wrote a complaint to the Judicial Service Commission, complaining about the conduct of the trial magistrate in the manner in which he conducted the proceedings in the subordinate court. What I am pointing out is that the applicant had a lot of time and opportunity to lodge an application of this nature. He certainly had the time from January 26, 2021 when his application to set aside the *ex parte* judgment was dismissed. He was very active before the Magistrates' Court but he did not deem it fit to file this application earlier. He only appears to have woken up after the bill of costs was assessed on September 2, 2022.
 8. Maybe I would have been moved if I had a hint of what sort of appeal the applicant has, but despite the applicant asserting that he has a good appeal, I have not seen any draft memorandum of appeal annexed to the application so that I can make a prima facie assessment of the nature of appeal that the applicant wishes to present to this court. I have nothing before me to enable me assess whether the applicant has some substance in the intended appeal that is worth giving a chance to ventilate. The fact remains that the hearing proceeded *ex parte* and no evidence was forthcoming from the applicant and I wonder what it is that he believes was an error on the part of the magistrate in allowing the respondent's suit which was undefended.
 9. I am aware that within this application, the applicant has averred that he has obtained an order of inhibition from the High Court at Kisii in Succession Cause No 3 of 2018. I have looked at the order and it appears that the applicant is challenging the manner of distribution of the land that resulted in the suit land being in the name of the respondent. He obtained a stay pending appeal to the Court of Appeal. If that is the case, maybe, the remedy of the applicant lies in pursuing that appeal.
 10. I see hints, within this application, that the applicant thinks that the respondent is being favoured because he is an advocate. This is a red herring. I have not seen any place where the respondent was given preferential treatment merely because he is an advocate. The applicant cannot continuously be suspicious of the wheels of justice by reason that the respondent is an advocate. The court is blind to the status of the parties who are before it and only deals with the facts and the law. What I see is that the applicant has been failing on merits and nothing else. He cannot seek the sympathy of this court, and extra leeway, on the basis that his adversary is an advocate.
 11. I am in the circumstances herein not persuaded that good and sufficient cause has been demonstrated in terms of the proviso to section 79G of the *Civil Procedure Act* to enable this court exercise its discretion in favour of the applicant. Having not been persuaded that this is a fit case to enlarge time, I am unable to issue an order of stay of execution in respect of the taxed costs.
 12. The result is that this application is dismissed.
 13. The only issue left is costs. I observe that the parties are brothers. Given that relationship, I opt not to make any order as to costs. Each party to bear his/her own costs.



14. Orders accordingly.

DATED AND DELIVERED THIS 22 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

