



REPUBLIC OF KENYA



**Kirimania v M’Iniu & 3 others (Environment & Land Case
117 of 2008) [2023] KEELC 15726 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 117 OF 2008
CK NZILI, J
FEBRUARY 22, 2023**

BETWEEN

PETER KIOGORA KIRIMANIA PLAINTIFF

AND

M’ITONGA M’INIU 1ST DEFENDANT

JOHN GIKUNDA M’RUKARIA 2ND DEFENDANT

JULIUS KITHINJI M’RUKARIA 3RD DEFENDANT

MBIJIWE M’RUTERE 4TH DEFENDANT

RULING

1. The court by an application dated December 13, 2022 is asked to stay the execution of the judgment dated May 18, 2022, pending the hearing and determination of the intended appeal. The 2nd prayer is for the court to grant leave to appeal against the said judgment out of time. The grounds upon which the application is made are contained on its face and the affidavit in support sworn on December 6, 2022 by John Gikunda M’Rukaria, the 2nd defendant on his behalf and that of the other defendants though no authority to plead and swear the affidavit was attached.
2. The applicants averred that they only came to know about the judgment recently since on September 23, 2021, the court directed that judgment would be on notice yet no notice was ever issued; that there has been no inordinate delay; there will be no prejudice to the respondents; that the appeal has arguable grounds with a likelihood of success; if execution proceeds they will suffer grave prejudice and that the court should look at substantive justice.
3. The plaintiff has opposed the application by a replying affidavit sworn by Peter Kiogora Kirimania on January 13, 2023. The grounds are that the application was brought in bad faith, was an afterthought; notice was duly issued and received by the parties on May 18, 2022.



4. That in particular, the applicants were served through the known email of their advocates who attended the judgment on May 18, 2022. That service of the notice and representation during the delivery of the judgment is not disputed, it was dishonest and misleading for the deponent to swear a false affidavit and for a misleading letter to be written dated August 22, 2022; a letter dated September 7, 2022 would not have been written if the law firm did not know the delivery of the judgment. In the application, the applicants have not disclosed when they obtained certified copies of the judgment; no explanation has been offered for the inordinate delay after receiving the certified judgment; the delay of 7 months has not been explained at all, and no good reason has been given.
5. In written submissions dated January 16, 2023, the applicant submitted a grant of stay of execution aims at preserving the subject matter of the appeal so that they may exercise the undoubted right of appeal and that if successful the same is not rendered nugatory. Similarly, the applicants submitted that the court should also ensure that no party suffers prejudice. Reliance was placed on *Amal Hauliers Ltd vs Abdunnasir Abubakar Hassan* (2017) eKLR where the court cited with approval, *Butt vs Rent Restriction Tribunal* (1982) KLR 417 on the proposition that the power to grant or refuse an application for stay was discretionary, based on inter alia any special circumstances of the case and its unique requirements.
6. On leave to file the appeal out of time, the applicants submitted that they came to know about the judgment after it had been delivered and time lapsed. Reliance was placed on *Thuita Mwangi vs Kenya Airways Ltd* (2003) eKLR, on the parameters to be considered such as the period of the delay, the reason thereof, the arguability of the appeal, degree of prejudice to the opposite party, the importance of compliance with timelines and the effect if any, on the administration of justice or public interest.
7. On the part of the respondents by oral submissions made by Mr Nyamu Nyaga Advocate on January 16, 2023, it was submitted that it was not true that a notice of the delivery of judgment was not sent going by annexure marked PKK 2 (a) and (b) on the replying affidavit dated January 13, 2023, indicating the email used which features in all the pleadings by the defendants in this file and which has not been disputed. Secondly, it was submitted that on May 18, 2022, the applicants had instructed counsel to take the judgment on their behalf which has also not been disputed or an affidavit sworn to disown the alleged instructions or the representatives.
8. Thirdly, it was submitted that there had been inordinate delay yet notice was there and a letter requesting proceedings dated August 22, 2022, in which a judgment was certified as of August 22, 2022. So thereafter, the applicants waited until December 13, 2022. Counsel submitted that by asking for certified proceedings only, it meant that they already had the judgment.
9. It was submitted therefore that the inordinate delay had not been sufficiently explained.
10. Fourthly, it was submitted no substantial loss has been demonstrated since the applicants had never lived on the suitland so no loss would be suffered. On the aspect of security for either cost or the due performance of the decree should the appeal not succeed, the respondents submitted that none was offered. Regarding whether the appeal was arguable or not, the respondent submitted the court became functus officio upon pronouncing the judgment and that it was only the Court of Appeal that could determine that.
11. On the written submissions, the respondents took the view that written submissions were not evidence and that instead of seeking leave to file a supplementary affidavit, the applicant resorted to tendering facts and evidence through written submissions which this court should not allow.
12. Lastly, the respondent urged the court to find that the issues they had raised were verifiable from the court record and decline to stop the respondents from enjoying the fruits of their judgment.



13. The issues for the court's determination are:
 - a. Whether or not the applicants are entitled to leave to file the appeal out of time.
 - b. If the applicants have made up a case to be entitled to a stay of execution pending appeal.
14. The decision on whether or not to extend the time to appeal is essentially discretionary to be exercised judiciously and not capriciously. In the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* (1997) eKLR, the court held that some of the factors to consider including; length of the time, the reason for the delay, chances of the appeal succeeding and the degree of prejudice to the opposite party. Further, in *Thuita Mwangi* (supra), the court added other items to be considered namely; sufficient cause and nature of the case.
15. In *Joreth Ltd vs Mbugua & 3 others* (civil appeal (E099 of 2021) (2022) KECA (163) KLR (Civ) 18th February (2022) (Ruling) the court was faced with an application based on failure to attend the judgment or coming to know of its delivery late. The issue was also that the judgment had been delivered virtually. The court cited with approval the principles set out under *Nicholas Kiptoo Arap Salat vs IEBC & 7 others* (2014) eKLR and *George Mwenda Muthini vs Mama Day Nursery & Primary School Nyeri C/A No 42 (2014) (UR)*, *Aviation Cargo Support Ltd vs St Marks Freight Services Ltd* (2014) eKLR. The court held that the applicant had failed to account for 3 months and 15 days delay hence there was a lack of seriousness on their desire to file the appeal. On the aspect of arguability of the appeal, the court held by not annexing the draft memorandum of appeal it also showed lack of seriousness. Concerning prejudice and the undoubted right of appeal, the court held that such a right was not to be granted as a matter of course if there is no demonstration of seriousness in the pursuit of such a right.
16. Applying the foregoing case law, there is evidence that the applicants' counsel was duly informed of the date for the delivery of judgment on time and subsequently attended the said delivery. The email used has not been disputed at all and so is the counsel who attended the delivery of judgment with full instructions by the applicants. The delay of about seven months has not been sufficiently explained.
17. Consequently, I find the applicants deliberately slept on their rights to appeal and instead of owning up to their mistakes, they now seek to heap the blame on the court. I find the application for leave lacking merits.
18. As to the stay of execution, in *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR, the court held a party must establish other factors showing that execution would create a state of affairs that will negate the very essential core of the applicant as the successful party in the appeal.
19. In *RWW vs EKW* (2019) eKLR, the court held that a court has to balance the interest of both the appellant and the respondent. In *Jaber Mohsen & another vs Priscilla Boit & another* (2014) eKLR, the court held that failure to apply for a stay within the period given for compliance with the judgment unreasonable delay.
20. In the case of *Dickson Muricho Muriuki vs Timothy Muriuki & 6 others* (2013) eKLR, the court declined to grant a stay in the interest of justice.
21. In this application, other than stating that the applicants could suffer prejudice if a stay was granted, no material has been put before the court to demonstrate the nature, status, value and the manner in which the substratum of the appeal was likely to change to the detriment of the applicants if a stay was not granted. The applicants have failed to tender tangible and cogent evidence on the nature of their



developments on the suit land. The respondents have stated that the applicants have never been on the land and so they stand to suffer no loss or damage. No supplementary affidavit was filed to counter those averments. Submissions however strong cannot amount to evidence as held in the case of *Daniel T Arap Moi v Stephen Murithi & another* (2014) eKLR.

22. The application has also been brought after an inordinate delay which has not been sufficiently explained. Similarly, no security for costs or for the due satisfaction of the decree has been proposed let alone offered. Given also that there is no pending appeal, it would also be in the interest of justice to decline to grant any stay orders.
23. The upshot is the application herein lacks merits. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 22ND DAY OF FEBRUARY, 2023

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: Kananu

Arithi for applicant

Mageria for Respondent

