



**Olegem v Mary (Suing as the Legal Attorney of Marco Mangerere
Mabeya) & another (Miscellaneous Application E004 of 2022)
[2023] KEELC 15776 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
MISCELLANEOUS APPLICATION E004 OF 2022
EM WASHE, J
FEBRUARY 21, 2023**

BETWEEN

LEKISHOW OLEGEM APPLICANT

AND

**GESARE MARORO ONDIEKI MARY (SUING AS THE LEGAL ATTORNEY OF
MARCO MANGERERE MABEYA) 1ST RESPONDENT**

LAND REGISTRAR, TRANSMARA 2ND RESPONDENT

RULING

1. The Applicant herein approached the Court by way of a Notice of Motion Application dated 27th September 2022 (hereinafter referred to as “the present application”) seeking the following Orders; -
 - i. The time for filing and service of the Memorandum of Appeal against the judgement by Hon. Robert Mobisa Oanda delivered on the 30th of June 2022 be extended.
 - ii. This Honourable Court be pleased to order a stay of execution of the judgement delivered on 30th June 2022, pending the hearing and determination of the Application and intended Appeal.
 - iii. A time be named which the said Notice of Appeal is to be filed and served.
2. The prayers outlined in the present Application are supported by the grounds pleaded therein as well as the Affidavit by the Applicant sworn on the 27th of September 2022.
3. The substantive grounds in support of the present application can be summarised as follows; -
 - a. The Applicant herein is the registered owner of the suit property known as L.r.no. Transmara/Moyoi/130.



- b. On the 15th of December 2016, the 1st Respondent instituted a suit known as Kilgoris Spm Elc Case No. 56 OF 2018 challenging the ownership of the Applicant of the suit property known as L.r.no. Transmara/Moyoi/130.
 - c. At the conclusion of the suit known as Kilgoris Spm ELC case no. 56 OF 2018, a judgement to the effect that the Applicant's title to the suit property known as L.R.NO. Transmara/Moyoi/130 had been cancelled and/or nullified was delivered by Hon.robert Mobisa Oanda on the 30th of June 2022.
 - d. The Applicant is now desirous of appealing against the said judgement pronounced on the 30th June 2022 by Hon.robert Mobisa Oanda (SPM) albert out of time.
 - e. The Applicant states that the delay in filing the Memorandum of Appeal was occasioned by the following reasons; -
 - i. The Applicant is an old illiterate person who is not well versed with the technical procedures relating to the Court process.
 - ii. There was no proper communication between the previous Advocates and himself on the way forward after the pronouncement of the judgement on the 20th of June 2022.
 - iii. The Applicant also needed to seek a second opinion from the current advocate in terms of the possible action plans moving forward.
 - iv. As a result of the above reasons, the period of 30 days provided by the Trial Court to file an Appeal lapsed before one was duly filed.
 - f. In addition to the above, the Applicant is also seeking for the judgement pronounced on the 30th of June 2022 to be stayed pending the hearing and determination of this Application as well as the Intended Appeal because the implementation of the same would result to an eviction from the suit property known as L.R.NO. Transmara/Moyoi/130 yet it is the only place they have known as home for over a period of 20 years.
 - g. The Applicant further states that the Appeal is arguable by virtue of the fact that it raises issues of jurisdiction against the Trial Court which pronounced the judgement on the 20th of June 2022.
 - h. In conclusion therefore, the Applicant seeks the Court to exercise its powers and extend the time of filing the Appeal as well as a Stay of execution of the judgement dated 30th June 2022.
4. In support of the grounds hereinabove, the Applicant attached (i) a copy of the Certificate of Official Search of the suit property known as L.R.NO. Transmara/Moyoi/130 dated 1st September 2016 (ii) a copy of the Green Card of the suit property known as L.R.NO. Transmara/Moyoi/130 (iii) the copies of the pleadings relating to the suit known as Kilgoris Spm Elc Case No. 56 OF 2018 (iv) copy of the judgement pronounced on the 30th of June 2022 and (v) draft Memorandum of Appeal dated 27th September 2022.
 5. The 1st Respondent on the other hand has opposed the present Application by filing a Replying Affidavit sworn on the 19th December 2022.
 6. The 1st Respondent opposes the present application on the following grounds; -
 - a. The Applicant in the present application fully participated in the hearing and determination of the suit known as Kilgoris Spm Elc Case No. 56 OF 2018.



- b. Consequently therefore, the Applicant was well aware of the judgement pronounced on the 30th of June 2022.
 - c. The 1st Respondent stated that the Applicant was represented by a qualified advocate who was familiar with the legal procedures and orders to be complied with upon pronouncement of the judgement on 30th June 2022.
 - d. In essence therefore, the 1st Respondent submitted that the Applicant's allegation that he was old and illiterate was misleading and did not give sufficient reason as to why they did not file the Appeal within the time prescribed.
 - e. Similarly, the prayer for a stay of the judgement pronounced on the 30th of June 2022 is an effort to frustrate the 1st Respondent from enjoying the fruits of the judgement.
 - f. The 1st Respondent further pointed out that the Applicant has not produced any documents bespeaking an Appeal through requesting for typed proceedings hence demonstrating the lack of seriousness to pursue an Appeal thereof.
 - g. The 1st Respondent indicated that the intended Appeal is not arguable on the basis that the Applicant had admitted and subjected himself to the jurisdiction of the Trial Court until the pronouncement of the judgement on the 30th of June 2022.
 - h. In conclusion therefore, the 1st Respondent submitted that the present Application be dismissed with costs.
7. On the 21st of November 2022, the Court issued directions that the present application would be canvassed by way of written submissions.
8. The Applicant therefore filed his submissions on the 23rd of November 2022 while the 1st Respondent filed his submissions on the 20th December 2022.
9. The Court having gone through the present Application, the Replying Affidavit of the 1st Respondent as well as the submissions filed therein, the issues for determination are principally as follows; -
- issue no. 1- is the applicant entitled for leave to file the intended appeal out of time?
- Issue no. 2- is the applicant entitled to an order of stay of the judgement pronounced on 30th June 2022 pending the hearing of the intended appeal?
- Issue no. 3- costs of the present application.
10. The Court having identified the above issues for determination, the same will now be discussed herein below; -

Issue no. 1- is the applicant entitled for leave to file the intended appeal out of time?

- 11. The Applicant herein is aggrieved by the judgement of the Trial Court pronounced on the 30th of June 2022.
- 12. One of the orders issued in the judgement of 30th June 2022 was that an Appeal should be filed within 30 days from the date of the judgement.
- 13. Unfortunately, the Applicant failed to file any Memorandum of Appeal within the prescribed period of 30 days provided in the judgement of 30th June 2022.



14. The reasons for the delay have been outlined in the body of the present application as well as the supporting affidavit.
15. The 1st Respondent on the other hand is of the view that the Applicant was aware of the judgement pronounced on the 30th of June 2022.
16. According to the 1st Respondent, the Applicant was represented by a qualified advocate who was well versed with the legal processes and procedures of filing an Appeal if so needed.
17. Application for extension of time within which to file Appeals from Sub-Ordinate Courts is provided for under Section 79 G of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
18. This section bestows the Court with discretionary jurisdiction to evaluate the grounds which would have led to a party not filing the necessary Appeal within the prescribed time and thereafter if so satisfied, extend the said period of filing an appeal.
19. The Court of Appeal in the case of *Thuita Mwangi-versus- Kenya Airways* (2003) eKLR provided guidelines upon which an application for extension of time should be evaluated upon as follows; -
 - i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue; and
 - vi. The effect if any on the administration of justice or public interest if any is involved.
20. On the first issue dealing with the period of delay, the Court notes that the judgement was pronounced on the 30th of June 2022.
21. The Draft Memorandum of Appeal attached in the present application is dated 27th September 2022.
22. Consequently therefore, the period between the date of pronouncing the judgement which is 30th June 2022 and the filing of the Draft Memorandum of Appeal is roughly 3 months.
23. In the Court's considered view, the period of approximately 60 days which the Applicant was late to file the Appeal cannot be deemed to be inordinate delay and can be excused.
24. The second issue is what was the reason for the delay in filing the intended Appeal.
25. The Applicant submits that the judgement was pronounced during the Covid pandemic period where the Courts altered the manner in which business was done.
26. Consequently, the proceedings or communications from the Courts were to the advocates and him being an old and illiterate person did not know how to navigate the new ways of interacting with the Court.
27. The net effect was that the Applicant was dependent on the Advocate on record who was not prompt to communicate the judgement pronounced on 30th June 2022.
28. Even after the Applicant being informed about the judgement of 30th June 2022, he needed to seek a second opinion on the implications of the said judgement which again took time and resulted to even changing the advocate acting from him to the new one who filed the present application.



29. Indeed, the occurrence of the Covid pandemic forced a change in the manner in which everyone was undertaking their business.
30. The judiciary began conducting its business through the internet platform, which can be limiting to those that are not trained in internet usage.
31. Similarly, the party aggrieved by a judgement or ruling can from time to time seek for a second opinion in the manner at which the proceedings and/or judgement would impact his/her pursuit of justice.
32. This in the opinion of the Court, would take time in terms of supplying the documents to the new advocates and waiting for the said second opinion.
33. In essence therefore, the Court is of the view that the Applicant has provided good grounds for the delay in filing the intended Appeal.
34. The third issue is the arguability of the intended Appeal to be filed by the Applicant.
35. The Applicant is of the view that the Trial Court that announced the judgement on the 30th of June 2022 did not have jurisdiction by virtue of the Statutory Limitations Act.
36. Secondly, the Applicant is also challenging the Trial Court reliance of the Adjudication Records in nullifying the title deed to the suit property without considering occupation and/or ownership rights created and/or protected by substantive legislative provisions once a person is registered as a proprietor of land.
37. The 1st Respondent has responded to the issue of jurisdiction by stating that the Applicant participated throughout the proceedings and consequently therefore cannot raise the issue of jurisdiction after the pronouncement of the judgement on 30th June 2022.
38. The 1st Respondent's submission is that the Applicant's efforts to file an appeal out of time is simply an effort to deny him the fruits of his judgement.
39. Indeed, the issue of jurisdiction is a fundamental ingredient to the adjudication of legal disputes.
40. Jurisdiction cannot be inferred by the mere participation of a party in proceedings before Court.
41. The issue of jurisdiction can be raised even after a party has participated in proceedings and the judgement pronounced thereof.
42. In other words, the fact that the Applicant is seeking for the re-evaluation on the issue of jurisdiction exercised by the Trial Court, then such an issue is an arguable point of law which should be fully canvassed through the substantive Appeal.
43. In addition to the above, the Applicant is also seeking for the re-evaluation of the evidence adduced in the Trial Court and the rights of a registered owner duly recognised by statutory registration.
44. Looking at Article 50 of the Kenyan Constitution, 2010, every party has a right to file an Appeal as a way to a fair hearing.
45. An appeal is therefore a right which this Court can not impede by placing procedural technicalities to a party who wishes to be heard on Appeal.
46. In conclusion therefore, the Court of the view that the Applicant has an arguable Appeal as envisaged in this ingredient.



47. The next issue is to what degree of prejudice will the Respondent suffer if the extension is granted to the Applicant.
48. According to the Court, the Respondent will not suffer any prejudice if the extension of time to file an Appeal is granted to the Applicant because there will be no alteration of any legal rights already bestowed on him/her.
49. The only thing that this Court will be allowing is the Applicant to pursue his right of Appeal as provided under Article 50 of the Kenyan Constitution,2010.
50. Consequently therefore, the Respondent will not suffer any prejudice by the extension of the time to file an Appeal as prayed by the Applicant.
51. Nevertheless, it is important for this Court to remind litigants that compliance of Court orders and directives is a cordial principle within the legal administration of justice and therefore compliance of such orders and/or directives must be adhered to at all times unless proper justifications for none compliance are provided for.

Issue No. 2- Is the applicant entitled to an order of stay of the judgement pronounced on 30th June 2022 pending the hearing of the intended appeal?

52. The second issue for determination in the present Application is whether or not the Applicant is entitled to a Stay of execution Order against the judgement pronounced on the 30th June 2022 pending the hearing and determination of the present Application as well as the intended Appeal.
53. On the 24th of November 2022, the Court granted the first limb of this prayer which was to the effect that there would be a Stay of execution of the judgement pronounced on the 30th of June 2022 pending the hearing and determination of the present Application.
54. In essence therefore, the only limb for determination is whether or not the Applicant should be granted a Stay of Execution of the judgement pronounced on the 30th of June 2022 pending the hearing and determination of the intended Appeal.
55. Order 42 Rule 6(1) of the *Civil Procedure Rules*,2010 states that: -

“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.

No order for stay of execution shall be made under subrule (1) unless—

- a. the court is satisfied that substantial loss may result to the 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 applicant.”



56. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court made the following observations while dealing with applications for stay pending Appeal; -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

57. In another case of *RWW v EKW* [2019] eKLR, the Court considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

58. Looking at the provisions of the law and the above authorities, the ingredients to granting a stay of execution can be summarised into three broad branches.

59. These three ingredients are namely (i) whether or not the application was filed without delay (ii) whether or not the Applicant will suffer any substantive loss if the stay is not granted and (iii) provision of security if the order of stay is granted.

60. On the first ingredient, the Court has already made a pronouncement in the first issue that the delay by the Applicant to file this Application is not inordinate and has been satisfactorily explained.

61. On the second ingredient of whether or not the applicant will suffer any substantive loss if the stay is not granted, the Court would like to approach this issue from the perspective of occupation.

62. According to the Applicant’s grounds contained in the body of the present Application and the supporting Affidavit thereof, the Applicant states that he is the one in occupation and has been in occupation for the last 20 years.

63. The 1st Respondent in its response to the present Application or their submissions did not dispute the Applicant’s occupation of the suit property.

64. Consequently therefore, if the 1st Respondent is to be allowed to execute the judgement of 30th June 2022, then the Applicant would be permanently enjoined from entering onto or being in possession of the suit property.



65. The suit property being the Applicant's place of residence for the last 20 years, it would cause a great hardship and immense loss to be kept away from such a place until the intended Appeal is heard and determined.
66. In addition to the above, if the 1st Respondent is allowed to execute the judgement pronounced on the 30th June 2022, there is a likelihood that the ownership of the suit property will be registered in the name of the 1st Respondent and therefore open a gate for further alienation hence rendering the intended Appeal nugatory as ownership will have moved to a third party.
67. Looking at the above scenarios and in the interest of justice, the Court is of the view that indeed there will be substantive loss to the Applicant if the Stay Order is not issued pending the hearing and determination of the intended Appeal.
68. The last limb for consideration is the issue of security to be provided during the pendency of the intended Appeal.
69. In the present Application, the security will be based on the possible costs that might arise out of the intended Appeal to be filed.
70. In conclusion therefore, the Court hereby makes the following Orders as appertains the Application dated 27th September 2022; -
 - A. The applicant is hereby granted an extension of 7 days from the date of this ruling to prepare, file & serve their memorandum of appeal.
 - B. An order for stay of execution against the judgement of 30th June 2022 in Kilgoris SPM ELC case no. 56 of 2018 be and is hereby granted pending the hearing and determination of the intended appeal herein.
 - C. The applicant is directed to prepare, file & serve the record of appeal within 45 days from the date of filing the memorandum of appeal.
 - D. The applicant shall deposit a sum of KShs 200,000/- within 14 days from the date of this ruling as security during the pendency of the intended appeal.
 - E. Costs of this application shall abide the outcome of the substantive appeal.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 21ST FEBRUARY 2023.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Ngeno

Advocates For The Applicant: Marete (no Appearance)

Advocates For The 1st Respondent: Omangi Holding Brief Nyamwange

