



Chepkwony v Kaura Barngetuny (Suing as the Adm. of the Estate of Stonik Orwacho) (Environment and Land Miscellaneous Application E004 of 2021) [2022] KEELC 137 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 137 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2021
CG MBOGO, J
JUNE 9, 2022

BETWEEN

DENNIS CHEPKWONY APPLICANT

AND

KAURA BARNGETUNY (SUING AS THE ADM. OF THE ESTATE OF STONIK ORWACHO) RESPONDENT

RULING

1. What is before this court for ruling is the Notice of Motion application expressed to be brought under Sections 1A,1B,3A,78,79(a) of the *Civil Procedure Act* and Order 42 Rules 6 and 11 of the *Civil Procedure Rules* for orders: -
 1. That this Honourable court be pleased to grant leave to the defendant/applicant to appeal out of time against the judgement made by the Hon. Wakahiu CM on the.....
 2. That the said leave does operate as a stay of proceedings.
 3. That the costs of this application be provided for.
2. The application is dated 10th February, 2021 and was filed in court on even date. It is predicated on the grounds on its face and is further supported by the affidavit of Dennis Chepkwony, the applicant herein, the same having been sworn at Narok on 10th February, 2021.
3. The respondent though served on 8th March, 2022 did not enter appearance. The application, as it were, remains unopposed but nevertheless the court directed the applicant to file submissions in support thereof.
4. The grounds in support of the application are:-



- (a) That the Hon. Wakahiu delivered a judgement on the 27th May, 2020
 - (b) That the defendant/applicant was not served with any documents
 - (c) That the defendant/applicant was not served with a decree as required by law and only learnt that there was judgement on record when the respondent herein moved in to execute the decree.
 - (d) That meanwhile the time of the appeal had run out
 - (e) That it is in the interest of justice that the defendant be allowed to appeal this judgement
 - (f) That the respondent will not be prejudiced if the said leave is granted.
5. The supporting affidavit more or less replicates the grounds in support of the application. I see no need to further replicate the same.
 6. In his submissions, the counsel for the applicant framed one issue for determination as follows:-
 1. Whether the applicant has satisfied the conditions precedent for the grant of an order for stay of execution pending hearing and determination of an appeal.
 7. I do note that the submissions are essentially centered on Order 42 Rules 6 of the [Civil Procedure Rules](#) which deals with stay in case of an appeal. In my view, the counsel ought to have made submissions on why the applicant ought to be granted leave to appeal out of time against the judgement delivered by the lower court on 27th May, 2020 first and then as on an ancillary issue, submit on stay pending appeal.
 8. The powers of the court in deciding on an application for extension of time are discretionary and unfettered as was held in the case of [Stanley Kahoro Mwanri & 2 others Versus Kanyawi Trading company](#) (2015) eKLR.
 9. The Court of Appeal in the case of [APA Insurance Ltd Versus Michael Kinyanjui Mutua](#) (2016) eKLR identified three conditions for consideration in granting an applicant leave to appeal out of time. These conditions are:-
 - (1) The length of the delay
 - (2) The degree of prejudice to the respondent if the application is allowed
 - (3) The chances of appeal succeeding
 10. In the application before me, the applicant has not indicated when he became aware of the entry of the Judgement delivered on 27th May, 2020 and what steps he took to file this application. He instead at paragraph 7 of his supporting affidavit deposed that he was served with an eviction order on a date that he did not disclose. The eviction order which is annexed as DC2 to the supporting affidavit shows that it was received at Mulot Police Station on 7th January, 2022 at 12.00 O'clock and presumably the same was served upon the applicant soon thereafter and hence the filing of this application on 10th February, 2021. I am of the view that under those circumstances, there was no inordinate delay in filing this application. It should however be noted that the applicant has left it to the court to speculate on when he became aware of the entry of judgement sought to be appealed against.
 11. Regarding the degree of prejudice to the respondent, it would seem from the averment in paragraph 7 of the supporting affidavit, the applicant has been in occupation of the suit property for almost 30 years. In my view no prejudice would be occasioned to the former if the applicant was granted leave to appeal out of time. However, I had no chance to peruse the judgement sought to be appealed against



in order to determine the chances of the appeal succeeding. In my view therefore, the application is unmeritorious notwithstanding the fact that the applicant claims that he had no notice of the delivery of the judgment of the lower court.

12. Whereas the applicant has a right to challenge the judgment of the lower court, for the reasons that I have given, my finding is that the application must fail. Same is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 9TH DAY OF JUNE, 2022.

MBOGO C.G

JUDGE

9/6/2022

In the presence of: -

CA:Chuma

