



**Gitau v Githinji & another (Environment and Land Appeal
E006 of 2022) [2023] KEELC 17542 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

JG KEMEI, J

MAY 23, 2023

BETWEEN

JOHN MICHUKI GITAU APPELLANT

AND

MARY NJERI GITHINJI 1ST RESPONDENT

**JOSEPH MUTURI MUNENE (SUED AS TRUSTEE OF GLORIOUS JOY
CHURCH NDARASHA) 2ND RESPONDENT**

RULING

1. The history of this appeal reveal that the Appellant/Applicant has been relentless in his pursuit to prosecute his appeal in this matter. *Vide* an Application dated 16/2/2023 the Appellant craves for omnibus Orders That;
 - a) Spent.
 - b) This Court be pleased to allow the firm of Rumba Kinuthia & Co Advocates to come on record for the Appellant/Applicant in place of the firm of Lokitano & Co Advocates or Tony Martin Law LLP.
 - c) This Honorable Court be pleased to review, set aside and/or vary the proceedings, rulings and consequential orders of this honorable Court issued n February 16, 2023 striking out this appeal.
 - d) This honorable Court to be pleased to deem this appeal as properly filed.
 - e) In the alternative to prayer d above, that this honorable Court be pleased to allow the Appellant/Applicant to file the memorandum of appeal out of time.
 - f) Spent.



- g) This Honorable Court be pleased to stay the execution of judgment and decree of Hon. J.A Ogonda in Ruiru SPM ELC Civil Suit No E65 of 2021 delivered on January 20, 2022 pending the hearing and determination of this appeal.
 - h) Spent.
 - i) This Honorable Court be pleased to and hereby do grant a temporary injunction restraining the Defendants by themselves, their agents, employees or anybody else whomsoever acting on their behalf from selling, transferring, auctioning, disposing off and/or otherwise howsoever interfering with Ruiru/Ruiru East Block 2/2580 pending the hearing and determination of this appeal.
 - j) This Honorable Court be pleased to allow the Appellant to file the Record of appeal out of time.
 - k) The costs of this Application be provided for.
2. The Application is based on the grounds summed up as follows; the Appellant was aggrieved with the trial Court Judgment delivered in Ruiru SPM ELC Suit No E65 of 2021 on 20/1/2022 necessitating the filing of his appeal; that without stay of execution orders against the said Judgment, the Appellant stands to suffer irreparably as the Respondent is intent on disposing the suit land; that the annexed draft Memorandum of Appeal herein demonstrates an arguable appeal with high chances of success and absent any stay of execution orders, the appeal will be rendered nugatory; Appellant filed the current appeal (sic) on 1/2/2022 through the firm of Tony Martin Law LLP which had no consent to come on record but subsequently obtained the said consent and filed it in the trial Court.
 3. It is further conceded that on 16/2/2023 this Honourable Court struck out the appeal for want of compliance with Order Rule 9 of the Civil Procedure Rules; that the mistake of counsel ought not be visited on the client and failure to file the consent does not go to the root of the dispute. That the Respondents will not suffer any prejudice if the Application is allowed and if they do, the same can be mitigated by payment of throw away costs.
 4. The Application is supported by the Affidavit sworn on 1/3/2023 of John Michuki Gitau the Appellant. Reiterating the above grounds, the deponent averred that he has an arguable appeal as demonstrated in his draft Memorandum of Appeal annexed as JMG1 which will be rendered nugatory if the Application is disallowed. Copy of the Ruling delivered on 16/2/2023 is also attached as JMG2. Notably at para. 17 he avowed that the delay in filing the Memorandum of Appeal was due to the striking out of the initial Memorandum of Appeal. Citing Article 159 (2) (d) of the Constitution of Kenya the Appellant beseeched the Court to dispense justice without undue regard to procedural technicalities.
 5. The Application is opposed.
 6. The 1st Respondent Mary Njeri Githinji swore her Replying Affidavit on 20/3/2023. She outlined the background of the Appellant's appeal as lodged by a Memorandum of Appeal dated 1/2/2022 and an Application of even date. That the Respondents raised a Preliminary Objection against the Application for want of compliance with Order 9 Rule 9 Civil Procedure Rules. On 16/6/2022 this Court upheld the Preliminary Objection and again on 16/2/2023 the Court struck out the entire appeal as filed by the Appellant. She averred that the instant suit was defective *ab initio*; the prayers sought cannot be granted as they are anchored on a null and void suit; the instant Application is frivolous and expressed on inappropriate legal provisions.



7. The deponent contended that the Appellant has not tabled cogent reasons for this Court to depart from its findings rendered on 16/6/2022 and 16/2/2023. That it is in the interests of justice, oxygen principles that the Application be dismissed to allow the 1st Respondent enjoy the fruits of her Jdt.
8. On 21/3/2023 directions were taken to canvass the Application by way of written submissions.
9. At the time of writing this opinion only the Appellant had filed his submissions dated 3/4/2023 through the firm of Rumba Kinuthia & Co Advocates.
10. The provisions of Sections 1A and 1B of the Civil Procedure Act were highlighted alongside their Application as expounded in the case of Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR. In addition, Articles 59, 159, 165 and 259 of the Constitution of Kenya were recited in urging the Court to exercise discretion and allow the Application.
11. On the provisions of Order 9 and 10 Civil Procedure Rules the Appellant relied on the case of Francis Omondi Odhiambo v Hippolitus Omondi Ochieng [2022]eKLR to argue that the said Civil Procedure Rules orders do not apply to appellate proceedings. In conclusion the Appellant reiterated that this Court has discretion to allow the firm of Rumba Kinuthia& Co Advocates to come on record in place of Lokitano & Co Advocates or Tony Martin Law LLP. That the Court reviews; set aside/vary the proceedings and Ruling issued on 16/2/2023; the Court deems this Appeal as properly filed or in the alternative allow the Appellant to file the Memorandum of Appeal out of time; order stay of execution of the trial Court Judgment pending the hearing of the appeal and lastly grant temporary injunction against the Defendants (sic) from interfering with the suit land pending the determination of the appeal.
12. As to whether the firm of Advocates should be allowed to come on record, the Court guided by Order 9 rule 9 answers the question in the affirmative.
13. As to whether the Applicant should be allowed to file an appeal out of time, the Court is guided by the legal framework set out in Section 79B of the Civil Procedure Act which states as follows;

“79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the Civil Procedure Act provides that:

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.”
14. The Applicant has explained that the delay in filing the appeal is attributed to the Advocate who filed the appeal that was struck out. Going by the record the Court finds the explanation plausible and that it would be unjust to hold the Applicant to the mistake of counsel. Purely in the interest of justice and to accord the parties the opportunity to be heard on the appeal the Court will allow the Application on terms set out below.
15. The upshot of the foregoing therefore is that the Application partly succeeds in the following terms; -
 - a. Application dated 16/2/2023 is allowed in terms of prayers b and e only.
 - b. The Appellant to file a fresh appeal within 30 days of this date.



c. Appellant be at liberty to canvass prayers for stay of execution of the trial Court Judgment and temporary injunction pending appeal in the fresh appeal.

d. Failure to abide by Orders b above, automatically leave so granted shall lapse without any further orders of this Court.

e. Parties are related , I order that each to bear their own costs

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MAY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Kuria for Appellant

Muchiru together with Ms. Omwoyo for 1st and 2nd Respondents

Court Assistants – Kevin & Lilian

