



Deepak L. Vyas t/a Haulers v Chika & 2 others (Environment and Land Appeal E032 of 2024) [2025] KEELC 342 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEELC 342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E032 OF 2024
SM KIBUNJA, J
JANUARY 29, 2025**

BETWEEN

DEEPAK L. VYAS T/A HAULERS APPELLANT

AND

LAWRENCE OMONDI CHIKA 1ST RESPONDENT

PAUL TABU CHIKA 2ND RESPONDENT

BEATRICE AKINYI CHIKA 3RD RESPONDENT

RULING

Notices Of Motion Dated 5th August 2024 And 9th September 2024

1. The appellant filed the notice of motion dated the 5th August 2024 seeking for *inter alia* orders that leave to appeal out of time against the ruling delivered on 28th June 2024 by Hon. Gathogo Sogomo, PM, in *Mombasa MCELC No. E148 of 2022*, and stay of execution of the decree arising out of the said ruling pending the hearing and determination of the appeal. The application is premised on the sixteen grounds on its face marked (i) to (xvi) and supported by the affidavit of Deepak L. Vyas, the appellant, sworn on the 6th August 2024. It is the appellant's case that the trial court awarded the respondent's costs in its ruling of 28th June 2028 upon his withdrawing of the suit, but failed to grant him costs upon the respondents' withdrawing their counterclaim. That the court then granted the respondents leave to canvass their bill of costs through written submissions and fixed the ruling for 12th July 2024. The respondents filed submissions dated 28th June 2024 purportedly for bill of costs dated 5th January 2024, which had not been served upon him. The ruling on the bill of costs was delivered on 12th July 2024 awarding the respondents Kshs.845,000, and the auctioneers has served him with proclamation notice dated 2nd August 2024. That unless stay of execution is granted, he will suffer substantial loss, and the intended appeal will be rendered nugatory. That he is currently unable to pay the decretal sum and is equally apprehensive that the respondent would be unable to refund the said sum if execution is



- undertaken, and he ends out being successful on appeal. That he is willing to abide by any conditions imposed by the court.
2. The respondents opposed the application through the replying affidavit of Lawrence Omondi Chika, the 1st respondent, sworn on the 22nd August 2024, *inter alia* deposing that the appellant filed the suit in 2022 and withdrew it after two years for reasons that the trial court was without jurisdiction. That the appellant was granted opportunity to file bill of costs and submissions but chose not to do so. That the purported appeal filed on 6th August 2024 by the appellant over the ruling of 28th June 2024 is time barred, and filed without leave and should be struck out with costs.
 3. The respondents filed the application dated the 9th September 2024 seeking to have the appeal herein struck out with costs for being filed out of time and without the leave of the court. The application is based on the three grounds on its face and is supported by the affidavit of Lawrence Omondi Chika, the 1st respondent, sworn on the 9th September 2024, among others deposing that the appeal over the ruling delivered on 28th June 2024 was supposed to have been filed by 29th July 2024. That the appeal filed on the 6th August 2024, was filed out of time, without leave of the court and should be struck out with costs.
 4. The court granted conditional stay of execution in terms of prayer (c) of the application dated 5th August 2024, on the 7th August 2024. It also issued directions on filing and exchanging submissions on the applications on the 17th September 2024 and 30th October 2024.
 5. The learned counsel for the respondents filed their submissions dated 16th October 2024 *inter alia* submitting that the stay order of 7th September 2024, lapsed after the appellant failed to comply with the condition thereof. That the respondents proceeded and executed the notice to show cause, and as the appellant has not opposed the application to strike out the appeal, it should be granted with costs. That the appellant's application is without merit and should be dismissed with costs.
 6. The issues for determinations on the two applications are as follows:
 - a. Whether the appellant has made a reasonable case for leave to file the appeal out of time and stay of execution to be granted.
 - b. Whether the appeal filed on 6th August 2024 on the ruling of 28th June 2024, outside the statutory time and without leave should be struck out with costs.
 - c. Who should pay the costs?
 7. The court has carefully considered the grounds on each of the applications, affidavit evidence, submissions by the respondents' counsel and come to the following conclusions:
 - a. It is clear that the appeal filed through the memorandum of appeal dated the 5th July 2024 was filed on the 6th August 2024, and is over the trial court's ruling of 28th June 2024. That as the statutory period for filing an appeal is 30 days, this appeal was therefore filed outside the time and undoubtedly without leave of the court being obtained before filing of the appeal.
 - b. The appellant filed the notice of motion dated the 5th August 2024 seeking for leave to file appeal out of time and stay of execution pending the intended appeal on the 7th August 2024. The application is opposed by the respondents through the replying affidavit sworn on the 22nd August 2024. That though the court granted conditional stay of execution on the 7th August 2024, the said order lapsed after the appellant failed to comply with the condition thereof. The appellant has not tendered any explanation as to why the appeal or memorandum of appeal dated the 5th July 2024 was not filed within the 30 days from the 28th June 2024, when the



impugned ruling was delivered. An appeal filed outside the statutory time and without leave is liable to be struck out.

- c. The appellant has not filed any reply in opposition to the respondents' application dated 9th September 2024 to strike out the appeal with costs for being filed outside the time and without leave. The appellant did not also file submissions despite being served with that by the respondents' counsel as confirmed in the affidavit of service sworn on 17th October 2024, and being given an opportunity to do so on 30th October 2024 within 14 days. As the appellant has not tendered any reasonable explanation on why he did not file his appeal within time, the court finds the respondents' application to be meritorious.
 - d. That as in terms of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, that costs follow the events unless where for good cause the court orders otherwise, the respondents shall have costs, as I find no reasonable cause to direct differently.
8. That in view of the foregoing determinations on the two applications, I find and order as follows:
- a. That the appellant's notice of motion dated the 5th August 2024 is without merit and is dismissed with costs.
 - b. That the respondents' notice of motion dated 9th September 2024 has merit and is allowed with costs.
 - c. That pursuant to order (b) above, the appeal filed on the 6th August 2024 through the memorandum of appeal dated 5th July 2024 is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF JANUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellant : Mr Okongo

Respondents: M/s Auma for Mwarandu

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

