



**PCM (Filing on her own behalf and on behalf of PNM – Minor) & 2 others v Makona & another (Environment & Land Case 43 of 2013) [2023] KEELC 20138 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20138 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 43 OF 2013  
BN OLAO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PCM (FILING ON HER OWN BEHALF AND ON BEHALF OF PNM – MINOR) ..... 1<sup>ST</sup> PLAINTIFF**  
**BRIAN MAGOBA MAKONA ..... 2<sup>ND</sup> PLAINTIFF**  
**MICHAEL MAGOBA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**CHARLES JOSEPH EGESA MAKONA ..... 1<sup>ST</sup> DEFENDANT**  
**WEST KENYA SUGAR CO LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. PCM, Brian Magoba Makona and Michael Magoba (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs respectively) approached this Court vide their plaint dated June 17, 2013 in which they pleaded, *inter alia*, that Charles Joseph Egesa Makona and West Kenya Sugar Company Ltd (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) had secretly and fraudulently entered into a contract of sale of the land parcel No Bukhayo/Matayos/262 knowing very well that it was matrimonial property. The Plaintiffs therefore sought an order of permanent injunction restraining the Defendants from selling the said land, a declaration that the sale/transfer was null and void and an order cancelling the said sale and transfer as well as costs.
2. After hearing the parties, Omollo J delivered a judgment in her favour on September 27, 2022.
3. The record shows that a decree was issued on December 2, 2022 although there is also an amended decree issued on February 27, 2023.



4. Aggrieved by that judgment, the 2<sup>nd</sup> Defendant filed a Notice of appeal in this Court on November 9, 2022. The said Notice of Appeal erroneously states that the judgment was delivered on October 27, 2022.
5. I now have for my determination the Notice of Motion by the 2<sup>nd</sup> Defendant/Applicant dated March 17, 2023 premised under the provision of Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules as well as all enabling provisions of the law.
6. The 2<sup>nd</sup> Defendant/Applicant seeks the following orders:
  1. Spent
  2. Spent
  3. Spent
  4. That this Honourable Court be pleased to stay execution of the judgment delivered on September 27, 2022 pending the hearing and determination of the intended appeal to be filed at the Court of appeal in Kisumu.
  5. That this Honourable Court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances.
  6. That costs of this application be provided for.
7. The application is based on the grounds set out therein and is supported by the affidavit of Gerald Okoth the 2<sup>nd</sup> Defendant/Applicant's General Manager.
8. The gravamen of the application is that the 2<sup>nd</sup> Defendant/Applicant is desirous of appealing against the impugned judgment but the delay in filing the Notice of Appeal was occasioned by the slow action by the counsel previously on record in transmitting the 2<sup>nd</sup> Defendant/Applicant's file to his new counsel O & M Law LLP which only arrived on February 8, 2023. The then previous advocate had filed a Notice of Appeal dated November 9, 2022 on the misconstrued belief that the judgment was delivered on October 27, 2022 as per the decree issued on December 2, 2022. That due to lack of proper handover, the Notice of appeal was not filed in 14 days and neither was the record of appeal filed within 60 days. The delay is however not inordinate and is regretted and should not be visited on the 2<sup>nd</sup> Defendant/Applicant. The 2<sup>nd</sup> Defendant/Applicant, as a show of it's preparedness to prosecute the intended appeal has already requested and obtained copies of the proceedings and the impugned judgment. That the intended appeal is highly meritorious and has reasonable chances of success as can be seen from the draft Memorandum of Appeal. The said appeal will be rendered nugatory should execution proceed and the Plaintiffs/Respondents will not suffer any prejudice.
9. The following documents are annexed to the supporting affidavit:
  1. Copy of the judgment delivered on September 27, 2022.
  2. Copy of letter dated February 6, 2023 from the Firm of Olendo, Orare & Samba Advocates forwarding file to the firm of O&M Law LLP.
  3. Notice of Appeal dated November 9, 2022 and decree dated December 2, 2022.
  4. Copies of proceedings certified on February 27, 2023.
  5. Draft Memorandum of Appeal dated February 27, 2023.



10. The Plaintiffs/Respondents filed a Preliminary objection dated April 4, 2023 in opposition to the application. They raised the following grounds:
  1. The decree as drawn and extracted is materially defective as there was no judgment dated, signed and delivered on October 27, 2022.
  2. The Notice of Appeal dated and lodged in Court on November 9, 2022 is defective in so far as it relates to a non-existent judgment delivered on October 27, 2022.
  3. No valid appeal has been filed in terms of Rule 75 of the Court of Appeal Rules.
11. When the application was placed before me on March 21, 2023, I directed that its be canvassed by way of written submission to be filed on or before April 13, 2023. None of the parties complied and although extension of time was granted, no submissions were filed by any of the parties. I do not therefore have the benefit of any submissions by counsel.
12. I have considered the application, the supporting affidavit and annexures as well as the “Preliminary Objection” by the Plaintiffs/Respondents.
13. I must start by observing that the main order sought is a stay of execution pending appeal. The power to grant such an order is donated by Order 42 Rule 6 of the *Civil Procedure Rules* and not Order 40. That flaw, however, is not fatal to the application.
14. Secondly, the Plaintiffs/Respondents have in their Preliminary Objection taken issue with the fact that the Notice of Appeal and Decree as drawn by the Defendant/Applicant are defective as they refer to a judgment delivered on October 27, 2022 which judgment is non-existent. That is correct. However, the decree was drawn by the Deputy Registrar of this court and it would be unfair to penalize the Defendant/Applicant for that flaw. In any event, the Plaintiffs/Respondents have not been prejudiced at all because it is clear from the documents herein that the impugned judgment was delivered on September 27, 2022 and not October 27, 2022.
15. On the other hand, Rule 75 (1) and (2) of the *Court of Appeal Rules* provide that:
  1. “Any persons who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the register of the superior Court.
  2. Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”
16. Rule 77(1) of the same Rule requires that such notice be served on the other party within seven days from the date on which it is filed. Clearly therefore, those time lines are mandatory and must be complied with in the first instance. That was not done and instead the Notice of Appeal was filed on November 9, 2022 well beyond the 14 days period. What is the explanation for that lapse? It is found in paragraph 4 of the supporting affidavit Gerald Okoth dated March 17, 2023. Therein, he has deposed as follows:

"14: “That the previous advocates on record for the Applicant filed the notice of appeal dated November 9, 2022 due to a misconstrued belief that judgment was delivered on 27<sup>th</sup> 2022 as per the decree issued by the trial court on December 2, 2022.
17. It is of course true that the decree issued by the Deputy Registrar on December 2, 2022 erroneously refers to the judgment of Omollo J as having been delivered on October 27, 2022 instead of September



22, 2022. However, the Defendant/Applicant and their counsel cannot talk about a misconstrued belief as to when the judgment was delivered because as is clear from the record of proceedings of September 27, 2022 when the judgment was delivered, Omollo J is recorded as making the following order:

“Order:

Notice of delivery of judgment was issued and also published in the daily cause list. Copy of the judgment shall be emailed for the plaintiff’s advocate before close of business.”

18. I have not heard the 2<sup>nd</sup> Defendant/Applicant allege that the judgment was not emailed to them as ordered. In any event, a Notice of Appeal is a simple document which does not need any fanfare to lodge. I find the 2<sup>nd</sup> Defendant/Applicant’s explanation wanting.
19. Having said so, Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) provides that:

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- (1) “No appeal or second appeal shall operate as a stay of execution or proceeding 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.”
- (2) “No order for stay of execution shall be made under sub-rule (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 has been given by the Applicant.” Emphasis mine.

Flowing from the above, it is clear that the 2<sup>nd</sup> Defendant/Applicant was required to meet the following threshold for the grant of an order of stay of execution pending appeal:

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, it will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.



20. The jurisdiction of this Court while considering such an application was circumscribed by the Court of Appeal in the case of *Visbram Ravji Halai & Another -v- Thornton & Turpin (1963) LTD* 1990 KLR 365 where it held:

“Thus the superior Courts’ discretion is fettered by three conditions; Firstly, the Applicant must establish a sufficient cause; Secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security. The application must of cause be made without unreasonable delay.”

Platt Ag JA (as he then was) stated in the case of *Kenya Shell Ltd -v- Benjamin Kibiru & Another* 1986 KLR 410, that “substantial loss in it’s various form is the cornerstone of both jurisdictions for granting a stay.”

21. Whereas the 2<sup>nd</sup> Defendant/Applicant can be exonerated for erroneously indicating that the judgment was delivered on October 27, 2022 instead of September 27, 2022, no sufficient cause has been shown to warrant the order of stay of execution pending appeal. This is because, while the filing of a Notice of Appeal will be considered as sufficient cause, it is clear that the said Notice filed herein was filed on November 9, 2022 well beyond the 14 days mandatory period provided for under Rule 75(2) of the *Court of Appeal Rules*. The 14 days period expired 14 days from September 27, 2022 which was on October 11, 2022. And as I have already stated above, such a Notice did not require much effort to file. It is a document that can be filed even on the same day a judgment is delivered. It did not require the transmission of the file to the Defendant/Applicant’s new advocates.
22. The Defendant/Applicant has also not demonstrated what substantial loss it will suffer if the orders sought are not granted. Instead, the Defendant/Applicant has stated that it’s appeal is not frivolous and has high chances of success. That is not a consideration when this Court is interrogating an application of such nature arising out of its own judgment or the judgment of Court of similar jurisdiction. It can only be a consideration if this Court, as an Appellate Court, is considering such an application arising out of a judgment of a subordinate Court.
23. On the issue of un-reasonable delay, the impugned judgment was delivered on September 27, 2022 and the record shows that it was emailed to the Defendant/Applicant on the same day. This application was filed on March 17, 2023 some six (6) months later. The 2<sup>nd</sup> Defendant/Applicant’s General Manager Mr Gerald Okoth has deposed in paragraphs 3, 5 and 6 of his supporting affidavit that the delay herein is “regrettable” but is “not inordinate”. A period of six (6) months is clearly inordinate. And even assuming that the delay was due to the fact that the 2<sup>nd</sup> Defendant/Applicant’s new counsel only obtained the file from the previous advocate on February 8, 2023, no explanation has been proffered as to why it took the 2<sup>nd</sup> Defendant/Applicant another forty seven (47) days to file this application.
24. Lastly, the 2<sup>nd</sup> Defendant/Applicant has not offered any security nor made any undertaking to abide by any terms which this Court may impose for the grant of the orders sought.
25. The up-shot of all the above is that the 2<sup>nd</sup> Defendant/Applicant has not met the threshold set out in Order 42 Rule 6 of the *Civil Procedure Rules* to warrant the grant of the order of stay of execution pending appeal.
26. The Notice of Motion dated March 17, 2023 is devoid of merit. It is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023 AS WAS ADVISED TO THE PARTIES ON 11<sup>TH</sup> MAY 2023.**

**BOAZ N. OLAO**



**JUDGE**

