



**Oucho v Opiyo (Environment and Land Appeal E031 of 2024)
[2025] KEELC 345 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 345 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E031 OF 2024
SM KIBUNJA, J
JANUARY 29, 2025**

BETWEEN

JOHN ABURA OUCHO APPELLANT

AND

PATRICK OMONDI OPIYO RESPONDENT

RULING

[Notices Of Motion Dated 17th September 2024, 4th October 2024 And Preliminary Objection Dated 15th October 2024]

1. The respondent moved the court through the notice of motion dated the 17th September 2024 seeking for the striking out of this appeal and memorandum of appeal dated 5th August 2024 with costs. The application is premised on the five grounds on its face marked (i) to (v), and supported by the affidavit of Patrick Omondi Opiyo, respondent, sworn on the 17th September 2024, inter alia deposing that the appeal filed through the memorandum of appeal dated the 5th August 2024 was filed out of time, without leave of the court and should be struck out with costs; that the grounds on the memorandum of appeal do not raise any triable case and the appeal has no chance of succeeding.
2. On his part, the appellant filed the notice of motion dated the 4th October 2024 seeking for inter alia leave to lodge an appeal against the ruling of Hon. J. B. Kalo delivered on 5th June 2024 out of time, and for the memorandum of appeal dated 6th August 2024 be deemed as properly filed. The application is based on the six (6) grounds on its face marked (a) to (f) and supported by the affidavit of John Abura Oucho, appellant, sworn on the 4th October 2024, inter alia deposing that the ruling of 5th June 2024 was delivered in his absence and that of his then counsel; that he was served with the ruling on the 24th July 2024 which was outside the 30 days for filing an appeal; that his advocate became uncooperative in filing an appeal and he instructed the current counsel; that the memorandum of appeal dated the 6th August 2024 was filed outside the 30 days period for filing an appeal due to the mistake of his



previous counsel which should not be visited upon him; that his appeal is arguable, meritorious, with high chance of success and his application should be allowed, as to order otherwise will deny him the right to be heard and lead him to suffer substantial loss.

3. The application dated 4th October 2024 is opposed by the respondent through the replying affidavit of Patrick Omondi Opiyo, respondent, sworn on the 15th October 2024, *inter alia* deposing that the appellant had appealed the judgement of ELC No. 2921 of 2009 and Munyao J, ordered the trial court to make an inquiry into damages pursuant to the appellant's undertaking to pay damages dated 29th October 2009, which the trial court did and delivered its ruling on 5th June 2024, that was duly served upon counsel for both parties; that the decree was received on 7th June 2024 and served upon the appellant with a notice to vacate; that the leave the appellant's seeks is to enable him get stay of execution as the 45 days given by the trial court has lapsed; that the appeal is not arguable, has no merits and the application cannot be granted as the appeal has already been filed without leave; that the memorandum of appeal dated 6th August 2024 is defective as it does not show the parties, case reference and space for the Deputy Registrar to sign and seal; that the application for leave to file appeal out of time is *res judicata* as there is a similar application dated 2nd September 2024 filed in HCC Appl. No. E253 of 2024, and should be dismissed with costs.
4. The respondent also filed the notice of preliminary objection dated 15th October 2024 seeking to have the appellant's application dated 4th October 2024 and the appeal struck out with costs on the grounds that;
 - a. The applications dated 4th October 2024 and 2nd September 2024 are *res judicata*.
 - b. The appeal was filed after 60 days and without leave of the court, instead of within 30 days from the date of ruling.
 - c. That the application dated 4th October 2024 is an abuse of court process.
5. The learned counsel for the respondent and appellant filed their submissions dated the 4th November 2024 and 11th November 2024 respectively, which the court has considered.
6. The following are the issues for the determination by the court:
 - a. Whether the notice of motion dated 4th October 2024 is *res judicata*.
 - b. Whether the appeal filed through the memorandum of appeal dated 6th August 2024 was filed outside the statutory time.
 - c. If the appeal was filed outside the statutory time, whether it should be struck out, or deemed as properly filed.
 - d. Who bears the costs in each application?
7. The court has carefully considered the grounds on the preliminary objection, both notices of motion, affidavit evidence, submissions by the learned counsel, the record and come to the following determinations:
 - a. That the appellant filed the appeal herein through the memorandum of appeal dated the 5th August 2024. The said memorandum of appeal indicates that the appeal is over the ruling delivered on 5th June 2024 by Hon. J. Kalo, but has not disclosed in respect of which suit, and between which parties. That notwithstanding, as the impugned ruling was delivered on 5th June 2024, and the appeal was evidently filed on the 5th August 2024, then it is crystal clear



the memorandum of appeal dated 5th August 2024 was filed about 60 days after the delivery of the impugned ruling, and hence outside the statutory 30 days' period.

- b. The record confirms that the appellant filed the notice of motion under certificate of urgency dated 2nd September 2024 seeking for inter alia stay of execution of ruling delivered on 5th June 2024. The court considered the application on 3rd September 2024 and directed it to be served, replies to be filed but declined to certify it as urgent due to among others the time that had lapsed since 5th June 2024, and failure to invoke the court's recess jurisdiction. The record shows that the appellant subsequently withdrew the application dated 2nd September 2024 through the notice of withdrawal dated 4th September 2024.
- c. The appellant then filed the notice of motion and chamber summons both dated 4th September 2024 seeking for inter alia;
 - i. That the application be heard during the recess;
 - ii. Stay of execution of the ruling delivered on 5th June 2024 be issued in the interim pending determination of the application and thereafter of the intended appeal; and
 - iii. Stay of execution of the warrants of attachment dated the 15th August 2024 pending the determination of the application and thereafter of the appeal.

The record shows that the application was considered by the court on the 5th September 2024, certified urgent, temporary stay of execution of the trial court's ruling of 5th June 2024 issued to be in force until the hearing date of 23rd September 2024, on condition the appellant deposits Kshs.4million in ten days. The record shows that the appellant has filed a Notice of Appeal dated the 11th September 2024 in respect of the decision of 4th September 2024. The reference on the notice of appeal to the decision of 4th September 2024 appear to be an error as the order was issued on 5th September 2024.

- d. The application dated the 17th September 2024 was filed on the 18th September 2024, by the respondent seeking to strike out the appeal. The court considered the application on 19th September 2024, directing that it be served, and fixed it for mention on the 23rd September 2024. The appellant has not filed any reply to the application dated 17th September 2024 despite having been directed to do so on 23rd September 2024 in 21 days.
- e. The record shows that both parties were represented by their respective counsel, who addressed the court on various issues on 23rd September 2024. I have noted that there was no extension of the stay order issued on 5th September 2024. It is also important to note that the counsel for the appellant informed the court that they had filed an application in the High Court that was before Macharia J, the court fixed the matter for mention on 7th November 2024. On the 7th October 2024, the appellant filed the notice of motion dated 4th October 2024, which was considered by the court, and fixed for mention on 7th November 2024. The respondent opposed the application through the preliminary objection and replying affidavit of 15th October 2024. On 7th November 2024, the court heard both counsel and inter alia fixed the applications and preliminary objection for ruling today.
- f. From the copies of the ruling and decree annexed to the affidavits by the parties, it is clear the appellant and respondent herein were the plaintiff and defendant respectively, in Mombasa MC ELC No. 2921 of 2009. The respondent deposition that the ruling was in compliance



with the order of Munyao J, for the trial court to determine the damages payable is confirmed by the trial magistrate in his ruling where he stated that;

“Both the plaintiff and the defendant laid claim to the land. This court found that the relationship between the plaintiff and the defendant was that of loaner/loanee. The appellate court upheld this finding. Specifically, it was found that the plaintiff and the defendant did not enter into a sale agreement as alleged by the plaintiff. The court directed the plaintiff to return to the defendant the documents pledged by the defendant as security for the loan. In essence, the court confirmed the defendant’s interest in the land. That finding has not been set aside nor reviewed. The defendant therefore remains the proprietor of the suit land.”

The contents of the said ruling has not been disputed by any of the parties herein, and even though no other decisions by the trial or appellate courts has been availed to this court, I will take it that the trial court was acting in accordance with this court’s order pursuant to an appeal over the trial court’s earlier decision.

- g. There is no doubt the appellant did not file any appeal over the ruling delivered on the 5th June 2024 within the widow of 30 days prescribed by the law. Indeed, the only appeal herein is the one filed through the memorandum of appeal dated 5th August 2024, which was filed after about 60 days had lapsed from 5th June 2024. Though this court has powers to in appropriate cases grant leave to file an appeal out of time or conversely put, extend the time for filing of an appeal, no such leave was sought before or during the time the memorandum of appeal dated the 5th August was filed. By the time the respondent filed the notice of motion dated the 17th September 2024 seeking to have the appeal filed by the appellant struck out for having been filed outside the 30 days period and without leave of the court, no application for leave or extension of time had been filed before this court. As pointed out above, the appellant has not filed any reply or opposition to the respondent’s application and I find it has merit.
- h. It is only through the notice of motion dated the 4th October 2024 that the appellant sought for leave to lodge an appeal out of time and for the memorandum of appeal “dated 6th August 2024”. I have perused the record and have not seen any memorandum of appeal dated 6th August 2024, as the one filed herein is dated 5th August 2024. The respondent has in his replying affidavit sworn on 15th October 2024 annexed a copy of notice of motion under certificate of urgency dated 2nd September 2024 filed in Mombasa HCC Misc. Appl. No. E253 of 2024, John Abura Oucho versus Patrick Omondi Opiyo, who are the same parties herein, that is similar in all aspect to the appellant’s application dated 4th October 2024. That though the respondent has contended that the application dated 4th October 2024 is res judicata because of that previously filed notice of motion dated 2nd September 2024 before the High Court, no evidence has been tendered to confirm whether or not that application has been decided. At best the existence of the application dated 2nd September 2024 filed in Mombasa HCC Misc. Appl. No. E253 of 2024, John Abura Oucho versus Patrick Omondi Opiyo may most probably mean the motion filed herein dated 4th October 2024 that seeks for similar orders and is between the same parties and subject matter is sub judice.
- i. The appellant has alleged that he only got to know of the ruling delivered on 5th June 2024 on the 24th July 2024 when the 30 days period for filing the appeal had lapsed. He further alleges that his then counsel was uncooperative and did not act on his instructions to file the appeal which made him instruct the current counsel. That claim has been disputed by the



respondent who deposed that the ruling was communicated by the trial court to the counsel of both parties, and further his counsel served the appellant with the decree date 6th June 2024 and notice to vacate on the 7th June 2024. There is no rebuttal filed by the appellant and noting that the application for leave to file the appeal out of time was filed on 7th October 2024, which was over two months after the filing of the memorandum of appeal dated 5th August 2024, which was itself filed about 60 days after the ruling was delivered on 5th June 2024, then the court agrees with the respondent's position that the Appellant was aware of the ruling as of early June 2024. The said memorandum of appeal was therefore filed outside the 30 days and without leave of court, and the appeal is therefore defective, and an abuse of court process.

- j. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where ordered otherwise for good cause. In this instance, I find no good cause to depart from that general position and the respondent having been successful in his application and defending that of the appellant should have costs.
1. Flowing from the foregoing determinations, the court finds and orders as follows:
 - a. That the appellant's notice of motion dated 4th October 2024 is without merit and is dismissed with costs.
 - b. That the respondent's notice of motion dated the 17th September 2024 has merit and is allowed with costs.
 - c. That pursuant to order (b) above, the appeal filed through the memorandum of appeal dated the 5th August 2024 is hereby struck out with costs for being filed outside the 30 days period and without leave of the court.

Orders accordingly.

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

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of:

Appellant : M/s Auma for Mwarandu

Respondent : M/s Amugure for Masake

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

