



**Sabani v Wasike (Environment & Land Case 146 of 2013)  
[2023] KEELC 22374 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22374 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 146 OF 2013  
EC CHERONO, J  
DECEMBER 14, 2023**

**BETWEEN**

**ERASTUS SOGONI SABANI ..... APPLICANT**

**AND**

**JACKSON SIMIYU WASIKE ..... RESPONDENT**

**RULING**

1. The application before me for determination is the Notice of Motion application dated 29<sup>th</sup> August, 2023 in which the applicant prays for the following orders;
  - a. Spent.
  - b. Spent.
  - c. That this honourable court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. J Boaz Olao. The annexed draft memorandum of appeal be deemed as duly filed.
  - d. That there be stay of execution pending the hearing and determination of the intended appeal.
  - e. Costs of this application be in the cause.
2. The application is anchored on the grounds that being aggrieved by the Court's judgment dated 23<sup>rd</sup> March 2023, the applicant intends to prefer an appeal to the court of appeal and if orders for stay of execution of that judgment is not granted, the intended appeal will be rendered nugatory. She states that the intended appeal is arguable with high chances of success.
3. The application is supported by the affidavit of the applicant sworn on 29<sup>th</sup> August 2023 and the annexures thereto.



4. The application is opposed by the respondent through grounds of opposition dated 23<sup>rd</sup> October, 2023. The Respondent in opposing the said application contends that this Hon. Court lacks the requisite jurisdiction to hear and determine the instant application since it is the preserve of the Court of Appeal. He contends that the memorandum of appeal can only be filed in the superior court and that no sufficient cause has been shown why the notice of appeal was not filed within the statutory period of 14 days.
5. The Respondent further argued that the applicant has not fulfilled the conditions necessary for the grant of orders for stay of execution of judgment under the provisions of Order 42 Rule 6 (2) of the [Civil Procedure Rules](#). He stated that he would be prejudiced if the orders sought are granted and prayed to have the application dismissed.
6. I have considered the application, the supporting affidavit and the grounds of opposition by the respondent and in my view, the only issue for determination in this application is whether the applicant has established the conditions for the grant of stay of execution pending appeal set out under Order 42 Rule 6(2) of the [Civil Procedure Rules](#).
7. First, the application is seeking enlargement of time to file an appeal from a decision of this court to the Court of Appeal and for stay of the judgment delivered 23<sup>rd</sup> March, 2023. It is trite that an appeal from a decision of the High court to the Court of Appeal is the preserve of the Court of Appeal according to Section 66 of the [Civil Procedure Act](#) and Section 3 of the [Appellate Jurisdiction Act](#), Cap 3 Laws of Kenya and the procedure for institution of such an appeal is set down in the Court of Appeal Rules.
8. Section 66: Appeal from decree of High Court
  66. Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.
9. Section 3 of the [Appellate Jurisdiction Act](#), Cap 9 Laws of Kenya;
  3. Jurisdiction of Court of Appeal
    - (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.
10. Section 77 [CAR](#) on the duration within which a notice of appeal should be lodged provides.
  - (1) .....
  - (2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.
11. The [Court of Appeal Rules](#) (CAR) on extension of time and lodging an appeal states as follows; -
  4. Extension of time
 

The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.
12. Section 7 of the [Appellate Jurisdiction Act](#) provides;



7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

13. The *Court of Appeal Rules* (CAR) on lodging of an appeal provides;

84.

(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged— Institution of appeals.

- (a) a memorandum of appeal, in four copies;
- (b) the record of appeal, in four copies;
- (c) the prescribed fee; and
- (d) security for the costs of the appeal:

.....

14. Guided by the provisions of the law cited above and considering the application and the documents attached thereto, I note that the applicant has attached a notice of appeal dated 24<sup>th</sup> March 2023 and filed 19<sup>th</sup> April, 2023. The said notice of appeal was admitted by the Deputy Registrar on the date of filing i.e. on 19<sup>th</sup> April, 2023. I have computed the days between the date of delivery of the impugned judgment and the date the notice of appeal was lodged and I find that the same was filed 12 days late. I also note that the applicant has attached a draft memorandum of appeal which she seeks the following order;

c) That this honourable court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. J Boaz Oloa. The annexed draft memorandum of appeal be deemed as duly filed.

15. My understanding of this prayer is that the applicant wishes to have the memorandum of appeal annexed to the application admitted out of time. As provided for in the foregoing provisions, a memorandum of appeal from the High Court to the Court of Appeal is to be lodged at the Court of appeal within 60 days of filing of the Notice of Appeal which ought to have been filed 14 days after the date of the decision. Therefore, the only document to be filed at the High Court and courts of concurrent jurisdiction to the court of appeal in such situation as this is the Notice of Appeal only.

16. As I had earlier stated, the applicant herein filed her notice of appeal 12 days late and has not even sought to have the same albeit filed out of time admitted as properly on record. In view of the foregoing, I find that the Notice of appeal as filed by the applicant is incompetent for being filed out of time and without leave of the court.

17. The other issue for determination is whether the applicant has established the conditions for the grant of stay of execution of the judgment delivered on 23<sup>rd</sup> March, 2023 and the decree issued thereon. Having found that the applicant has not properly filed his notice of appeal, it is important to understand the import and purport of a Notice of Appeal by the court of appeal. In *Yani Haryanto*



vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 the Court of Appeal was of the following view;

“...A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...”

18. From the foregoing, it is clear that the jurisdiction to grant stay of execution of a judgment, Decree or an order flows from an appeal or a notice of appeal properly lodged such that if no notice or proper notice of appeal has been filed, one cannot then seek for orders under Order 42 Rule 6 CPR.
19. The upshot of my finding is that the applicant’s notice of motion dated 29<sup>th</sup> August, 2023 is devoid of merit and the same is hereby dismissed with costs to the Respondent.
20. Orders accordingly

**DATED, DELIVERED, AND SIGNED AT BUNGOMA THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023.**

.....

**HON. E. C CHERONO**

**JUDGE**

