



**Wanjiku v Kariuki (Environment and Land Appeal E054 of 2021)
[2022] KEELC 3699 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E054 OF 2021
LC KOMINGOI, J
MAY 12, 2022**

BETWEEN

PHYLIS WANJIKU APPLICANT

AND

JOHN NDIRANGU KARIUKI RESPONDENT

RULING

1. This is a Notice of Motion dated July 28, 2021.
2. It is brought under Sections 1A, 1B, and 3A of the [Civil Procedure Act](#). Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) and all other enabling provisions of the law.
3. It seeks orders: -
 - a) Spent.
 - b) Spent.
 - c) That there be a stay of further proceedings in Civil Suit No.6308 of 2019 at Chief Magistrate's Court Milimani Commercial Courts pending the hearing and determination of this appeal.
 - d) That there be a stay of the orders of the Principal Magistrate (Mr. Kagoni) in Civil Suit No.6308 of 2019 at Chief Magistrate's Court Milimani Commercial Courts pending the hearing and determination of this appeal.
 - e) That there be a stay of the orders of the Principal Magistrate (Mr. Kagoni) in Civil Suit No.6308 of 2019 at Chief Magistrate's Court Milimani Commercial courts pending the hearing and determination of this Appeal.
4. The grounds are on the face of the application. It is also supported by the Appellant's supporting affidavit sworn on July 28, 2021. She deponed that she is the registered owner of four (4) plots being



L.R Nairobi/Block 166/392- Block 395 which she has developed and leased to tenants and which is neighbouring the parcel claimed by the Respondent. She further deponed that unknown people moved to the neighboring plot and commenced construction but the Respondent sued her yet she is not the one carrying out the construction. She faulted the ruling of the Magistrate dated April 29, 2021 where the learned Magistrate made a finding; allegedly without evidence, that she was in control of the parcel claimed by the Respondent and therefore in contempt of orders of the court requiring status quo to be maintained. She added that if the orders sought are not granted, she will suffer irreparable damage since the decision of the learned Magistrate will interfere with her liberty.

5. The Respondent opposed the application *vide* grounds of opposition dated August 30, 2021. The grounds are:-
 - a) That the Applicant having opted to apply for review of the order cannot come back to seek to appeal after the review application was denied.
 - b) That the Applicant is seeking to appeal and or review an order that parties entered into by consent through the back door.
 - c) That the Appellant has failed to attach the order she is seeking to stay.
 - d) Application is a gross abuse of process and is meant to subvert the cause of justice and delay this matter.
 - e) That the Appellant has failed to demonstrate that the Appeal has well chance of success and or is an arguable appeal.
 - f) That the Appellant has not shown sufficient cause to entitle it to the orders sought.
 - g) That the ruling amounted to negative orders which are incapable of being stayed.
 - h) That the Application amounts to a fishing expedition with intention of delaying compliance with the court's orders.
6. The Respondent also swore a replying affidavit on November 11, 2021. He deponed that on October 2, 2019, parties to this suit entered into a consent that the status quo with respect to the suit property Nairobi/Block/107/1/126 be maintained; that is to say that no further construction nor development by any party should proceed or commence on the suit property pending hearing and determination of the Magistrate's matter CMCC 6308 of 2019 and the same was adopted as an order of the court.
7. He further deponed that on December 7, 2020, the Defendant had resumed construction on the suit property despite the consent order prompting the Respondent to file the application for contempt against the Appellant dated January 11, 2021 which was heard and determined on April 29, 2021. He added that the Appellant sought a review of the orders *vide* her application dated May 7, 2021 but it was dismissed on June 29, 2021 and the Appellant now seeks to appeal the dismissal of the application for review.
8. On the October 21, 2021, the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

The Appellant's submissions

9. They are dated February 9, 2022. Counsel for the Appellants submitted that this court has jurisdiction to issue stay orders. He put forward the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 as cited in *SBM Bank Kenya Limited v Misky General Limited & Another* [2021] e KLR.



10. It was his submission that that while the Appellant has put up a commercial complex on her 4 plots being L.R Nairobi/Block 166/392- Block 395, the Respondent claims L.R Nairobi Block 107/1/126 which is totally different to the Appellant's plots. He also submitted that the Respondent failed to prove that the Appellant acted in breach of the orders and that her conduct was deliberate; which are elements required to be proved by a party alleging contempt.

The Respondent's submissions

11. They are dated February 21, 2022. Counsel for the Respondents urged the court to dismiss the application for the reason that the Appellant has not annexed the ruling of June 29, 2021 which she seeks to stay. He relied on the case of [Juliet Kwamboka Ongwae t/a Kahawa Kulture v Mocha Place Limited](#) [2020] eKLR.
12. It was his submission that the Applicant having applied for review of the orders of April 29, 2021, cannot appeal against those orders and her appeal against must be limited to the issues related to the ruling/orders dated June 29, 2021 and accordingly, she must demonstrate how the learned Magistrates' court failed to meet the threshold set for review under Order 45 of the [Civil Procedure Rules](#). He relied on the Court of Appeal decision in the case of [Gerald Kitbu Muchange v Catherine Muthoni Ngare & Another](#) [2020] e KLR.
13. He also relied on the case of [Kenya Wildlife service v James Mutembei](#) [2019] e KLR to submit that the Appellant has not demonstrated why the main suit should be stayed yet her appeal is only on the orders of contempt. He added that if the main suit was to proceed, the Appellant will not be prejudiced as this appeal does not touch on any substantive issues raised in the main suit and the orders issued against her can be compensated by way of damages if the appeal was to succeed.
14. It was his submission that the contempt orders issued on 29th April 2021 and affirmed on June 29, 2021 by way of review, and review being an exercise in discretion by the trial court, the Appellant is limited to demonstrate how the trial court failed to consider the relevant principles in an application for review. He put forward the case of [Pancras T Swai v Kenya Breweries Limited](#) [2014] e KLR.
15. The Appellant seeks stay of orders of the Principal Magistrate (Mr. Kagoni) delivered on June 29, 2021. She did not annex the said ruling. It emerged that the said orders were granted on review of the ruling dated April 29, 2021 which was not annexed. *Vide* the ruling dated April 29, 2021, the learned trial Magistrate found that the Appellant was in contempt of court orders and ordered her to pay Kshs.100,000/= and in default to be committed to 6 months in jail. The orders were affirmed by the learned Magistrate on a ruling *vide* an application for review by the Appellant.
16. I have considered the notice of motion and the affidavit in support, I have considered the grounds of opposition and the replying affidavit by the Respondent. The issue for determination is whether this application is merited.
17. Order 45 rule 1, 2 of the [Civil Procedure Rules](#) provides that:-
- “ Any person who considers himself aggrieved –
- a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



18. Order 45 Rule 2 provides;

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”

19. It is clear from the provisions of order 45 rule 1, 2 of the *Civil Procedure Rules* that a party cannot apply for review and appeal at the same time from the same decree or order. The orders of 29th April 2021 and 29th June 2021 are the same. The Appellant chose to apply for review. She cannot be allowed to have a second bite of the cherry.

20. I find that she has failed to satisfy the court that the orders of June 29, 2021 ought to be stayed.

21. The Appellant also sought stay of proceedings pending appeal. Grant of stay of proceedings is discretionary; the court’s jurisdiction being derived from Order 42 rule 6 (1) of the *Civil Procedure Rules*. In the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 cited in *Kenya Wildlife Service v James Mutembei* [2019] e KLR the court held;

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”.

22. It would be a travesty of justice if the proceedings in this matter were stayed pending appeal on an application seeking to establish whether the Appellant was in contempt. The issue in the appeal does not concern the main suit.

23. In conclusion, I find no merit in this application and the same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 12TH DAY OF MAY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mrs. Omondi for Mr. Were for the Appellant

Mr. Nyangena for the Respondent

Steve - Court Assistant

