



**Mwinyifaki v Munyika (Environment and Land Appeal
16 of 2015) [2022] KEELC 2316 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 16 OF 2015
NA MATHEKA, J
JUNE 28, 2022**

BETWEEN

FATUMA MWINYIFAKI APPELLANT

AND

HUSSEIN MUNYIKA RESPONDENT

RULING

1. The application is dated 27th August 2021 and is brought under Section 2 of the *Civil Procedure Act* Cap 21 Laws of Kenya; Section A1, B1 & 3A, 79B, 78(1)A, B under Order 17 Rule 2 ; Under order 42, order 51 Rule 1, 13 Order 51 Rule 6 of the *Civil Procedure Rules* seeking the following orders;
 1. That the application be certified as urgent and service be dispensed with in the first instance
 2. That the honourable court do order that the appeal filed herein on 21st November 2016 by the Appellant/Respondent in this matter to stand dismissed after two years when no step has been undertaken.
 3. That the costs of this Application be provided for.
2. It is based on the following grounds that the Respondent is the owner of the plot in question. That the Applicant has planned to develop the plot but there is an appeal hanging on the balance and is yet to be heard and determined. That it is now 5 years and the Appellant has not taken any step in making the appeal heard. That according to law this appeal should be declared dismissed after 2 years without taking step to have it heard.
3. The Appellant opposed the application and states that they are yet to be informed of the admission or rejection of the Appeal in terms of Section 79 B of the *Civil Procedure Act* and as such the Order for dismissal is draconian and not in accordance with overriding objective principle requiring hearing disputes on merits rather than procedural technicalities. The process of admission or rejection of



Appeal is an administrative exercise of the Court which is not within the control of the Appellant and the dismissal order sought is totally in bad faith. The application is bad in law and misguided.

4. This court has considered the application and submissions therein. Section 79B of the *Civil Procedure Act* provides as follows;

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

Order 42 Rule 13 of *Civil Procedure Rules* provides as follows;

- 1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
- 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
- 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- 4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a) the memorandum of appeal;
 - b) the pleadings;
 - c) the notes of the trial magistrate made at the hearing;
 - d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
Provided that—
 - i. a translation into English shall be provided of any document not in that language;
 - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).



5. It is evident from the provisions of Section 79B of *Civil Procedure Act* that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in Order 42 Rule 11 of the *Civil Procedure Rules* that states as follows:

“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.

6. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with Order 42 Rule 12 of the *Civil Procedure Rules*. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty one (21) days, the Appellant shall again cause the appeal to be listed before the judge for directions as seen in Order 42 Rule 13 of the *Civil Procedure Rules*.

7. This court finds that an appeal cannot be dismissed before directions had been given. I have perused the court file and there is no evidence that directions had been given herein, this Appeal cannot be dismissed under Order 42 Rule 35 (1) of the *Civil Procedure Rules*. There was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of *Civil Procedure Rules*. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid. In the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR and *Kirinyaga General Machinery v Hezekiah Mureithi Ireri* [2007] eKLR the courts held that an appeal could not be dismissed if directions had not been given. Article 50(1) of *Constitution of Kenya* provides as follows;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

8. I find that the Respondent ought to be given a fair hearing and direct that the Appellant takes a hearing date of this appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

