



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Mwangi (Environment and Land Miscellaneous Application  
E009 of 2019) [2022] KEELC 3493 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3493 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2019  
LN GACHERU, J  
JULY 27, 2022**

**BETWEEN**

**HUMPREY IRUNGU MWANGI ..... APPLICANT**

**AND**

**STANLEY IRUNGU MWANGI ..... RESPONDENT**

**RULING**

1. The Applicant herein Humprey Irungu Mwangi, has brought this Notice of Motion Application dated 17<sup>th</sup> May 2022, against the Respondent Stanley Irungu Mwangi, and has sought for the following orders;
  - a. That time for filing a Notice of Appeal be extended.
  - b. That time for filing a Memorandum of Appeal be extended.
  - c. That this Honourable Court be pleased to allow the Applicant to Appeal the Judgement in Murang'a Chief Magistrate Court - Civil Case No. 32 of 2018, dated 22<sup>nd</sup> July 2021 out of time.
  - d. That this Honourable Court be pleased to order stay of execution of the Judgement delivered on 22<sup>nd</sup> July 2021, pending the hearing and determination of this Appeal.
  - e. That costs of this Application be in the cause.
2. The Application is premised on the following orders;
  - a. That Judgement in Civil Case No. 32 of 2018, at the Chief Magistrate Court at Murang'a was delivered on 22<sup>nd</sup> July 2021, and the Applicant being aggrieved by the said Judgement, he appealed in the High Court at Murang'a, in HCCA E041 of 2021.



- b. The High Court at Murang'a, in its Ruling dated 26<sup>th</sup> April 2022, noted that the suit relates to the use, occupation or title to land and the court seized of jurisdiction to entertain this Appeal is the Environment and Land Court.
  - c. That the Appeal to the High Court at Murang'a was due to the true and honest belief by the Applicant's Advocate that the said Memorandum of Appeal was at the time of filing in compliance with all relevant laws, procedural and substantive and hence we are filing out of time premised on the aforesaid.
  - d. That there is a high and probable likelihood of execution of the said judgement in the absence of stay orders, and the Applicant herein has an arguable appeal that raises triable issues that necessitate the determination of the appeal on merit and any execution will render the Applicant's appeal nugatory.
  - e. That Applicant is ready and willing to deposit security as required by law.
  - f. That no prejudice will be occasioned upon the Respondent if the orders sought are granted.
  - g. That it is in the interest of justice, that the orders sought be granted.
3. The Application is also supported by the Supporting Affidavit of Humphrey Irungu Mwangi, who reiterated the contents of the grounds in support of the Application. He further added that he has an arguable Appeal that raises triable issues that necessitate the determination of the Appeal on merit; - That his application for stay of execution was dismissed on 26<sup>th</sup> April 2022, and he was apprehensive that there is a high and probable likelihood of execution of the lower Court judgment by the Respondent in the absence of stay orders. That such execution would render his Appeal nugatory.
  4. The Application is contested through the Replying Affidavit sworn by Stanley Irungu Mwangi, the Respondent herein.
  5. He averred that the instant Application is only meant to delay and obstruct the end of justice from being realized and also meant to deny him the opportunity to enjoy the fruits of his judgment. That the Application reeks of inordinate delay and is an afterthought. Further that the Application is unmeritorious as no substantial loss is demonstrated by the Applicant.
  6. Further that the Judgement in Murang'a Civil ELC No. 32 of 2018, was entered on 22<sup>nd</sup> July 2021, and the Court ordered that the land parcel No. Loc.12/Sub-Loc.3/180, be registered in his name as the sole proprietor.
  7. That the Applicant did not Appeal against the said Judgement before this Court within the stipulated time. That the application herein is an afterthought with intention of obstructing this matter and he urged the Court to dismiss the same.
  8. He also averred that his advocate has informed him that this application is resjudicata as the same application had been filed at Murang'a High Court on 17<sup>th</sup> August 2011, and was dismissed on 26<sup>th</sup> April 2022.
  9. He further averred that he will suffer prejudice if this Application is allowed, since he will not enjoy the fruits of his judgement as the suit land Loc12/Sub-Loc.3/180, is a family property where he has been in occupation and possession. That the Applicant has his own land where his family members live to date. Further, that his Advocate has informed him that the attached Memorandum of Appeal, is a sham with no triable issues and that the Intended Appeal has no chances of success as it has no legal grounds. He urged the Court to dismiss the instant application.



10. The Applicant filed a Further Affidavit and averred that he is the registered owner of the suit property being Loc.12/Sub Loc. 3/180. That the Lower Court revoked the title deed of the said parcel of land where he is the bona fide owner. Further that he indeed filed an Appeal on time being HCCA E041 of 2021, but he only filed it in Murang'a High Court, instead of this Court. That the High Court on 26<sup>th</sup> April, 2022, directed that the Appeal should be filed in the Environment and Land Court.
11. It was his contention that he had filed the Appeal at Murang'a High Court on time, since he had filed it on 17<sup>th</sup> August 2021, and the Judgement of the Lower Court had been delivered on 22<sup>nd</sup> July 2021.
12. Further that the Appeal at the High Court being HCCA E041 of 2021, was not heard and determined on merit as the High Court had no jurisdiction and therefore the Application is not Res judicata.
13. That the registered documents of the suit land are in his name and cancellation of the same will cause irreparable damages to him. Further, that he is ready and willing to deposit security for the Appeal as required by the law.
14. On 13<sup>th</sup> June 2022, the Court directed the parties to canvass the Application by way of Written Submissions.
15. The Applicant filed his submissions on 24<sup>th</sup> June 2022, through the Law Firm of Muthoni G.M & Co. Advocates.
16. On his part, the Respondent filed his submissions on 4<sup>th</sup> July 2022, through the Law Firm of L.M. Kinuthia & Associates Advocates and urged the Court to dismiss the instant Application.
17. The Court has carefully read and considered the instant Application and the annexures thereto. The Court too has considered the reply to the same, the rival written submissions and the cited authorities.
18. Further the Court has considered the relevant provisions of Law and finds that the issues for determination are;
  - i. Whether the instant Application is *Res judicata*?
  - ii. Whether the prayer for leave to appeal out of time is merited?
  - iii. Whether the prayer for stay of execution is merited?
19. From the annexures attached to this Application, there is no doubt that the Applicant herein had filed an Appeal at the High Court being HCCA No EO41 of 2021, being an Appeal against the Judgement of Hon. E M Nyagah delivered in Murang'a SPMCC No. 32 of 2018, which Judgement was delivered on 22<sup>nd</sup> July 2021.
20. The Applicant has not attached the Memorandum of Appeal for the said Appeal at the High Court, or a copy of the Lower Court Judgement. However, from the Ruling attached to the Application, it is clear that the said Appeal was against the Judgement of Hon. E M Nyaga in Murang'a SPMCC No. 32 of 2018.
21. The Annexed Intended Memorandum of Appeal also confirms that the Intended Appeal is against the Judgement of Hon. E M Nyagah SPM, which Judgement was delivered on 22<sup>nd</sup> July 2021. The case number is not given, but the parties at the Lower Court are the parties herein. The suit property is Loc.12/Sub-Loc.3/180.
22. Therefore, this Court has no reasons to doubt that the Applicant herein had filed an Appeal at Murang'a High Court after the delivery of a Judgement on 22<sup>nd</sup> July 2021, by the Lower Court. The



Court is not clear when the Appeal was filed, but the Notice of Motion that had sought the stay of execution was allegedly filed on 17<sup>th</sup> August 2021, as per the Ruling of the High Court.

23. The said Application and the Appeal at the High Court were struck out on 26<sup>th</sup> April 2022, for want of Jurisdiction.
24. The Court finds and holds that the Applicant herein after the delivery of Judgement at the Lower Court, which he was aggrieved by, he filed an Appeal against the said Judgement, but he filed it at the wrong Court. A Court without jurisdiction.
25. In his Ruling, the Judge in HCCA E041 of 2021 held that; -
26. The Appellant if well advised, may seek leave of the ELC to file a fresh Appeal”.
27. It is on the above background that the Applicant filed the Instant Application on 17<sup>th</sup> May 2022.
28. Having set out the above background; the Court will now determine the issue earlier set out.

**(i) Whether the Instant Application is Resjudicata.**

29. The Respondent in his Replying Affidavit and Submissions has averred that this Application is *Res judicata* having been filed in Court of competent jurisdiction and was dismissed by the High Court on 26<sup>th</sup> April 2022. Though none of the parties attached the Application that had been filed at the High Court on 17<sup>th</sup> August 2021, it is evident from the Ruling of the High Court dated 26<sup>th</sup> April 2022, that the Applicant in the above stated Application had sought for stay of execution.
30. In the instant Application, the Applicant is seeking for extension of time to file the Appeal and also for stay of execution of the Judgement of the Lower Court that was delivered on 22<sup>nd</sup> July 2021. The prayer in the Application dated 17<sup>th</sup> August 2021, and the prayers in the instant Application are not the same.
31. The doctrine of *Res judicata* is provided for in Section 7 of the [Civil Procedure Act](#) which states;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.
32. The above doctrine helps the Court to bring litigations to an end.
33. See the case of [John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others](#) (2015) eKLR, as quoted by the Court of Appeal in [Accredo AG & 3 others v Stefano Ucceli & another](#) [2019] eKLR, Civil Appeal No. 43 of 2018 where the Court held;
34. The rationale behind *Res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.
35. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *Res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably”.



36. As submitted by the Respondent “*Black Law Dictionary* defines *Res judicata* as;  
 “An issues that has been definitely settled by Judicial decision”. The three ingredients are; -
- i. An earlier decision on the issue.
  - ii. A final decision on the merit.
  - iii. The involvement of the same parties or parties privy with the original parties.
38. Through the parties in the High Court Civil Appeal No. EO41 of 2021, are the same parties, the prayers in the said two Application are slightly different.
39. The Application dated 17<sup>th</sup> August 2021, was dismissed because the Appeal No. HCCA E041 of 2021, was struck out for being filed in Court without jurisdiction. The Court had advised the Applicant to file an Application seeking leave to file the Appeal in the Court with requisite jurisdiction that is Environment and Land Court. The said Application was therefore not decided on merit but on lack of jurisdiction. See the case of *Samuel Kiiru Gitau v John Kamau Gitau*, Nairobi HCCC No. 1249 of 1998, where the Court held;
- “For a matter to be Resjudicata, it must be one on which the Court has previously exercised its judicial mind and has after argument and consideration came to a conclusion on the contested matter and for the reason, a matter is said to have been heard and finally decided notwithstanding that the former suit was disposed of by a Decree or on an award”.
40. The Application at the High Court having been dismissed for want of jurisdiction, the Court finds that the said Application dated 17<sup>th</sup> August 2021, was not determined on merit and therefore the doctrine of Resjudicata cannot apply. The Court finds the instant Application is not resjudicata.

**ii. Whether the prayer for leave to file Appeal out of time is merited?**

41. Though a copy of the said Judgement delivered at the Lower Court was not attached, there is no doubt that a Judgement was delivered at Murang’a SPMCC No. 32 of 2018 on 22<sup>nd</sup> July 2021. It is also not in doubt that the Applicant herein filed an Appeal being HCCA E041 of 2021 at Murang’a High Court. The said Appeal was struck out on 26<sup>th</sup> April, 2022, for want of jurisdiction.
42. Section 79G of the *Civil Procedure Act* is very clear that an Appeal from the subordinate Court to the High Court shall be filed within a period of 30 days from the date of the Decree. The proviso to the said Section is that an Appeal may be admitted out of time, if the Applicant satisfies the Court that he had sufficient cause for not filing the Appeal on time.
43. Though the Memorandum of Appeal to the High Court is not attached to confirm the date of filing the said Appeal at the High Court, the Applicant averred that he had filed the said Appeal - HCCA E041 of 2021, on 17<sup>th</sup> August, 2021. The Application that the High Court determined on 26<sup>th</sup> April 2022, was the one dated 17<sup>th</sup> August 2021, and this Court believes that the Appeal at the High Court HCCA E041 of 2021 was filed on 17<sup>th</sup> August 2021. The Judgement at the Lower Court had been delivered on 22<sup>nd</sup> July 2021. Indeed, the Applicant was within time, but he filed the Appeal in a Court without jurisdiction.
44. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 these principles were set out thus;



45. It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”
46. It is evident that the Court has discretion to enlarge time to file an Appeal. However, the Court has to consider the explanation given for the delay and any other sufficient reasons.
47. See the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where the Supreme Court stated as follows;
- it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
48. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
49. The Applicant herein has explained the reason for the delay. That he had filed the Appeal on time but the same was filed in a wrong Court. That it is the High Court which did not have jurisdiction and proceeded to struck out the said Appeal No. HCCA E041 of 2021 for want of jurisdiction.
50. The Applicant has satisfactorily explained the reasons for the delay and the Court finds the prayer for leave to file the Appeal out of time is merited.

### **iii. Whether the prayer for stay of execution is merited?**

51. The Court is guided by Order 42 Rule 6 (2) of the *Civil Procedure Rules* which provides;
- (2) No order for stay of execution shall be made under subrule (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 on him has been given by the applicant”.
52. It is evident that the filing of an Appeal is not an automatic stay of execution. The Appellant has to file an Application for stay of execution and satisfy the Court that he/she deserves the orders for stay.
53. The Court has seen the intended Memorandum of Appeal. However, this Court has not seen a copy of the Lower Court Judgement to satisfy itself of the final Orders that were issued by the said Court. The Court has also not seen the copy of the claim that had been filed at the Lower Court to confirm whether the said prayers were issued by the Lower Court and that if the said Orders are executed, then the instant Appeal will have been rendered nugatory. The Court finds that the Applicant has not annexed any evidence of the Orders that were issued by the Lower Court for this Court to satisfy itself that if indeed there is no stay, and the said orders are executed, then the Applicant will suffer substantially and that the Appeal will be rendered nugatory. The Court finds that the prayer for stay of execution is not merited.
54. Having now carefully considered the instant Notice of Motion dated 17<sup>th</sup> May 2022 and the Response thereto in opposition to the same and the rival written submissions, the Court finds that the said Application is merited in terms of prayers No. 2,3 and 4.
55. However, prayer No. 5 is disallowed and the same is dismissed entirely. The Applicant is entitled to costs of this Application.
56. Further, the Court directs the Applicant to file the intended Appeal within a period of 14 days, from the date hereof.
57. Failure to do so, the Orders granted herein will lapse automatically.
58. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27<sup>TH</sup> DAY OF JULY, 2022.**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Ms. Muthoni for the Applicant

Respondent – Absent

L. Gacheru

Judge

27/7/2022

