



**Wekesa & another v Wekesa (Environment and Land Appeal  
E001 of 2022) [2022] KEELC 3597 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

**BN OLAO, J**

**JULY 21, 2022**

**BETWEEN**

**GEORGE WEKESA ..... 1<sup>ST</sup> APPLICANT**

**DOROTHY SYLVIA WEKESA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DANIEL NYONGESA WEKESA ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Notice of Motion dated February 7, 2022 in which Dorothy Sylvia Wekesa And Geoffrey Wekesa (the 1<sup>st</sup> and 2<sup>nd</sup> Applicant respectively) seek the following orders: -
  1. Spent
  2. That the Honourable Court be pleased to temporarily stay this appeal pending the hearing and determination of ELC 067 of 2021 Dorothy Sylvia Wekesa & Geoffrey Wekesa v Daniel Nyongesa Wekesa.
  3. That the Honourable Court be pleased to dismiss the appeal since the entire ruling has been fully spent and adequately utilized.
  4. That in the alternative, the Honourable Court do make such other interlocutory order as it may deem just and expedient pending the hearing of this application.
  5. That the Applicants be at liberty to pray for such further or other orders as the Honourable Court may deem fit and just to grant.
  6. That the costs of this application be provided for.



The Notice of Motion which is premised on the provisions of Section 3A of the *Civil Procedure Act* and Order L Rule 1 of the *Civil Procedure Rules* is also supported by the affidavit of Ruth Wangui Kuria Counsel for the Applicants.

2. The gravamen of the application is that the parties herein are litigating in Bungoma Chief Magistrate's Court ELC Case No E067 of 2021 in which Judgment is yet to be delivered. Meanwhile, the Respondent has filed this appeal against the ruling of Hon. C. S. Mutai (senior Principal Magistrate) delivered on December 10, 2021. However, that ruling has already been spent and this appeal is now an academic exercise. That if this appeal is not dismissed, then the trial Court will be deprived of its independence to hear and determine the issues pending before it. That the Respondent in this application and who is the Appellant in the pending appeal has already been evicted from the subject matter of the suit being land parcel No West Bukusu/south Mateka/5406 (the suit land) and so the Appellant is pursuing an appeal which has already been overtaken by events and which is therefore frivolous, un – sustainable and a waste of Judicial time.
3. Annexed to the supporting affidavit are the following documents: -
  1. The impugned ruling delivered on 10<sup>th</sup> December 2021 in Bungoma Chief Magistrate's Court Elc Case No E067 of 2021.
  2. Proceedings in Bungoma Chief Magistrate Court Elc Case No E067 of 2021.
  3. Letter dated February 28, 2022 from OCS Bumula Police Station addressed to Chief Magistrate Bungoma Court.
4. The application is opposed and Daniel Nyongesa Wekesa the Respondent has in his replying affidavit dated March 22, 2022 described the application as aimed at denying him justice. That he is exercising his Constitutional right in filing this appeal being dissatisfied with the ruling delivered in the Subordinate Court on December 10, 2021.
5. Annexed to the said affidavit are the following documents: -
  1. Memorandum of Appeal No E001 of 2022.
  2. Plaint, Defence and other pleadings in Bungoma Chief Magistrate's Court Elc Case No 67 of 2021.
6. The application has been canvassed by way of written submissions. These have been filed both by Ms Kuria for the Applicants and by Ms Ayieko for the Respondents.
7. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel.
8. The gist of the Applicants' submissions is that in filing the appeal herein which is still pending, the Respondent is pursuing a lost cause. This is how Counsel to the Applicants has submitted in paragraphs 24 and 25 of those submissions: -

24: "Your Honour, it is our humble submission that the purpose of the appeal by the Appellant/Respondent is to preserve the subject matter that is already spent and dispensed with as the orders dated December 10, 2021 *are fully procedurally utilized by the Applicants in exercise of the ruling issued by the lower Court in ELC E067 of 2021 – Dorothy Sylvia Wekesa & Geoffrey Wekesa v Daniel Nyongesa Wekesa.*"



25: “From the foregoing, it is our submission that one cannot appeal orders that are already spent and hence the appeal by the Appellant/Respondent has been overtaken by events and should therefore be dismissed.”

9. In response to those submissions, Counsel for the Respondent has submitted thus: -

Your Lordship, the Respondent herein filed a Memorandum of Appeal on the January 3, 2022 challenging the lower Court ruling which allowed the eviction of the Appellant at the application stage.

Your Lordship under the *Constitution of Kenya 2010*, the right to a fair trial is a fundamental right the non – observance of which undermines all other human rights. Therefore, the right to a fair trial is a non – derogable right.”

10. Whereas it may or may not be true that the Respondent is pursuing an appeal which has already been spent, the Applicants herein also need to remember that under Article 50(1) of the *Constitution*, it is stated that: -

50(1) “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.”

Article 48 of the *Constitution* provides for the right to access to justice. The rules of Natural Justice – *Audi Alteram Partem* (hear the other side) demand that no person shall be condemned un – heard. Having filed this appeal, the Respondent herein and who is the Appellant in the appeal is entitled to expect that the procedures set out in Sections 79 to 79G of the *Civil Procedure Act* are applied before his appeal is dismissed as sought by the Applicants. In any event, before the appeal is dismissed, it has to be heard and determined on it’s merits.

11. The only way in which an appeal can be summarily rejected is provided for under Section 79B of the *Civil Procedure Act* which reads: -

79B “Before an appeal from the Subordinate Court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers there is no sufficient ground for interfering with the decree, part of the decree or order appealed against he may, notwithstanding Section 79C, reject the appeal summarily.” Emphasis mine.

Even if this Court was minded to summarily reject the appeal, there is no basis upon which I can exercise that discretion because as of now, there is no record from the Subordinate Court to enable me to do so. Without the record of the Subordinate Court, I cannot give any directions in the appeal as envisaged under Section 79C of the *Civil Procedure Act*. The Applicants herein are therefore jumping the gun. There is no jurisdiction which this Court can exercise in “dismissing” the appeal in the manner sought by the Applicants.

12. Secondly, no matter how weak the appeal may be, the Appellant is entitled to his day in Court. In *Savings And Loan Kenya Ltd v Odongo* 1987 KLR 294, the Court of Appeal said:-

The very foundation upon which any Judicial system vests is that a party who comes to Court shall be heard fairly and fully. The Court is duly bound to hear all parties to a case and failure to do so is an error.”

Indeed, as was held by Madan J A In *DT Dobie & Company (k) Ltd v Muchina* 1982 KLR 1, the power to strike out any pleading is to be exercised in only the clearest of cases. The above was also reiterated in



the case of *Yaya Towers Ltd v Trade Bank Ltd (in Liquidation)* Ca Civil Appeal No 35 of 2000 where the Court said: -

A plaintiff is entitled to pursue a claim in our Court however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the Court, it must be allowed to proceed to trial ..... It cannot be doubted that the Court has inherent jurisdiction to dismiss that which is an abuse of the process of the Court. It is a jurisdiction which ought to be sparingly exercised and only in exceptional cases ..... No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

The same argument would apply to an appeal. When this appeal is eventually placed before me for directions, I will then exercise my jurisdiction under Section 79B of the *Civil Procedure Act*, and see if there is no sufficient ground for interfering with the impugned ruling and only then can I reject the said appeal summarily or admit it for hearing. I cannot at this stage purport to dismiss this appeal in the manner sought by the Applicants.

13. The up – shot of all the above is that the Notice of Motion dated February 7, 2022 is devoid of merit. It is accordingly dismissed with costs.

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> July 2022.**

Ruling dated, signed and delivered at BUNGOMA by way of electronic mail on this 21<sup>st</sup> day of July 2022. This ruling was due to be delivered on 12<sup>th</sup> July 2022 but I was in Nairobi for the Installation ceremony of the Presiding Judge of this Court. The delay is regretted.

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> July 2022.**

