



**Murrunka & another v Maki (Environment and Land Appeal
E004 of 2022) [2022] KEELC 13283 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 13283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

EM WASHE, J

JULY 19, 2022

BETWEEN

JOSEPH MBATIAN MURRUNKA APPLICANT

AND

JANET TUYUNI YIAMPOI APPELLANT

AND

JOSEPH L. MAKI RESPONDENT

RULING

1. The plaintiffs/applicants herein filed a notice of motion application dated March 11, 2022 (hereinafter referred to as “the present application.”) in court on the March 14, 2022.
2. The prayers in the present application are as follows; -
 - i. That this application be and is hereby certified urgent and the same be heard *ex-parte* in the first instance. (spent)
 - ii. That this honourable court do grant leave to the firm of Shira & Company Advocates to come on record for the appellant/applicants after judgement. (spent)
 - iii. That this honourable court do order for stay of execution of the judgement delivered in Kilgoris MCL & E No 40 of 2018 between the parties herein on July 9, 2020 and/or the subsequent Decree dated August 28, 2020 and/or the warrants of execution given on the November 26, 2021 and all other subsequent proceedings and/or consequential orders pending the hearing and determination of this application inter partes.
 - iv. That the appellants/applicants be at liberty to apply for such further or other orders and/or directions as the court may deem fit and just to grant in the circumstances.



- v. That costs of this application be provided for.
3. The present application is supported by the affidavit of Joseph Mbatian L Murrunkawho is the 1st appellant/applicant sworn on the March 11, 2022 (hereinafter referred to as “the applicant’s supporting affidavit.”)
 4. The applicant’s supporting affidavit places before the court three annexures namely the warrant of sale of property in execution of decree for money issued to fortune auctioneers dated November 26, 2021, The warrant of attachment of movable property in execution of decree for money issued to fortune auctioneers on the November 26th, 2021 and lastly, a copy of the auctioneer’s bill of costs dated February 16, 2022.
 5. The present application was served on the respondent and a replying affidavit dated March 21, 2022 was duly filed in court on the March 22, 2022 (hereinafter referred to as “the replying affidavit.”)
 6. In the replying affidavit, the respondent placed before this court the ruling pronounced on the November 8, 2021 in the proceedings known as Narok ELC Appeal No 3 of 2020, a Taxation Notice dated August 5, 2020 as regards the proceedings known as Principal Magistrates Court at Kilgoris Case No 40 of 2018 ,the affidavit of service of the notice of taxation dated August 5, 2020, a notice to show cause why warrants of arrest should not be issued under order 26 rule 32 dated February 15, 2022 and the relevant Affidavit of Service dated March 10, 2022.
 7. On the May 18, 2022, the court directed that the present application be canvassed by way of written submissions.
 8. The applicants indeed filed their submissions on the May 27, 2022 and the respondent filed his submissions on the April 19, 2022.
 9. The issues for determination in the present application have been captured by both parties in their submissions as follows; -
 - a. Is there a proper appeal before the court to grant jurisdiction for the present application to be entertained?
 - b. Is the present application res judicata keeping in mind the ruling pronounced on the November 8, 2021 in Narok ELC Appeal No 3 of 2020?
 - c. Does the present application meet the threshold of the Court granting stay pending appeal?
 - d. Who bears the costs of the present application?

Issue A- Is there a proper appeal before the court to grant jurisdiction for the present application to be entertained?

10. The respondent in the replying affidavit raised an issue of jurisdiction to entertain the present application.
11. The respondent avers in the replying affidavit that the applicant failed to comply with order B issued in the Ruling pronounced on the November 8, 2021 in Narok ELCA NO 3 of 2020.
12. Order B of the ruling pronounced on the November 8, 2021 in Narok ELCA No 3 of 2020 granted leave to the applicants in this present application to file the record of appeal within 30 dates thereof.
13. The record of appeal was then filed on the February 15th, 2022 in this current file.



14. The period between the pronouncement of the ruling on November 8, 2021 and February 15, 2022 exceeds the 30 days granted by the court.
15. The applicants have indeed admitted in their submission dated May 25, 2022 that the record of appeal was filed out of time.
16. However, the applicants have pleaded that it was a mistake of the previous counsel and this mistake should not be visited upon the clients.
17. The applicants then relied on the decision of *Gideon Mose Onchwati v Kenya Oil Co Ltd & another*.
18. The gist of the above cited decision is that a litigant should not bear the consequences of the advocates default unless the litigant is privy to the default or the default results from, on the part of the litigant, to give the advocate due instructions.
19. A perusal of the Ruling pronounced on the November 8, 2021 discloses the fact that the applicants herein had not filed any memorandum of appeal as at the time of determination of the applicants application dated September 10, 2020.
20. The subsequent leave granted by the court on the November 8, 2021 entailed the filing of a memorandum of appeal and record of appeal within 30 days.
21. The applicants failure to comply with the period granted by the court effectively meant that both the memorandum of appeal and the record of appeal were filed out of time.
22. The present applicant does not seek for enlargement of time as provided in section 95 of the *Civil Procedure Act*.
23. In addition to the above, there is no prayer in the present application to deem the memorandum of appeal and record of appeal filed out of time to be deemed as fully filed.
24. The applicants have simply closed their eyes to the issue of having filed the both the memorandum of appeal and/or the record of appeal out of time.
25. The applicants explanation that the delay was caused by a mistake of the previous counsel can only be a ground for the enlargement of time.
26. The legality of the both the memorandum of appeal or record of appeal has to be dealt with through section 79 G and 95 of the *Civil Procedure Act*.
27. In conclusion therefore, there is no valid appeal before the court to enable the court entertain the applicants present application.
28. In the case of *Patrick Kiruja Kitbinji v Victor Mugira Marete*; Meru CACA No 48 of 2014, the court held as follows; -

“An appeal filed out of time goes to the jurisdiction of the court and deprives it of jurisdiction to entertain an appeal filed out of time without leave.”
29. In the celebrated case of *Owners of the Motor Vessel Lillian v Caltex Kenya* (1989) KLR, the court observed as follows; -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending



other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

30. This court therefore finds that there is not valid appeal before the court to grant it jurisdiction to hear and/or determine the applicants’ present application.
31. In the absence of jurisdiction, this court is unable to make any further determinations on the remaining issues outlined hereinabove.

In conclusion therefore, the court makes the following orders; -

- A. The application dated March 11, 2022 is and is hereby dismissed.
- B. The applicants will bear the costs of this application.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 19TH JULY 2022.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

Court Assistant: Ngeno

Advocate for the applicant: shira for the applicants

Advocate for the respondent: Okemwah/b for Nyambatifor respondent.

