



REPUBLIC OF KENYA



**Kapngetuny Farm Limited & 2 others v Kosgei (Environment and Land Appeal E039 of 2021) [2022] KEELC 12582 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12582 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E039 OF 2021  
SM KIBUNJA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**KAPNGETUNY FARM LIMITED ..... 1<sup>ST</sup> APPELLANT**

**SIMON KURGAT ..... 2<sup>ND</sup> APPELLANT**

**SAMUEL MALAKWEN ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ESTHER JELAGAT KOSGEI ..... RESPONDENT**

*(Being an application for stay of execution of the Judgement and decree of the Chief Magistrates Court at Eldoret (HON. R. Odenyo) dated 19th August, 2021 in Eldoret CMCC Case NO. 16 of 2015)*

**RULING**

**[Notice of motion Dated the September 21<sup>st</sup>, 2021 and notice of preliminary objection Dated the September 30<sup>th</sup>, 2021]**

1. The appellants filed the notice of motion dated the September 27, 2021 seeking for the following orders;
  - a. Spent.
  - b. Spent.
  - c. There be stay of execution of the judgment and decree hearing pending the hearing and determination of the appeal herein, Eldoret Civil Appeal No E039 of 2021.
  - d. Costs of this application do abide the outcome of the appeal.



The application is brought under sections 1A, 1B, 3A, 34 of the [Civil Procedure Act](#) and order 42 rule 6, and order 51 of the [Civil Procedure rules](#). It is premised on the seven (7) grounds on its face and supported by the affidavit sworn by Simon Kurgat, the 2<sup>nd</sup> appellant, on the September 27, 2021. It is the appellants case inter alia, that they are aggrieved by the judgment of the lower court and have appealed against that decision to this court; that they are apprehensive that the Respondent will extract the decree and execute the judgment resulting in irreparable loss to the appellants; that the intended appeal has overwhelming chances of success and will be rendered nugatory should this application be disallowed, and that the application is grounded on the interest of justice.

2. The application is opposed by the respondent through the two (2) grounds on the notice of preliminary objection dated September 30, 2021 and replying affidavit sworn by Esther Jelagat Kosgei, the respondent, on the September 30, 2021. The respondent's case is among others that the application offends the provisions of section 79G of the [Civil Procedure Act](#); that the motion is an abuse of court process and subjudice as a similar motion for stay of execution is pending before the lower court; that grant of stay cannot be predicated on an incompetent motion; that the application is subjudice, and neither substantial loss nor sufficient cause have been established; that no offer of security has been made; that the litigation has protracted for about sixteen (16) years from the year 2005, and that the appeal and motion should be dismissed with costs.
3. That following the consent of the February 21, 2022 on filing and exchanging submissions on both the preliminary objection and the notice of motion, the learned counsel for the appellants and respondent filed their submissions dated the March 22, 2022 and April 5, 2022 respectively, which are as summarized here below.
  - a. The appellants counsel submitted that the grounds set out in order 42 rule 6 of the [Civil Procedure rules](#) serve as guidance to the court in considering applications such as the instant one. The counsel referred to the decisions in the cases of [RWW v EKW](#) [2019] eKLR, and [Victory Construction v BM \(Minor suing through next friend noe PMM\)](#) [2019] eKLR. The appellants further submitted that the amount claimed under the impugned judgement is substantial, and if paid to the respondent when the appeal is pending, the respondent will be unable to repay should the appellants be successful on appeal. That the application has been filed one month after the judgement, and three days after filing the appeal and therefore without unreasonable delay. That it is for the court to give directions for the security to be deposited. That the appellants have established the requirements for the grant of stay of execution of the impugned judgement, and their prayer should be granted with costs in view of section 27 of [Civil Procedure Act](#), chapter 21 of Laws of Kenya, that costs follow the events.
  - b. The learned counsel for the respondent submitted that this court is without jurisdiction to entertain both the application and appeal as the same was lodged out of time contrary to the provisions of section 79 of the [Civil Procedure Act](#). The counsel cited the decisions in the cases of [Joseph Michael Mwenja v Woolmatt Limited](#) (2019) eKLR, [Gregory Kiema Kyuma v Marietta Syokau Kiema](#) (1988) eKLR, [Captain Harry Gandy v casper Air Charters Limited](#) (1956) 23 EACA, 139, [Carter & Sons Ltd v deposit Protection Fund Board & 2 others](#) Nbi. Civil Appeal No 291 of 1997, [Ndiritu Muriithi v IEBC & 2 others](#) (2018) eKLR, [Meteine Ole Kilelu & 19 others v Moses K Nailole](#) (2009) eKLR, [Machira t/a Machira & Company Advocates v East Africa Standard](#) (No 2) (2002) KLR 63, [Kenya Shell Limited v Benjamin Karugu Kibiru & another](#) Nbi. CA Civil Application No 97 of 1986, [Attorney General v Law Society of Kenya & another](#) CA Civil Appli No 133 of 2011 (UR), [Richard Nyongesa Mayamba v Jane Namono Meru](#) (2011) eKLR, and [Jaber Mohsen Ali & another v Priscillah Boit & another](#) (2014) eKLR. The counsel submitted further that the motion is defective and incompetent



for failure to indicate the case reference number, and particulars of the decree sought to be stayed; that there are no competent pleadings upon which the relief sought can be grounded; that neither substantial loss nor sufficient cause have been established by the appellants; the appellants have not shown that the respondent is a person of straw; that the issue of security has only been raised in submissions, yet it ought to have been deposed to on oath, and urged the court to strike out both the motion and the appeal, with costs.

4. the following are the issues for the court's determinations;
  - a. Whether notice of preliminary objection has merit.
  - b. If (a) is in the negative, whether the appellants have satisfied the threshold for grant of stay of execution pending the hearing and determination of the appeal.
  - c. Who pays the costs.
5. The court has after carefully considering the grounds on the application and the preliminary objection; the affidavit evidence by both sides, submissions by counsel for the parties, superior courts decisions cited thereon come to the following conclusions;
  - a. What amounts to a preliminary objection was defined by Sir Charles Newbold in the celebrated case of *mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, cited by the Supreme court in [\*Hassan Nyanje Charo v Khatib Mwashetani & 3 Others\*](#), Supreme court appli No 23 of 2014, as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

It therefore follows that a preliminary objection can only be raised on a pure question of law. That includes points of law touching on the jurisdiction of the court, questions of the plea of limitation and questions of a party's locus standi to institute or defend a suit.

- b. To discern a point of law, the court has to be satisfied that there is no contest as to the facts on record. The facts have to be deemed as uncontested or as prima facie presented on record. Anything purporting to be a preliminary objection must not deal with disputed facts, and as stated by Hon Justice Ojwang (as he then was) in [\*Oraro v Mbaja\*](#) [2005] eKLR, ‘it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....’ Whenever a court of law is called upon to hear and determine an appeal arising from a decision of a subordinate court, it cannot assume jurisdiction that it does not have.
- c. The question of whether an appeal was filed out of time goes to the root of the jurisdiction of this court. For as long as the question of jurisdiction lingers, it must be determined in limine. See [\*Owners of the motor Vessel “Lillian SS” v Caltex Oil \(Kenya\) Ltd\*](#) 1989 KLR 1. In the matter before the court, it is not contested that the impugned judgment was delivered on August 19, 2021. It is also not disputed that the memorandum of appeal was filed on the September 24,



2021 and the instant notice of motion for stay of execution order filed on the September 27, 2021. The question that arises is therefore whether there is a proper appeal before this court. section 79G of the Civil Procedure Act provides that -

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

What can be gleaned from the above provision is that for the appellants to have a competent application, based on the appeal, the said appeal ought to have been filed within the statutorily prescribed time limit prescribed of thirty (30) days.

- d. That as the impugned judgement was delivered on the August 19, 2021 the thirty days lapsed on or about September 18, 2021. That the appellants had not filed any appeal by that date, and it was not until seven (7) days later on the September 24, 2021, that the appeal herein was filed. That the appellants have not sought for extension of time to file the appeal, or attempted to offer any explanation for the delay, by for example tendering a certificate of delay. I must emphasize that the requirement that an appeal ought to be filed within thirty (30) days is not a mere procedural requirement or technicality curable under article 159 of the Constitution. It is not. The thirty (30) days period is rooted in express statutory provisions, and I am of the view that it goes to the root of the appellate jurisdiction of this court. As the appeal upon which the instant application is grounded upon was filed outside the thirty (30) days period prescribed by the law, and therefore out of time, this court is bereft of jurisdiction in both the appeal and the notice of motion.
- e. There is no evidence of any application filed by the appellants to have the appeal admitted out of time. There is therefore, no valid appeal before this court upon which I can issue an order for stay of execution pending appeal, in terms of the notice of motion filed. That unless otherwise permitted by the court, an order for stay of execution can only be issued where there is a valid appeal before court, and as there is no valid appeal in this case. The application for stay pending appeal therefore lacks a foundation.
- f. Further, I have noted that the appellants have not disputed that they had filed an application dated the August 31, 2021 before the lower court seeking for stay of execution orders over the same judgement delivered on the August 19, 2021. I have looked at the copy of the said application annexed to the respondent’s replying affidavit and it seeks stay of execution of the decree emanating from the same judgment as the present application. That application was reportedly pending ruling before the Magistrates’ court by the time the instant notice of motion was filed. I fail to understand why the appellants found it necessary to file the present application when both parties and Counsel were aware of the existence of the application for stay before the lower court. The existence of the application for stay before the lower court over the same judgement and or decree makes the application herein that was subsequently filed before this court subjudice.



- g. That the findings above lead the court to conclude that the notice of motion dated the September 27, 2021 is without merit. That further, the court finds merit in the two grounds raised by the respondent through the preliminary objection dated the September 30, 2021.
  - h. That as the appellants' application has failed while the respondent's preliminary objection has been upheld, in terms of section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, the appellants will pay the respondent costs.
6. The upshot of the foregoing is that the appellants' application fails while the respondent's preliminary objection succeeds. The court therefore orders as follows;
- a. The appellants' application dated the September 27, 2021 be and is hereby dismissed with costs.
  - b. The Respondent's preliminary objection is hereby upheld and the Memorandum of Appeal dated and filed on the 24<sup>th</sup> September, 2021 be and is hereby struck out with costs.
- orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2022**

**S. M. Kibunja, J.**

**Environment & Land court - Eldoret**

IN THE VIRTUAL PRESENCE OF;

APPELLANTS: .....

RESPONDENS: .....

COUNSEL: .....Absent

court ASSISTANT: ONIALA

**S. M. Kibunja, J.**

**Environment & Land court - Eldoret**

