



**Mutua & 3 others v Mutua & 4 others (Environment & Land Case
75 of 2013) [2022] KEELC 14562 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14562 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 75 OF 2013
CA OCHIENG, J
OCTOBER 31, 2022**

BETWEEN

**RASHID MUTUA 1ST PLAINTIFF
MUKAI MBAI MUVINGA 2ND PLAINTIFF
ANGELINA MUTILE MUTHOKA 3RD PLAINTIFF
KYALO NYUMBU KYAKA 4TH PLAINTIFF**

AND

**PETER KYALO MUTUA 1ST DEFENDANT
NZIOKI WILSON NDUTU 2ND DEFENDANT
DANIEL MULANDI KIKUNZE 3RD DEFENDANT
ROSEMARY K. MUTUNGA 4TH DEFENDANT
JULIUS KIOKO 5TH DEFENDANT**

RULING

1. What is before court for determination is the plaintiffs' notice of motion application dated the February 28, 2022 brought pursuant to section 1A, 3B and 75G of the *Civil Procedure Act* and order 43 and 51 of the *Civil Procedure Rules*. The plaintiffs seek the following orders:
 1. Spent
 2. That the applicant be granted leave by the honourable court to lodge an appeal out of time.
 3. That the honourable court be pleased to stay execution of judgment dated February 3, 2022 pending lodging of intended appeal and pending the hearing and determination of the appeal.



4. Costs do abide outcome of the application.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Rashid Mutua. The applicants contend that judgment was delivered on February 3, 2022 by a court on transfer sitting in Nairobi. Further, that both parties were absent and were unable to access court within the required time. They state that they were unable to access the judgment in Machakos registry upon return of court file. They reiterate that the appeal is meritorious. Further, that the respondents illegally filed documents dated the October 18, 2018 that were used to procure a favourable decision in their favour. They aver that the respondents used their submissions to introduce new evidence which was contrary to the law. Further, that the respondents have already served them with a notice of taxation which is scheduled to be heard on April 13, 2022.
3. In response to the instant application, the defendants/respondents filed a notice of preliminary objection on the following grounds:
 1. That the courts lack the jurisdiction to entertain the application and the same offends the provisions of rule 4 of the *Court of Appeal Rules*.
 2. That the plaintiffs suit having been dismissed, there is no positive order to be stayed hence no orders for stay of execution of the judgment can be granted.
 3. That the application is a non-starter and should be struck out with costs to the defendants/respondents.
4. The plaintiffs filed a further affidavit sworn by rashid mutua where they insist the notice of preliminary objection is misplaced and misconceived. They argue that section 7 of the *Appellate Jurisdiction Act* empowers and gives the High Court jurisdiction to extent time for giving notice of intention to appeal. Further, that the respondents are in the process of executing for costs as evident in the bill of costs which has been filed. They contend that the court had ordered *status quo* in the matter that prevented the respondents from further subdivision of the land to third parties. Further, that the respondents are likely to commence subdivision of the land in absence of a stay.
5. The application and notice of preliminary objection were canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant notice of motion application dated the February 28, 2022 including the notice of preliminary objection, respective affidavits and rivalling submissions, the following are the issues for determination: Whether the plaintiffs should be granted an extension to lodge an appeal out of time. Whether the court should grant a stay of execution pending lodging and determination of the intended appeal.
7. As to whether the plaintiffs should be granted an extension to lodge an appeal out of time.
8. The law provides that any party aggrieved with the decision of this court and seeks to appeal is supposed to file a notice of appeal within fourteen (14) days from the date of the said decision. On extension of time to file a notice of intention to appeal, section 7 of the *Appellate Jurisdiction Act* cap 9 provides *inter alia*:

The High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a



certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

9. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997 the Court of Appeal stated that:

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.”

10. See also the decision in *Fakir Mohammed v Joseph Mugabe & 2 others*, Civil Application No Nai 332 of 2004.
11. In this instance the applicants have explained the reason for the delay in filing the notice of appeal and stated that the confusion arose as a result of the transfer of the trial judge who delivered his judgment in absence of both parties. Further, they were unable to get the court file from the registry. I note the instant application was filed on February 28, 2022 while the impugned Judgment had been delivered on February 3, 2022. From this time line, I find that the delay was not inordinate.
12. Based on the facts as presented while relying on the legal provisions cited above and associating myself with the quoted decision, it is my considered view that the applicants have established a case for extension of time to file the notice of intention to appeal. Further, noting that article 159(2) (d) of the *Constitution* allows justice to be dispensed without procedural technicalities and granting of leave is discretionary, I will allow the orders as sought.
13. As to whether the court should grant a stay of execution pending lodging and determination of the intended appeal.
14. I note in this instance the plaintiffs have not yet lodged an appeal. Further, on perusal of the court file, i note the plaintiffs suit was dismissed with costs. The legal provisions governing stay pending appeal are contained in order 42 rule 6(2) of the *Civil Procedure Rules* which provides inter alia:

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.”

15. Further, rule 5(2) (b) of the *Court of Appeal Rules* provides thus:

Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”



16. In the Bungoma HC Misc Application No 42 of 2011 *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR the court held that:

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential are of the applicant as the successful party in the appeal. This is what substantial loss would entail...”

17. See also the decision of *Samuel Mwaura Muthumbi v Josephine Ngugi & another* (2018) eKLR.

18. In this matter, judgment was delivered on February 2, 2022 dismissing the plaintiffs’ suit with costs. The plaintiffs being dissatisfied with the whole of the said judgment seek to lodge an appeal but are yet to file a notice of appeal. The plaintiffs are apprehensive that the defendants will proceed to subdivide the suit land to their detriment. The defendants insist the plaintiffs are not entitled to orders of stay since there was no positive order to be stayed. They aver that if a stay is granted, then the plaintiffs should provide security for the taxed costs.

19. From the averments in the respective affidavits, i find that applicants have not demonstrated what loss they stand to suffer. In the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal (Kantai JA) held as follows: -

...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co Advocates v National Insurance Corporation* (Civil Appeal No13 of 1984) where it was stated:

‘... an order for stay of execution must be intended to serve a purpose ...’”

20. Based on the facts as presented while relying on this Court of Appeal decision, I find that there is no positive order to be stayed. I opine that since the plaintiffs are yet to lodge a notice of appeal in the Court of Appeal, the instant application for stay of execution pending appeal is premature. In the circumstances, while relying on rule 5(2) (b) of the *Appellate Jurisdiction Act (Court of Appeal Rules)* cited above and associating myself with the decisions quoted, I find that the applicants have failed to meet the threshold set for granting stay of execution pending appeal and will decline to grant the said orders.

21. It is against the foregoing that I find the plaintiff’s notice of motion application dated the February 28, 2022 partially successful. I will allow prayer No 2 only but dismiss the rest of the prayers. I direct the plaintiffs to file and serve the notice of appeal within fourteen (14) days from the date hereof, failure of which the leave is cancelled.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF OCTOBER, 2022.

CHRISTINE OCHIENG

JUDGE

