



REPUBLIC OF KENYA



KENYA LAW
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**Mzingo v Nzaka & another (Environment & Land Case 93 of 2019)
[2022] KEELC 14847 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 93 OF 2019
MAO ODENY, J
NOVEMBER 16, 2022**

BETWEEN

ABDALLA CHOGO MZINGO PLAINTIFF

AND

JUMA NZAKA (SON) 1ST DEFENDANT

JOHN NZAKA (DECEASED) 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated March 15, 2022 by the defendant/applicants seeking the following orders: -
 - a. Spent.
 - b. That the Honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Justice J. O Olola delivered against the Applicant on the April 30, 2021 pending the hearing of this application inter partes.
 - c. That the Honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Justice J.O Olola delivered against the Applicant on the April 30, 2021 pending the hearing and determination of the appeal in the Court of Appeal.
 - d. That the costs of this application be provided for.
2. The application was supported by the annexed affidavit of Juma Nzakasworn on the March 15, 2022 where he deponed that he was granted leave on February 23, 2022 to appeal the decision of Justice J.O Olola delivered against the applicant on the April 30, 2021 whereby he has preferred an appeal to the Court of Appeal and that if stay of execution is not granted he will suffer irreparable and substantive loss in the event execution proceeds.



3. The Plaintiff filed a replying affidavit sworn on the March 4, 2022 whereby he deponed that in a ruling dated 22nd February, 2022 the defendant/ applicant was allowed to file an appeal out of time within 14 days which period expired on March 19, 2022. That he was served with a Notice of Appeal dated February 23, 2022 which was lodged on February 28, 2022. He asserted that that amounted to an abuse of the court process since the application for stay had already been dealt with and determined.

Analysis And Determination

4. I agree with the plaintiff that this application is an abuse of the court process as the applicant filed an application dated August 12, 2021 seeking the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to order a stay of execution on the Ruling and/or order in ELC Cause No. 93 of 2019-Malindi delivered against the Applicant on the April 30, 2021, pending the hearing and determination of this Application.
 - c. That this Honourable Court be pleased to grant the applicant leave to file an Appeal against part of the Ruling written by Justice J.O Olola on the ELC Cause 93 of 2019- Malindi.
 - d. That this Honourable Court be pleased to grant the applicant leave to file an Appeal out of time against part of the Ruling written by Justice J.O Olola on the ELC Cause 93 of 2019- Malindi and as a result of enlarge the time for filing a notice of appeal of the decision.
 - e. That costs of this application be in the cause.
5. By a ruling dated February 22, 2022 this court found that the application for stay had no merit and was dismissed but the application for leave to file an appeal out of time was allowed. The Applicant was granted 14 days within which to file the appeal and failure to which the leave lapses.
6. I find that the application is an abuse of court process and is therefore dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

