



**Kigwe v Kigwe Limited & another (Environment & Land Case
E032 of 2021) [2022] KEELC 14815 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E032 OF 2021**

JG KEMEI, J

NOVEMBER 10, 2022

BETWEEN

CELINE WAMBUI KIGWE PLAINTIFF

AND

KIGWE LIMITED 1ST DEFENDANT

MHASIBU HOUSING COMPANY LIMITED 2ND DEFENDANT

RULING

1. The plaintiff/applicant filed the instant motion dated December 12, 2021 principally under Order 43 Rule 3(1) *Civil Procedure Rules*, Order 42 Rule 6; Order 51 Rule 1 of the Civil Procedure Rules; Sections 1A, 1B, 3A, & 63 E of the *Civil Procedure Act* seeking an Order That;
 - a. Spent.
 - b. That the honourable court be pleased to grant leave to the plaintiff to appeal against the Ruling and order of the honourable court delivered in this case on the December 9, 2021.
 - c. That pending the hearing of this application inter partes, the Honourable Court be pleased to extend the status quo prevailing in this case with respect to the Plaintiff's possession and occupation of sixteen (16) acres out of L.R. No. 10823/13 which status quo was ordered by the court on the June 24, 2021 and which the order of the court given on the December 9, 2021 extinguished or set aside.
 - d. That the honourable court be pleased to extend the status quo prevailing in this case, with respect to the plaintiff's possession and occupation of sixteen (16) acres out of L.R. No. 10823/13, to cover the period pending the hearing and determination of the appeal against the Ruling and order given in this case on the December 9, 2021.



- e. That should the plaintiff be evicted from the said sixteen (16) acres before this application is heard and eventually the court finds merit in the application then the honourable court be pleased to reinstate the plaintiff to the status quo ante pending the hearing and determination of the appeal against the Ruling and order of the court delivered in this case on the December 9, 2021.
 - f. That the honourable court be pleased to provide for the costs of the application.
2. On the 13/6/2022 Learned Counsel Mr. Masore for the applicant informed the court that he had withdrawn prayers Nos c-e in the Motion on 13/6/2022 leaving the singular prayer as contained in para 1(b) above.
 3. The Application is based on the grounds on the face of it and Supporting Affidavit of the Plaintiff, Celine Wambui Kigwe of even date. She avowed that being dissatisfied with this Court's Ruling delivered on 9/12/2021, she has filed her Notice of Appeal and request for typed proceedings dated 10/12/2021 both annexed as CWK1. That her Counsel has advised her that such a Ruling is not appealable as a matter of right hence the Application. She assailed the Court's Ruling to dismiss her suit for being Res Judicata on the basis of Milimani ELC 453 of 2013 that she was not privy to. That her appeal is arguable as demonstrated in her memorandum of appeal, CWK2.
 4. The 2nd defendant's Chief Executive Officer Morris Njagi swore his RA dated 13/6/2022 and averred that the Application is unmerited and an abuse of the process of the court. That the applicant has never had any interest in the suit land and therefore would not suffer any substantial loss if the order sought is denied. That the intended appeal does not have any reasonable chance of success since no triable issues have been raised. That the applicant's sole intention is to deny the 2nd defendant's right to enjoy fruits of its judgment and accordingly the Application ought to be dismissed with costs.
 5. These averments are echoed in the 2nd defendant's grounds of opposition of even date which opposed the application on the following grounds;
 - a. That the application lacks merit and has not demonstrated sufficient grounds that warrant this honourable court to grant leave to the applicant to appeal against the Ruling and order of the honourable court delivered in this case on the 9th of December 2021.
 - b. That the application is an attempt to bring back to court a matter that has already been rightfully dismissed by this honourable court on the 9th of December 2021 for running afoul the doctrine of res judicata.
 - c. That the application is misconceived and incapable of granting since it seeks to stay execution of a negative order which dismissed the suit. It is a settled principle in law that there can be no stay of a negative order hence this court cannot grant the orders sought.
 - d. That the application has already been overtaken by events. The eviction exercise was carried out and supervised by the Officer Commanding Station Juja Police Station pursuant to orders granted by Hon. I. Komingoi on the 2nd of November 2021.
 - e. That the prayers and grounds set forth in the application dated the 14th of December 2021 are meant to distract this honourable court from the fact the applicant has never had an interest in the suit land to begin with. The application is another desperate attempt by the applicant to deny the 2nd respondent the fruits of its Judgment.



- f. That justice will not be served by allowing the application. The applicant is admitting to trespassing on the suit property and is thus not deserving of any orders from this honourable court in regards to the suit property.
 - g. That the application is in bad faith and is an attempt to mislead this honourable court in regards to the true position of the ownership of the suit property. The 2nd respondent was declared the rightful owner of the property by Milimani Environment & Land Court on the 22nd of July 2021.
 - h. That the application is therefore an abuse of the Court process and should be struck out and/or dismissed with costs as the applicant fails to meet the threshold to warrant the orders sought.
 - i. And on other grounds to be adduced at the hearing herein.
6. On October 11, 2022 directions were taken to canvass the application through written submissions. Only the 2nd defendant filed its submissions dated October 18, 2022 through the firm of Gichuki King'ara & Co. Advocates.
7. As to whether the applicant should be granted leave to appeal the ruling delivered on the 9/12/2021, Counsel for the 2nd defendant /respondent submitted that the applicant has no prima facie grounds of appeal to warrant granting leave to so file an appeal. That leave to appeal is a discretionary relief and it is for the applicant to provide the court with justifiable reason and a strong arguable case which in his view the applicant has failed. That neither has the applicant showed any specific novel issue or point of law of general public importance which fall for consideration of the appellate court. See the case of *Masore Nyangau & Co Advocates v Supplies & Services Limited; Machira T/A Machira & Company Advocates v Wangethi Mwangi & anor; Sango Bay Estates Limited & others v Dresdner Bank AG*.
8. The sole issue for determination is whether the Application is merited.
9. The right to appeal is succinctly provided for under section 75 *Civil Procedure Act* as read with Order 43 *Civil Procedure Rules*. Section 75 *Civil Procedure Act* states;
- “75. Orders from which appeal lies
- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) an order under section 64;



- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under Rules from which an appeal is expressly allowed by Rules.
- (2) No appeal shall lie from any order passed in appeal under this Section.”
10. Order 43 Rule 1 (1) *Civil Procedure Rules* provides for orders that a party can appeal against as a matter of right i.e. without leave of court being sought. Order 43 Rule 1(2) *Civil Procedure Rules* however requires a party to seek leave to appeal against all other decisions/order that do not fall under Rule 1 (1) with leave of the court in the following terms;
- “(2) An appeal shall lie with the leave of the Court from any other order made under these Rules.”
11. An application seeking leave in this instance is made first to the trial court issuing such an order either orally at the time when the order is made, or within fourteen days from the date of such order pursuant to Order 43 Rule 1(3) *Civil Procedure Rules*. The instant motion was filed well within time on 15/12/2021, six days after the impugned Ruling was delivered on 9/12/2021.
12. The Applicant is dissatisfied with the said Ruling that found her suit to be Res judicata on the basis of Nbi ELC 454 of 2013. The 2nd Defendant argues that allowing the Application would hamper his right to enjoy the fruits of its Judgment. That it is not the correct position because the subject of appeal herein is the Ruling dated 9/12/2021 as opposed to the Judgment delivered in Nbi ELC 453 of 2013 which according to their Grounds of Opposition, has already been executed.
13. The decision whether or not to grant leave to appeal is discretionary as stated by the Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR where it was held that:
- “Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered.”
14. The rationale for requiring leave to appeal in certain instances was restated in *Rene Dol v Official Receiver of Uganda* [1954] 21(1) EACA 116 where it was held that:
- “The general purpose of requiring leave to appeal from some orders is to restrict appeals from being made in minor procedural or interlocutory matters which do not go to the root of the litigation or determine finally the substantive rights of the parties and which can themselves be brought into question in an appeal from the final decision..”
15. According to the decision in *Sango Bay Estates Ltd and others v Dresdner Bank AG* [1971] EA 17:
- “Leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of judicial discretion, a rather stronger case will have to be made out.”



16. In the case of *Machira T/A Machira & Company Advocates v Mwangi & anor* [2002] 2 KLR 391 where the court stated that:

“The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the Applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises a novel point or an issue where the law clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.”

17. In this case the applicant has filed grounds of appeal which are annexed to the application challenging the decision of the court issued on the 9/12/2021 where the court struck out her case for being *resjudicata*. Aggrieved by the decision the applicant filed a notice of appeal on the 10/12/2021. Without going into the merits or otherwise of the intended appeal, I am guided by the article 50 of the *Constitution* which guarantees the right to be heard and I am satisfied that the applicant should be granted leave so that she can ventilate her case in the appellate court.

18. In the upshot the application is granted. I make no orders as to costs.

19. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 10TH DAY OF NOVEMBER,
2022 VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff - Absent

1st Defendant - Absent

Wachuka for 2nd Defendant

Court Assistants – Phyllis / Kevin

