



**Ngatuny & 2 others v Mosoiko (Environment and Land Appeal
7 of 2022) [2022] KEELC 15557 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 7 OF 2022**

EM WASHE, J

DECEMBER 19, 2022

BETWEEN

MOSES MEIBAKO NGATUNY 1ST APPELLANT

KOIYAGI NGATUNY ALIAS KOIYAKI TOBIKO ATETI 2ND APPELLANT

SITONY NGATUNY 3RD APPELLANT

AND

PEIPEI OLE MOSOIKO RESPONDENT

RULING

1. The appellants (hereinafter referred to as “the applicants”) have filed a notice of motion application dated August 12, 2022 (hereinafter referred to as “the present application”) seeking the following orders ;-
 - i. The instant application be certified urgent and same be heard ex-parte in the first instance.
 - ii. Pending the hearing and determination of this application, the honourable court be pleased to grant an interim order of stay of execution and/or implementation of the judgement and/or decree issued on the December 10, 2019 *vide* Kilgoris PMC ELC Case No 9 OF 2018 together with all consequential orders.
 - iii. The honourable court be pleased to vary, rescind and/or set-aside the orders made on the July 12, 2022 vacating the orders issued by the honourable court on the November 4, 2021.



- iv. Consequent to prayer (3) hereinabove being granted, the honourable court be pleased to reinstate and/or restore temporary injunctive orders issued on the November 4, 2021 albeit vacated by the court on the July 12, 2022.
 - v. The honourable court be pleased to grant an order for extension and/or enlargement of time within which the appellants/applicants to comply with the orders issued on the November 4, 2021 more particularly, the limb requiring the appellants/applicants to file and/or lodge the record of appeal within 45 days.
 - vi. The honourable court be pleased to grant such further and/or other orders as may be deemed just, appropriate and/or expedient to be granted.
2. The prayers hereinabove have been supported by the grounds contained in the body of the application and the supporting affidavit sworn by 2nd applicant on the August 12, 2022 which can be summarised as follows;-
- a. The respondent herein obtained a judgement in its favour on the December 10, 2019 from the proceedings known as Kilgoris PMC ELC Case No 9 of 2018.
 - b. The judgement pronounced on the December 10, 2019 declared the respondent herein to be the lawful owner of the suit property known as Transmara/Moita/488 and directed the Land Registrar, Transmara to rectify the particulars of the owner accordingly.
 - c. The applicants being dissatisfied with the judgment pronounced on the December 10, 2019 filed a Memorandum of Appeal on the February 3, 2020 against the entire judgement.
 - d. In addition to the memorandum of appeal filed on the February 3, 2020, the applicants filed an application dated August 25, 2020 which was duly heard and determined on the November 4, 2021 by the issuance of the following orders;-
 - i. There shall be temporary injunctive orders against the respondents who are enjoined from entering or taking possession, sub-dividing, selling, charging, alienating and/or transacting on the suit property known as Transmara/Moita/488 that may affect or vitiate the title of the suit property, pending the hearing and determination of this Appeal.
 - ii. The applicants/applicants shall within 45 days from the date of this ruling, compile, file and serve upon the respondent a complete record of appeal in default the interim orders herein shall lapse automatically.
 - iii. The Deputy Registrar is directed to call for the proceedings of the lower court record for admission of this Appeal to hearing expeditiously.
 - iv. Costs to abide as per the outcome of the Appeal.
 - e. After the issuance of the above orders on the November 4, 2021, the appellants were not able to prepare, file and serve the substantive record of appeal within the 45 days period granted by the court.
 - f. The main reason why the record of appeal was not filed within the 45 days period was because the court registry has failed to provide the requisite proceedings of the trial court up to date.



- g. As a result of the failure to secure the requisite proceedings and filing the substantive record of appeal, the orders issued on the November 4, 2021 were vacated, lifted and/or set-aside on the July 12, 2022.
 - h. Thereafter, the respondent proceeded to file an application for eviction in the trial court seeking to now enforce their judgement having obtained a new title deed of the suit property in his name.
 - i. The trial court upon hearing the said application directed that the respondent was at liberty to issue a notice to show cause why the appellants should not be evicted from the suit property.
 - j. The applicants submission is that if the respondent proceeds and evicts them from the suit property, then the entire appeal shall be rendered nugatory.
 - k. In addition to the entire appeal being rendered nugatory, the appellants stand to suffer substantial loss from the destruction of their structures and/or homes which are within the suit property.
 - l. The appellants position is that the failure to comply with the orders of November 4, 2021 is as a result of the court's failure to provide the necessary proceedings to facilitate the filing of the record of appeal.
 - m. The appellant finally indicate their willingness to provide any security that may be required and/or directed by the court as a condition of the stay orders issued by the court.
3. The present application was served on the respondent who filed a replying affidavit sworn on the August 30, 2022.
4. The respondent opposed the present application on the following grounds; -
- a. The appeal filed by the appellants has not been admitted by this court.
 - b. The injunctive orders issued on the November 4, 2021 were conditional on the appellants filing the substantive record of appeal within 45 days from the issuance of the said orders.
 - c. In the event the substantive record of appeal was not filed within the 45 days, the said orders issued on the November 4, 2020 would be discharged and/or vacated accordingly.
 - d. Indeed, the said orders of November 4, 2020 were discharged, lifted and/or set-aside on the July 12, 2022 and the appellants have not filed any appeal against the said action by the court.
 - e. The applicants' present application has been brought purely to frustrate and/or deny the respondent from enjoying the fruits of his judgement which was pronounced on the December 10, 2019.
 - f. Similarly, the applicants have taken an extra ordinate time to file their record of appeal with a case in hand being the date of when the letter bespeaking an appeal was issued on the August 7, 2020.
 - g. Lastly, the respondent lamented the period of time this litigation has taken since its inception in the trial court and the appeal filed herein.
5. The court directed that the present application be canvassed by way of written submissions and in compliance thereof, the applicants filed their submissions on the October 24, 2022 while the respondent filed his submissions on the October 21, 2022.



6. The issues for determination in the present application can summarily be identified as are as follows;-

Issue No 1-

Should this court issue an order of stay of the judgement pronounced on the December 10, 2019 and the other orders thereof pending the hearing & determination of this application?

Issue No 2-

Should the court vary, set-aside and/or vacate the orders issued on the July 12, 2022 and reinstate the earlier orders of November 4, 2021.

Issue No 3-

Should the court extent and/or enlarge the time granted to the appellants to file their record of appeal in the orders issued on the November 4, 2021.

7. This court, having identified the above issues, it shall now proceed to analyse and make the necessary determination hereinbelow; -

Issue No.1-

Should this Court Issue an Order of Stay of the Judgement Pronounced on the December 10, 2019 and the Other Orders Thereof Pending the Hearing & Determination of this Application?

8. The issue under discussion emanates from Prayer No 2 of the present Application.
9. The applicants sought for a stay of the judgement issued on the December 10, 2019 and the other consequential orders thereof pending the hearing and determination of this application.
10. The manner in which this prayer is couched is specifically limited to only the pendency of this application.
11. Once the court pronounces its ruling on the present application, then legally speaking, this order will have been spent and/or overtaken by events.
12. It is therefore of no use to decide on the same yet the court has not been presented with a prayer that can be granted post the pronouncement of this ruling.
13. It is imperative and indeed trite law that parties are bound by their pleadings otherwise the court stands a risk of being accused of introducing prayers and remedies that have not been sought for.
14. It is the court's considered view that prayer No 1 as drawn has been overtaken by events and/or is spent as at the time of pronouncing this ruling and cannot be granted.

Issue No. 2-

Should the Court Vary, Set-aside and/or Vacate the Orders Issued on the July 12, 2022 and Reinstate the Earlier Orders of November 4, 2021.

15. The 2nd issue for determination arises from prayer No 3 & 4 of the present application.
16. According to the applicants, this court should review, vary and/or set-aside its orders of July 12, 2022 and instead reinstate the initial orders granted on the November 4, 2021.
17. The orders of this court issued on the July 12, 2022 were to lift the injunction orders issued on the November 4, 2021 prohibiting the respondent from entering, taking possession, sub-division, selling,



- charging, alienating and/or transacting on the suit property known as Transmara/Moita/488 that may affect or vitiate the title of the suit property, pending the hearing and determination of the appeal.
18. This particular injunctive order issued on the November 4, 2021 was to subsist on condition that the appellants have filed their record of appeal within 45 days from the date of the issuance.
 19. It is clear from the pleadings by the applicants that the record of appeal was not filed within the period specified in the order of November 4, 2021.
 20. It was therefore on the basis of this failure by the applicants that the court lifted, vacated and/or set-aside the orders of November 4, 2021 on the July 12, 2022.
 21. The applicants have submitted that the failure to comply and file the record of appeal within 45 days from the date of the ruling on the November 4, 2021 was as result of the court's inability to provide the necessary typed proceedings which form an integral part of the record of appeal.
 22. The applicants have indeed produced a number of letters in their supporting affidavit to prove that indeed they have been requesting and diligently pursuing the trial court proceedings from court to no avail.
 23. This court is apologetic for the delay in providing the required typed proceedings of the trial court to the applicants for the last two (2) years.
 24. Nevertheless, the applicants are also reminded of one maxim of equity which says "delay defeats equity, or equity aids the vigilant and not the indolent."
 25. When the court granted the conditional injunctive order on the November 4, 2021, the obligation of complying and/or protecting the said orders rested on the applicants shoulders.
 26. Once the applicants noticed that they would not obtain or secure the typed proceedings within the 45 days granted by the court, it was their duty to bring this to the attention of the court and possibly seek extension of the period before the same lapsed.
 27. The inaction by the applicants to inform the court of their difficulty and seek for an extension of the period granted to file the substantive record of appeal resulted to the automatic lapse and/or expiry of the injunctive orders issued on the November 4, 2021 after a period of 45 days.
 28. The interpretation of the condition orders issued on the November 4, 2021 was that if the substantive record of appeal was not filed within the 45 days granted therein, then there would be no injunctive orders against the respondent on the 46th day from November 4, 2021 whether a formal order was pronounced or not.
 29. The orders of November 4, 2021 simply ceased to exist by effluxion of time after 45 days from the date of issuance.
 30. In essence therefore, the lifting, vacating and/or setting aside of the orders issued on November 4, 2021 done on the July 12, 2022 was a procedural exercise and not a determination based on issues raised by the parties.
 31. In conclusion, the court is of the considered view that any reinstatement of the orders issued on the November 4, 2021 would metamorphically speaking mean giving the applicants an already dead order which is of no use.



Issue No.3-

Should the Court Extend and/or Enlarge the Time Granted to the Appellants to File their Record of Appeal in the Orders Issued on the November 4, 2021.

32. The last issue for determination is whether or not the applicants have provided sufficient ground to the extension of time of which to file their Record of appeal.
33. The applicants submit that since the year 2020, their efforts to obtain and/or be supplied with the trial court proceedings have not been successful.
34. The applicants have placed before the court a number of correspondences to demonstrate their efforts.
35. The respondent have not denied the contents of the correspondences placed by the applicants and/or challenged the evidence that the proceedings from the trial court have not been forwarded to the applicants.
36. The court is also aware that currently, the Judiciary generally have had its share of challenges relating to enough support staff in various departments and/or courts including the typing pool.
37. The court therefore understands the applicants frustration on the issue of delayed typed proceedings and finds that it is a sufficient reason to grant and extension of time to file the substantive record of appeal.
38. In any event, the right to appeal is an avenue of being heard and an enjoyment of the right to fair hearing under article 50 of the *Constitution of Kenya, 2010* .
39. This court does not intend to take away that from the applicants.
40. In conclusion therefore, the court hereby makes the following orders appertaining to the application dated August 12, 2022; -
 - A. The appellants/applicants are hereby granted leave of 90 days to prepare, file and serve their substantive record of appeal.
 - B. Costs of this application shall abide the outcome of the substantive appeal.

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

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

ADVOCATES FOR THE APPLICANT: **MR. WAFULA**

ADVOCATES FOR THE RESPONDENTS: **MR. NYAMBATI**

