



REPUBLIC OF KENYA



KENYA LAW
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**Cheruiyot v Mashinani Star Limited & 4 others (Environment and Land
Appeal 1 of 2024) [2025] KEELC 4147 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 1 OF 2024
MAO ODENY, J
MAY 28, 2025
(FORMERLY HCCA NO E69 OF 2023)**

BETWEEN

CHARLES KIPKEMBOI CHERUIYOT APPELLANT

AND

MASHINANI STAR LIMITED 1ST RESPONDENT

TESSY JERUTO RONO KIPYATOR 2ND RESPONDENT

**JOYCE CHEPKOSKE SANG (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF STEPHEN MALAKWEN SANG) 3RD RESPONDENT**

CHIEF LAND REGISTRAR 4TH RESPONDENT

JAVAN TUITOEK 5TH RESPONDENT

*(Appeal against the Ruling of Honorable K.I Orenge (Principal
Magistrate) which was delivered on 29th March, 2023)*

RULING

1. This ruling is in respect of a Notice of Motion dated 14th April, 2023 by the Appellant/Applicant seeking the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to grant the Appellant leave to Appeal against the Ruling of Honorable K.I Orenge (Principal Magistrate) which was delivered on 29th March, 2023, and the Memorandum of Appeal dated and filed on 12th April, 2023 be deemed as duly filed.



- c. Spent
 - d. That this Honorable Court be pleased to grant an order of stay of execution of the Ruling of Hon. K.I Orenge of 29th March, 2023, together with all consequential orders in Nakuru CMCC/E679/2021, pending the hearing and determination of the Appeal.
 - e. That this Honourable Court be pleased to issue orders of status quo on the ownership and possession of the property known as Plot No F Nakuru Municipality measuring approximately 0.9 hectares, pending hearing and determination of the Appeal.
 - f. That costs of this Application be provided for.
2. The application was supported by the annexed affidavit of Charles Kipkemboi Cheruiyot sworn on 14th April, 2023 who deponed that by a Ruling delivered on 29th March, 2023, the trial court allowed the 2nd Respondent's application which sought orders that the Plaintiff suit abated for want of taking out summons to enter appearance.
 3. The Applicant further deponed that he filed a Memorandum of Appeal dated 12th April, 2023 and that the status quo orders issued by the trial court on 17th August, 2022 have since lapsed hence he is at risk of being evicted from the suit property.
 4. It was the Applicant's case that the 3rd Respondent had served his advocates with party and party bill of costs dated 3rd April, 2023 and intends to proceed with execution.
 5. Robert H. Ndubi, counsel for the 3rd Respondent filed a Replying Affidavit sworn on 27th April, 2023 where he deponed that the Applicant filed a suit in 2021 and failed to take out summons for over a year hence the same stands abated as per the ruling dated 29th March, 2023. It was counsel's disposition that this application is an abuse of the court process and further that the order of status quo dated 17th August, 2022 lapsed due to the ruling of 29th March, 2023 which the Applicant is appealing against.

Applicant/Appellant's Submissions

6. Counsel for the Applicant filed submissions dated 17th February, 2025 and identified the following issues for determination:
 - a. Whether this court has jurisdiction to determine the matter?
 - b. Whether leave should be granted to the Applicant to appeal as per Section 75 of the Civil Procedure Rules?
 - c. Whether stay of execution sought should be granted?
7. On the first issue, counsel submitted that the matter was filed but was subsequently transferred to the Environment and Land Court, which aligned with the constitutional and statutory mandates that designate the Environment, and Land Court as the appropriate forum for land disputes. Counsel relied on Article 162 (2) (b) of *the Constitution* of Kenya, 2010 and Section 13 (2) of the *Environment and Land Court Act*.
8. On the second issue, as to whether the Applicant should be granted leave as per Section 75 of the *Civil Procedure Act*, counsel submitted that the section outlines specific orders from which an appeal lies as of right and stipulates that appeals from other orders require leave of the court.
9. Counsel further submitted that the Applicant's advocate sought leave to appeal orally in court in the first instance and has also sought leave to appeal against the ruling of Hon. K.I. Orenge (Principal



Magistrate) delivered on 29th March 2023, which allowed the 2nd Respondent's application on the abatement of the Applicant's suit for want of taking out summons to enter appearance.

10. It was counsel's submission that this ruling does not fall within the categories of orders from which an appeal lies as of right under Section 75(1) of the *Civil Procedure Act*, therefore the Applicant requires leave to appeal and further seeks that the Memorandum of Appeal dated and filed on 12th April 2023 be deemed as duly filed.
11. Ms. Kiprop further submitted that the grounds raised in the Memorandum of Appeal merit judicial consideration on appeal and relied on the case of: *Simon Kalachu v Yuasa International Limited & Another* [2021] eKLR, and *Benel Development Limited v First Community Bank Limited* [2021] eKLR.
12. It was counsel's submission that leave to appeal will normally be granted where prima facie it appears that there are grounds, which merit judicial consideration. Further that the issues raised in the Memorandum of Appeal on the issue of non-service of summons where a party fully participates in the proceedings should be given judicial consideration and relied on the case of *Tropical Foods International & Another v Eastern and Southern African Trade and Development Bank & Another* [2017] eKLR where the court held that:

“The purpose of the issue of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If, therefore, the Defendant gets notice of the suit by other means other than the Summons and participates in subsequent proceedings then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non-service has caused some prejudice on the Defendant.”

13. On the third issue as to whether stay of execution orders should be issued, counsel submitted that the Respondents have argued that the order appealed against is a negative order but she disagreed with this position as the order stated that the Applicant's suit had abated hence he risks being evicted from the suit land and an order of payment of costs.
14. Ms. Kiprop submitted that executing the ruling would effectively terminate the suit thus denying him an opportunity to have the substantive issues determined on merit. Further that the Applicant has been ordered to pay costs to all respondents and if an order of stay is not granted he would be financially prejudiced before the appeal is heard which will occasion him substantial loss.
15. Counsel relied on Order 42 Rule 6 (2) of the Civil Procedure Rules and the cases of *RWW v EKW* [2019] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and *Vishram Ravji Halai v Thornton & Turpin Civil Application No Nai 15 of 1990* [1990] KLR 365.B and urged the court to allow the application as prayed.

1st and 3rd Respondent's Submissions

16. Counsel for the 1st and 3rd Respondents filed submissions dated 6th July, 2023 and 11th February, 2025 and relied on Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 and the cases of *Mukuma v Abuoga* [1988] KLR 645 and *Kenya Shell Limited v Kibiru* [1986] KLR 410.
17. Counsel submitted that if the Applicant's application is disallowed, the Applicant will not suffer in any way as the suit stands abated since it offends the provisions of Order 5 Rule 1 of the Civil Procedure Rules and relied on the case of *Pauline Wambui Ngari v John Kairu & Another* [2009] eKLR. Counsel urged the court to dismiss the application with costs.



2nd Respondent's Submissions

18. Counsel for the 2nd Respondent filed submissions dated 5th September, 2023 and identified the following issues for determination:
 - a. Does the Appellant have an automatic right of appeal?
 - b. Has the Appellant satisfied all the pre-requisites necessary for the granting of the status-quo order?
 - c. Whether this Honourable Court has the jurisdiction to hear and determine the application and appeal?
19. Counsel urged the court to summarily reject the Appeal and relied on Section 75 and 79 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules. Counsel further relied on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 and submitted that there can be no stay of a negative order. Counsel cited the case of Catherine Njeri Maraga v Serah Chege & Another [2017] eKLR and submitted that there is nothing to be stayed and that the doctrine of lis pendens states that no fixed property may be transferred when a law suit relating is pending.
20. Mr. Ndubi submitted that the Appellant has not demonstrated why he should be granted the status quo orders or any irreparable injury he may suffer if the order is not granted. Counsel cited the cases of Amir Suleiman v Amoseli Resort Limited [2004] eKLR and Humplepy Kilambo Mehano v Kenya Commercial Bank Ltd and urged the court to dismiss the application and the Appeal with costs.

Analysis And Determination

21. The issues for determination are as to whether the Applicant should be granted leave to appeal the ruling dated 29th March 2023 and whether an order of stay of execution should be granted pending the hearing of the Appeal.
22. Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules set out decrees/orders that are appealable as a matter of right and also provides for any other order where appeal shall also lie with the leave of the court making such order or of the court to which an appeal would lie if leave were granted.
23. Order 43 Rule 1(3) of the Civil Procedure Rules goes on to state:

“An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”
24. In the case of Directline Insurance Co. Ltd v Onyango (Civil Appeal E345 of 2022) [2022] the court held as follows:

“It is then clear that under order 43(2) an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under order 43(1) leave to appeal must be obtained before such an appeal can be preferred. (See Mutungi J in Serephen Nyasani Menge v Risphah Onsase [2018] eKLR). Order 42 rule 6 under which applications for stay of execution fall is not one of the orders mentioned in order 43(1) where the appeal lies as of right. The appellants ought to have sought leave before filing this appeal. In Stephen



Omondi Juma v Sprocer Awuor Rabote [2022] eKLR, Aburili J was faced with a similar issue as the issue before me. She cited a Court of Appeal decision and stated that:

“As was emphatically stated in Nyutu Agrovat Ltd v Airtel Networks Ltd [2015] eKLR, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. Further, that the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of section 75 of the Civil Procedure Act and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”

Leave to appeal in the instant case did not lie as a matter of right.”

25. It is on record that the Applicant first made an oral application in the lower court for leave to appeal the ruling as required by procedure. The same having not been granted, the Applicant is within his rights to seek leave to appeal the ruling which is the gist of the current application together with a prayer for stay of execution.
26. It is trite law that the guiding principle as to whether a court can grant leave to appeal is whether there are prima facie grounds that merit judicial consideration as was held in the case of Simon Kalachu v Yuasa International Limited & another [2021] eKLR, that:

“The general rule is that every decree may be appealed from unless barred by some law. However, an appeal does not automatically lie against every order. Leave to appeal will normally be granted where prima facie it appears that there are grounds, which merit judicial consideration.”
27. Similarly, in the case of Bandali t/a Shimoni Enterprises v Wills [1991] eKLR, the court quoted with approval the case of Sango Bay Estates Ltd v Dresdner Bank AG [1971] EA 17 which held that :

“I turn to the application itself which can, I think, be disposed of very briefly. As I understand it, 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 considerations but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out.”
28. The issue that merits consideration is whether the Trial Court was right in finding that a suit had abated for non-service of summons when the respondent participated fully in the proceedings. I find that the Applicant has met the threshold for the grant of leave to Appeal.
29. On the issue whether the court should grant a stay of execution. The purpose of a stay of execution is to preserve the substratum of the case pending the Appeal. Having granted leave to Appeal the ruling of marking the suit as abated due to non-service of summons to the Respondents who participated fully in the proceedings. It would be in the interest of justice to grant stay of execution of the order to allow the hearing and determination of the Appeal.
30. I have considered the Application, the submissions by counsel and find that the application for leave to file an Appeal has merit and is hereby allowed. Applicant’s Memorandum of Appeal dated and filed on 12th April 2023 is hereby deemed as duly filed. Applicant to file and serve the Record of Appeal within 30 days. An order of stay of execution is hereby granted pending the hearing and determination of the Appeal.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF MAY 2025.

M. A. ODENY

JUDGE

