



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. E3 OF 2020**

**ESTHER INYANJE TOLOI**

**RAPHAEL JOTHAM WABISINWA.....APPLICANTS**

**VERSUS**

**KRISPINUS SIMITI TEMBETE.....RESPONDENT**

**RULING**

The application is dated 28<sup>th</sup> September 2020 and seeks the following orders;

1. That services of this application be dispensed with at the 1<sup>st</sup> instance.
2. That this Hon. High Court be pleased to issue an injunction order restraining, stopping the respondents, interested party their agents, servants or anybody else from using the land, ploughing, planting, trespassing, developing or carrying out any work or in any manner dealing with the same portion of land from plot No. NK/Surungai/1283 and 1284 pending the hearing and determination of this case.
3. That OCS North Kabras police station to maintain peace and unity.
4. That cost of the application be provided for It is based on the grounds that the appellant/applicant is the legal representative of the land plot No. NK/Surungai/1283 and 1284. That the interested parties respondent has trespassed and entered in any land unlawfully illegally. That the 1<sup>st</sup> respondent is inciting the interested party respondent to entered in the land and caused damages of the appellant's crops. That the interested party respondent is causing violence to fight by cutting damaging the appellant's crops. That unless the High Court is pleased and issue injunction order against the 2<sup>nd</sup> respondent from trespassing, using the land, they shall cause violence of fight. That the appellant/applicant prays that this Court to be pleased to issue injunction orders restraining stopping the respondent from using, trespassing, planting, in order the grant of this application makes the end of justice, peace between all parties herein.

The respondent opposed the application on the grounds that the application and the entire appeal is an abuse of the due process of law. The appeal is an abuse of the due process as it has been filed out of time without leave of the court, judgment having been delivered on 23<sup>rd</sup> April, 2020. The 2<sup>nd</sup> respondent/interested party cannot be enjoined at the appellate level when he was not a party to the case in the trial court. The appeal herein has no chances of success. The orders of injunction cannot be granted in an appeal which is void ab initio and when there is no stay of execution.

*This court has considered the application and the submissions therein. Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:*

*“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*

*Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”*

In the case of *Paul Musili Wambua v Attorney General & 2 others (2015) eKLR*, the court held that;

**“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”**

I have perused the lower court records annexed to this application and the grounds of opposition and find that the appeal is an abuse of the due process as it has been filed out of time without leave of the court, judgment having been delivered on 23<sup>rd</sup> April, 2020 and this appeal filed on the 21<sup>st</sup> September 2020 without the leave of the court. In the case of Republic vs Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR the court held as follows;

*“The word "shall" when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words ‘shall’ and ‘must’ are mandatory and the word ‘may’ is directory.”*

*Section 79G of the Civil Procedure Act states that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against. I find that this appeal is not properly filed before this court and I strike out the same. There being no appeal there is no application and it is dismissed. Costs of the appeal and application to the respondents.*

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> FEBRUARY 2021.**

**N.A. MATHEKA**

**JUDGE**