Ngita v Njagwa & 14 others (Environment and Land Appeal E008 of 2025) [2025] KEELC 5394 (KLR) (9 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5394 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E008 OF 2025

FO NYAGAKA, J

JULY 9, 2025

BETWEEN

WILLIAM ATHIAMBO NGITA .... APPLICANT

AND

ASENTUS OTIENO NJAGWA & 14 OTHERS & 14 OTHERS & 14 OTHERS & 14 OTHERS & 14 OTHERS .... RESPONDENT

RULING

Brief Facts

1. The Applicant filed the instant application dated 24th April, 2025 seeking the following orders:
    1. Spent.
    2. Spent.
    3. That this Honourable court be pleased to grant an order for stay of execution of the judgment issued on 26th November, 2024 and decree issued on the 14th November, 2024 and all consequential orders pending the hearing and determination of the appeal filed vide Migori ELCA No. E008/2025.
    4. That the costs of this application be provided for.
2. The Application was based on grounds set out in the body and supported by the Affidavit of Wiiliam Athiambo the Applicant sworn on 24th April, 2025.
3. He stated that being judgment in ELC E028 of 2022 was delivered on 26th November, 2024 in favour of the Respondents. He further stated that being aggrieved by the entire judgment and decree, he filed the instant appeal. He added that the appeal raised triable issues with high chances of success.

4. He stated that the Respondents have instructed auctioneers who have already proclaimed his properties. He added that the Respondent will not be prejudiced if the orders sought herein are granted.

5. In conclusion, he stated that the application was made in good faith and without delay. He also stated that he was willing to abide by any conditions.

Response

6. By the time this Application came up for hearing, the Respondents had not filed a response. This did not preclude the Court from making a determination on the merits or otherwise of the pertinent issues pertaining the application.

Submissions

7. None of the parties filed written submissions. However, during the time of giving directions, online immediately upon the filing of the application under certificate of urgency for the hearing and determination of the application, the Court invited the Appellant to file both the decree appealed form and the Order granting leave to appeal out of time, and at the inter partes hearing, make arguments in terms of compliance with Order 42 Rule 6 of the Civil Procedure Rules.

8. On the material date learned counsel for the Appellant stated that there was a delay in the subordinate court issuing the proceedings and decree. Further, the Appellant had not filed a similar application in the lower court because he had written a letter to the Judicial Service Commission complaining of the manner the trial magistrate handled the matter. The Judicial Service Commission had since responded, indicating that it was a matter of judicial discretion, hence the Appellant ought to have appealed against the decision. He added that the decree was dated 14th November 2024, while the judgment was delivered on 26th November 2024. He added that this was an anomaly the Court could see. Further, he stated that judgment was to be delivered on 26th November 2024, but when the plaintiff and his advocate attended court on the material date, they were informed that judgment had been delivered on 14th November 2024. He referred the court to the proceedings, annexed as WA 1.

9. In response, learned counsel for the Respondent stated that the Appellant had submitted extensively while he preferred the application in this Court and not in the subordinate court. He added that the Judicial Service Commission had since given the judicial officer clean bill of health since the officer had indicated that the judgment was written on 14th November 2024 but delivered on 26th November 2024, and, as per the record, on the later date the Plaintiff was in court in absence of both counsel. He added that Section 79 of the *Civil Procedure Act* prescribed that an appeal ought to be preferred within 30 days of the decision and that it had not been observed. He asked that the appeal be dismissed.

Analysis and Determination

10. This court has carefully considered the application and the main issue for determination is whether the Applicant should be granted stay of execution pending appeal.

11. The relevant provisions in the Rules in regard to appeals are provided under, Order 42 Rule 6(1) of the Civil Procedure Rules which provides that:

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court

appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

12. It is this court's view that the Applicant can only apply to the Appellate court to stay execution of the decree or order appealed from if aggrieved by such an order first makes an application seeking similar orders in that other or subordinate court. This, in terms of the Civil Procedure Rules, it is obligatory for the Applicant to first move the subordinate court before approaching the Appellate court.

13. It is trite law that an Appellant ought not side-step the subordinate court in an attempt to successfully to move the Appellate for orders he/she should have sought formally in that court. Often litigants have made this mistake of skipping the step of moving the lower court first, arguing that it is permitted. They derive the argument from the procedure of appealing from this Court to the Court of Appeal. This procedure is different from that to the Court of Appeal. For one pick on which between this and the subordinate court to present such an application it is akin to forum shopping and a direct call for a breakdown of the rule of law. The law does not give that room for choice. Moreover, laws are enacted for the proper ordering of and to avoid arbitrariness in actions of people in society. Further, rules of procedure were designed for orderliness, fairness and justice.

14. In the case of Vipingo Ridge Limited V Swalehe Ngonge Mpitta [2021] KEELRC 616 (KLR) the court held that:

> " A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.
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> 12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other."

15. While the some of my colleagues may hold the view that an applicant seeking an order of stay of execution in the superior courts may elect which between the appellate court and the subordinate court he/she may move for such an order (See, for instance the case of Dennis Dennis Odhiambo v Elius Njoka & Another [2021] eKLR and Gede Enterprises Limited v Cheboi & another (Civil Appeal E153 of 2021) [2022] KEHC 11742 (KLR) (17 May 2022) (Ruling), among others, I do not subscribe to their view. And so do many of my brother and sister judges, as will be seen below.

16. In my humble and respectful view, Order 42 Rule 6 of the Civil Procedure Rules is clear and express on the steps an applicant is to take in the circumstances. I once again invite my brothers and sisters who hold a different view to reread the provision and give it a plain, grammatical or textual interpretation because giving it other interpretations such as the mischief rule or other, including the spirit of the law, still give the same meaning. It is important, when giving any interpretation of the law for the judge or judicial officer to given the meaning that accords all perspectives of the meaning, including the history, mischief and spirit the right place. Forum shopping must never be encouraged by both the law and the courts.

17. The defining phrase of the relevant paragraph *(1)*, when reproduced or quoted verbatim in a is,

> " (1) No appeal or second appeal shall operate as a stay of execution or proceedings ... except in so far as the court appealed from may order but, ... , and whether

> the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, ... , to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

18. While this Court has given the interpretation of the provision (Order 42 Rule 6(1) before, it is once again called upon to do so. This time around it will give a deeper and easier interpretation.

19. A plain reading of the provision is that an appeal or second appeal to the superior court (the Court appealed to) shall not of necessity operate as a stay of execution or proceedings in the court appealed from. It only does so when the aggrieved party moves the Court. This is the phrase that creates the exception to the point that the filing of an appeal is not an automatic guarantee that there is a stay of execution or proceedings. That exception is then explained by the provision that the aggrieved party shall move the court from which he/she has appealed. When he/she does so, the outcome may be one or other, that is, successful or unsuccessful. In those circumstances, that is to say, whether the application shall have been granted or refused, the party aggrieved (by the order of stay as made by the court appealed from) will be at liberty now to apply to the court appealed to have such an order set aside. Thus, the function of the superior courts, when applications for stay of execution or proceedings are made is to consider (to set aside) the order made by the subordinate court on the same issue presented. The Superior court does not assume jurisdiction unless the party appealing to it has moved the subordinate court first for a stay of execution or proceedings.

20. A number of decisions have affirmed the above position. For instance, in Mwangi V Mokaya (environment And Land Appeal 17 Of 2022) [2022] Keelc 14835 (klr) (17 November 2022) (ruling), the Court held,

> "A plain grammatical or textual reading of this terminology reading of the text above, particularly, the underlined phrase is to the effect that a party is not permitted to skip the must important point as the first point of call: the respective trial magistrate or judge against whose order or judgment an appeal is preferred. After he or she has moved the Court and his Application is granted or not, depending on how he views the decision, then he/she will file another application in the Court appealed to. It is upon this step having been taken that the application for stay of proceedings in the trial can be considered by the appellate Court. Absent of this step, the application filed for stay of execution or proceedings directly to the appealed to is improper."

21. Also, in Anyenda v Simidi *& 12 others (Environment and Land Appeal 1 of 2023*) [2023] KEELC 21845 (KLR) (24 November 2023) (Ruling), the learned Judge held,

> "The above Rule is to the effect that before an Appellant aggrieved by an order or decree of a subordinate Court moves the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one to a Court subordinate to the Superior Court) moves the Superior Court for stay of proceedings or execution he/she/it should have moved the court appealed from for similar orders. This is not optional but a compulsory step. Only upon fulfilment of that step shall the Superior Court be seized of jurisdiction to handle an application for stay of proceedings or execution. This is clearly provided for in the sub-Rule that "any person aggrieved by an

order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

... it has not been denied or even submitted on to the contrary that the Appellant did not move the trial court first for its determination on whether or not it was to grant an order of stay of enforcement of the orders of the trial court as made on 16/05/2021. It therefore means that the instant Application was made contrary to the requirements of Order 42 Rule 6(1) of the Civil Procedure Rules. It means further that as the Respondent argued, the Application is premature, incompetent and bad in law."

22. Similarly, in Vipingo Ridge Limited V Swalehe Ngonge Mpitta [2021] eklr held:-

> " A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.
>
> 12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other."

23. Also, in Pius Mbithi& Another V Daniel Mutiria & Another [2017] eklr, it was held,

> " I read and understand the rule to dictate that the first port of call by an application for stay pending appeal is the trial court and that once it considers and determines the application then an aggrieved party has the liberty to approach this court and have the orders so issued set aside. 17. Put in the context of the matter before me it is clear that the trial court has not been afforded the opportunity to hear and determine any application for stay. That being the position, and being a court of law applying the law as enacted, this court must tell the applicant that the law is for all to be observed and not be side-stepped. I am in no doubt that the application seeking stay before this court as the appellate court is prematurely made and does not lie."

24. In the instant Application, it is not in contention that the Applicant did not move the trial court first for its determination on whether or not it was to grant an order of stay of execution of the orders of the trial court as made on 26th November, 2024. It therefore means that the instant Application was made contrary to the requirements of Order 42 Rule 6(1) of the Civil Procedure Rules. It means further that the Applicant's argument of having filed the appeal and decree is rather misplaced.

25. In the circumstances, the Application is premature, incompetent and bad in law and this court need not consider the merits or otherwise of an Application that is incurably defectively incompetent.

26. On 23rd April 2025 the applicants moved this Court and the Court issued directions, including one requiring them to demonstrate that they had moved the lower court in first before coming to this Court and also whether the instance appeal was properly before the Court. Further, it has not been explained, as required by the directions issued on 25th April 2025 whether the Appeal was filed regularly or irregularly given that the judgment impugned was delivered on 14th November, 2024 yet the Memorandum of Appeal was filed on 13th March 2025 without an accompanying order granting leave to appeal out of time. It is therefore doubtful as to the validity of the appeal thereof but that is matter to be considered on the deciding on the merits of the appeal during its substantive hearing or other step if a party moves the court to address it. Furthermore, the said Appeal is filed by Amadi and

Associates Advocates of P. O. Box 28290 00100 Nairobi while instant Application is filed by the firm of KAN Advocates LLP of the same postal address.

27. There is no Notice of Change of Advocates filed by the latter law firm or evidence that there was one filed and served on all parties. Thus, the application is filed by a stranger to the said appeal. These are fundamental procedural issues that go to the root of the instant application and cannot be cured by Article 159(2)(d) of the *Constitution* 2010 or the interests of justice under the *Civil Procedure Act* because strangers cannot be permitted to run other people's "houses" or affairs. These many reasons make this Court find that the application is one for dismissal with costs to the Respondents.

28. The matter shall be mentioned on 28th October, 2025 for parties to indicate to the Court what they shall have considered to do next.

29. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 9TH DAY OF JULY 2025

HON. DR. IUR NYAGAKA,

JUDGE

At 10:06, in the presence of,

Mr. Ouma Advocate for the Applicant (online)

Mr. Kisia Advocate for the Respondent (in open court)