



REPUBLIC OF KENYA



KENYA LAW
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**Omaido v Omunga & 11 others (Environment & Land Case
22 of 2015) [2024] KEELC 469 (KLR) (5 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 22 OF 2015
FO NYAGAKA, J
FEBRUARY 5, 2024**

BETWEEN

JACKSON EKIM OMAIDO PLAINTIFF

AND

LUCIA NGAIRA OMUNGA 1ST DEFENDANT

ROSELYNE OMUNGA 2ND DEFENDANT

CLARA ANDABWA 3RD DEFENDANT

NELSON MAKOKHA 4TH DEFENDANT

JOHN OKWARO 5TH DEFENDANT

STANLEY EKOINE JUMA 6TH DEFENDANT

GEORGE WAFULA 7TH DEFENDANT

KENNEDY MUMBWANI 8TH DEFENDANT

BONIFACE NYONGESA 9TH DEFENDANT

ALFRED CHAMAKETI 10TH DEFENDANT

NAMBUCHA KIRIKICHA 11TH DEFENDANT

ALEXANDER IMONI 12TH DEFENDANT

RULING

1. By a Notice of Motion dated 28/09/2023 brought under article 50 of the sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, order 22 rule 22, order 51 rule 1, order 42 rule 6(1) of the



Civil Procedure Rules, 2010 and all other enabling provisions of the Law. The applicants sought the following orders:-

1. ...spent
 2. ...spent
 3. ...spent
 4. ...spent
 5. That this honourable court be pleased to stay further proceedings in this matter pending the hearing and determination of the intended appeal.
 6. That this honourable court be pleased to issue an order of stay of execution of the judgment dated 18/01/2021, the order and decree herein pending the hearing and determination of the intended appeal.
 7. That the costs of this application be provided for.
2. It was supported by the affidavit sworn jointly by Lucia Ngaira Omunga, Nelson Makokha, John Okwaroi and Stanley Ekoine Juma on 06/09/2023 and a number of grounds which were to the effect that on 01/09/2023 the matter was mentioned and the applicants granted seven days to file submissions on the bill of costs dated 15/05/2023 and ruling was fixed for 15/09/2023; the applicants had filed an Application in the Court of Appeal in Eldoret, being Civil Appeal COACA/E043/2023 by which they sought leave to file an appeal out of time against the ruling dated 03/05/2021; the ruling raised triable issues and unless the proceedings herein were stayed the application and the intended appeal would be rendered nugatory; the application and the intended appeal were meritorious and with extremely high chances of success; that the applicants had previously filed an appeal being Civil Appeal No. 181 of 2021 but the appeal was dismissed for reason of having been filed outside of the period stipulated; the Respondent will not suffer loss but the applicants herein will instead suffer loss; and the it was in the interest of justice that the application be granted.
 3. The depositions in the supporting affidavit repeated the contents of the grounds except that at paragraph 7 the deponents stated that an appeal does not operate as a stay of proceedings hence the instant application, and further that the application had been made without unreasonable delay. Further they deponed that if the application was not allowed they risked being rendered homeless and that would be irreparable loss.
 4. The application was opposed by the plaintiff through his affidavit sworn on 25/11/2023. He deponed that the application was incompetent, defective, devoid of merit and ought to be dismissed with costs. That prayer 2 of the application had been overtaken by events since the ruling on the bill of costs had been delivered on 15/09/2023 and a certificate of costs issued on 03/10/2023. He annexed and marked as JO1 the copy of the Certificate. He stated that there was no appeal against the judgment delivered on 18/01/2021 and the decree thereto hence no basis for stay of execution. That he was aware that Eldoret Civil Appeal No. 181 of 2021 was struck out *vide* a Ruling delivered on 22/07/2022. He annexed and marked JO2 a copy of the Ruling of the Court of Appeal.
 5. He stated further that the applicants had never been granted leave to appeal against the said Ruling hence there was no appeal at all hence no basis for the application for stay. That the instant application had been brought with inordinate delay, the period being 2 years and 7 months after the delivery of the judgment and decree. He annexed a copy of the decree as JO3. He deponed that the applicants had failed to comply with the decree of the Court and that he was in the process of evicting them. He annexed and marked JO4 a copy of the eviction notice.



6. The Plaintiff submitted orally on the application when it came up for inter partes hearing in the open Court in the presence of the applicants and other parties who attended the hearing. That was on 27/11/2023. In brief he stated that during the hearing of the suit only the 1st Defendant took part in it and she was represented by learned counsel. Further that the rest of the Defendants applied severally to set aside the proceedings but their applications were dismissed. He referred them to the Rulings of the Court, including the one of 03/05/2021 and the ruling of the Court of Appeal that struck out their appeal. He summed it that there was not appeal pending as at the time.
7. On his part the 4th Applicant stated that they had never been heard in the matter and that they wished to appeal but their learned counsel advised that they come back to this Court (sic). The 5th Defendant only prayed that they be heard. The 6th asked the Court to hear the application while the 1st prayed for a stay of proceedings pending appeal filed in Eldoret in August, 2023. On his part the 7th defendant did not oppose the application but added that he did not know what was happening and that all he knew was that he used to work with a mzungu. The 8th defendant submitted that he did not have any matter with the Respondent since he vacated the land six years before the instant application while the 9th defendants indicated that he vacated the land a long time ago hence he did not bother to follow up the case from inception.

Issue, Analysis and Determination

8. I have considered the Application, the law and the rival submissions. I am of the view that only two issues lie before me for determination:
 - a. Whether the application is merited
 - b. Who to bear the costs of the Application
9. To begin with the first issue, this Court is alive to the fact that in applications of this nature, it has a wide discretion to grant such an order. But the discretion should be exercised judiciously hence the circumstances of the case ought to be weighed carefully and balanced against the interest of justice for the parties.
10. I will not go to the nitty gritty of the relevance of the provisions relied on. Suffice it to say that parties are advised to cite the proper provisions of the law relied on in any application where they exist, and in their submissions explain the said relevance. Both mere citation and irrelevance of the cited law trudge pretty the same path: non-guidance of the court in the proper direction.
11. That said, I will now consider the merits of the instant Application. I would apply the Issue, Rule, Application and Conclusion (IRAC) format of reasoning herein. Thus, the issue herein is that the Applicants pray for both the stay further proceedings in this matter and execution of the judgment dated 18/01/2021, the order and decree pending the hearing and determination of what they refer to as the intended appeal.
12. The rule applicable on such an issue is order 42 rule 6(1). The other provisions cited are basically irrelevant. The rule stipulates, at the relevant part, as follows:-
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, ...”



13. The provision presupposes that there exists an appeal already filed and the party moving the Court relies on the existence of that fact and the law then to move the Court appropriately. In regard to appeals from this Court to the Court of Appeal, for one to satisfy the Court that there exists an appeal against a judgment or order, he/she has to demonstrate to the Court that by the time of moving it, there is in existence a Notice of Appeal duly filed in against the judgment or order. This is in terms of order 42 rule 6(5) of the *Civil Procedure Rules*. It stipulates that, “For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”
14. In applying the facts of the instant case to the Rule (law), this Court is obliged to satisfy itself that there indeed is a Notice of Appeal filed herein against the impugned Ruling. I have carefully considered the record. I find no other Notice of Appeal was filed by the Applicants herein prior to the instant application being made. The only existing one was the one dated 04/05/2021 lodged the same date and it must be the one that relates to the Appeal that the Applicants and Respondent agree was struck out. This is borne by the paragraphs (f) of the grounds in support of the Application and paragraphs 4 and 5 of the Replying Affidavit.
15. After the Notice of Appeal referred to above, the other one dated 18/09/2023 and filed the same date. That was ten (10) days after the instant application. Such a notice cannot possible be one that was intended to base the Application herein: it cannot act retrospectively. In any event it is filed contrary to the law regarding filing or institution of appeals.
16. The facts above being the obtaining ones in the instant application it is clear to me that there is no intended appeal against the Ruling dated and delivered on 03/05/2021. The fact of filing an application, being COACA/E043/2023, in the Court of Appeal as deposed to by the applicants at paragraph 4 of the Supporting Affidavit and ground (c) of the grounds the application is based is of no consequence since this Court cannot base the same as basis for the determining the instant application when the outcome of the said application remains dependent on the merits thereof and its prosecution which issues are only but a matter of guesswork by this Court. I therefore agree with the Respondent that there is no intended appeal or appeal in existence against the impugned Ruling of this Court.
17. That being so, I find no merit in the instant application. Actually, it is frivolous and an abuse of the process of this Court. For that reason, I need not consider the other limbs the Court does consider whenever it handles applications of this nature. Costs be borne by the 1st, 4th, 5th and 6th defendants/ applicants.
18. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 5TH DAY OF FEBRUARY, 2024.

**HON. DR. IUR FRED NYAGAKA
JUDGE, ELC KITALE**

