



Eliud Maelo aka Ambassador v Barasa & another (Environment and Land Appeal E001 of 2024) [2024] KEELC 5328 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E001 OF 2024
EC CHERONO, J
JULY 11, 2024**

BETWEEN

ELIUD MAELO AKA AMBASSADOR APPELLANT

AND

GEOFFREY WANYONYI BARASA 1ST RESPONDENT

BEN SIMIYU MAKHANU 2ND RESPONDENT

RULING

1. The Appellant moved this Honourable Court vide the Notice of Motion application under certificate of urgency dated 22nd April, 2024 seeking the following orders;
 1. (Spent)
 2. That directions be given by His Lordship the Judge on the Manner, and time duration of the hearing and disposal of this appeal
 3. Costs be provided.
2. The application is based on grounds shown on the face of the said application and the supporting affidavit of Saul S. Wasilwa Advocate sworn on 30/04/2024 as well as the annexures thereto.
3. In response, the Respondent filed grounds of opposition and a Replying affidavit in opposition thereto. When the said application came up for directions on 14/05/2024, the parties through their Advocates on record agreed to canvass the application by way of written submissions.
4. The Applicant through the Firm of BS Advocates LLP filed their submissions dated 20/05/2024. However, the Respondent through the Firm of ABK Advocates LLP did not file submissions as this Court withdrew to write this Ruling.



Applicant's Summary Of Facts

5. According to the applicant, this appeal arises from an interlocutory application by Hon. T.M Olando, Principal Magistrate in CM-ELC No. E020 of 2024 where the learned Magistrate delivered a ruling on 11/4/2024. The applicant stated that he was dissatisfied with the Ruling by the trial Magistrate and preferred the present appeal. He stated that he has filed the present application under under Order 47(7) & (8) CPR as read with Section 1A and 1B of the Civil Procedure Act.
6. The applicant further stated that the orders issued by the trial Court have since stalled the construction of a road that is 90% complete and that there are hired machinery on the site that the applicant is incurring hire charges of Kshs. 350,000/= daily and are escalating by the day beyond salvage.
7. It is further deposed that from the pleadings upon which the trial Magistrate issued the impugned order, the acts complained of i.e cutting down trees and breaking a house are actions that have already been committed and an injunction cannot issue to undo what has already been done and its remedy lies in an award of damages.

Respondents Summary Of Facts.

8. The 1st Respondent in his Replying affidavit deposed as follows;
 1. That from the onset, I wish to state that I filed the primary suit and application because the Appellant, under the instructions of the 1st and 2nd Defendants in the primary suit, by undue process, arrogance and illegality, while purporting to construct a road encroached on several properties including mine and the 1st plaintiff and demolished houses, uprooted trees and occasioned incommensurable damage to property.
 2. That it is satirically ironical that the same person who meted out cruel and inhumane demolitions and uprooting of indigenous trees against the interest of the public now turns around to purport that the instant orders to determine the truth are in violation of the public interest when it is very clear that his only concern is the money he is purportedly losing (which is denied). If there is such loss, then that is the price to pay when you violate laid down procedures that are meant to protect the public. It cannot be that the personal issues of the Applicant arising from undoing on his part now turn to be an emergency to the public.
 3. That I have been advised by my counsel on record, advice which I believe to be true that the Appeal as filed together with the application are fatally defective and should be struck out for the reasons set out in my Grounds of Opposition.
 4. That the incompetence of the instant application stem from the beginning. The filing of this application came as an afterthought, the court having denied the Applicant reliefs in the iterim after he filed a certificate of Urgency with no attendant application. One wonders what informs such benighted conduct.
 5. That what is before this Honourable court under the said application is pure hearsay. There is no proof tendered to the allegation that the road is 90% complete or that there are losses of up to Kshs.350,000/daily incurred.
 6. That the Ruling from which the instant Appeal emanates did not address itself to the substance of the application but made an interlocutory finding to aid the court in determining whether indeed there is a prima facie case.



7. That the Applicant should be directing this energy to the compliance of the said Orders so that a proper Ruling is made for him to get a proper order to appeal against. On my part, I am ready and willing to comply with the Court Orders soonest possible to ensure that justice is met expeditiously.
8. That I have been advised by my Counsel on record which advice I believe to be true that the Civil Procedure Rules under Order 40 Rule 10 authorizes the court to inspect property subject of injunctive orders or interlocutory reliefs. It is a surprise that the Appellant/Applicant seems enraged by these provisions.
9. That the said machinery is not on the ground and the Applicant has not rendered any proof as to any of the allegations. There is no basis of the alluded to hire charges on stalled machinery. The said machinery left the ground long ago.
10. That the Honourable Court, once the record is placed before it, will learn that the purported contract engaging the Appellant/Applicant (marked as EM9 on his Replying affidavit sworn on 11th March 2024) does not allude to any amount of Kshs. 350,000/ to be lost on hire charges,
11. That further, nothing in the said Agreement gives any provisions as to what would happen beyond 20th March 2024 when the Contract is supposed to have ended. Even if the said losses are to be believed to be true, the illegal actions of the Appellant cannot be cured by an incompetent appeal.
12. That I the only reason the Applicant is under immense pressure to set aside the said Orders is because he wants to continue with his illegal exercise at the expense of the public. It is in the public domain that he cannot rubberstamp the perpetuation of an illegality.
13. That the reasons wherefore on the Memorandum are incomplete. One wonders what the end of this Appeal is meant to achieve. Does the Applicant intend the Superior Court to hear and make a determination on an application that is yet to be substantively determined and is still competently before the subordinate court? Does he intend for a re hearing of the application by the subordinate court? The applicant places us in an awkward position and it is only proper that the incompetence in the instant Appeal should not see the light of day.

Legal Analysis And Decision.

9. I have considered the Notice of Motion application, the supporting affidavit, the grounds of Opposition, the Replying affidavit, submissions and the applicable law. These proceedings had initially been brought under a certificate of Urgency certified by Saul S. Wasilwa Advocate. At paragraph 4 of the said certificate of Urgency, the learned Counsel stated as follows;
 - “4. That it is in the interest of substantial justice that the application be certified extremely urgent and that it be placed before the Deputy Registrar of the Environment and land Court for giving of directions for the speedy hearing and disposal of the appeal.
10. When the said application under certificate of urgency was placed before me as the Duty Judge, I observed that the Court would not give directions as no proper application had been filed. That prompted the Appellant/Applicant to file the present Notice of Motion dated 30th April, 2024. Order 47 Rule 7 & 8 of the Civil Rules under which this application has been brought states as follows;
 - “47(7) In a suit proceeding in a District Registry all formal steps preliminary to the trial and all interlocutory applications shall, in the absence of a judge, be made and taken before the District



Registrar; and when such suit is ready for trial it may be set down for hearing before a judge sitting at the place of the Registry.

48(10) An appeal from a decree or order of a subordinate Court to the High Court may be filed in the District Registry within the area of which such subordinate Court is situate; and the District Registrar shall, upon the payment to him of all fees, endorse the date of filing upon the Memorandum of Appeal, and forward the papers to the High Court Registry in that area for hearing and disposal.”

11. What the Applicant/Appellant is seeking in the present application is expeditious hearing and determination of this Appeal. Section 1B of the *Civil Procedure Act* Cap 21 Laws of Kenya provides the purpose of furthering the overriding objective of the Act is for the courts to handle all matters presented before it for the purposes of attaining the just determination of proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties and the use of suitable technology.
12. Having considered the application and the materials placed before me both in support and in opposition thereto, I find that the application is merited. To avoid prejudice to the Applicant/Appellant by way of prolonged delay in the lower court, this Honourable Court shall issue guidelines and timelines on the hearing and disposal of the appeal as hereunder.
 1. To facilitate an expeditious and timely disposal of this appeal, the Appellant/Applicant is hereby ordered and directed to file and serve a record of appeal within 14 days of this ruling and the appeal shall thereafter be heard within 21 days.
 2. This matter shall be mentioned on 25/07/2024 to confirm compliance and further orders.
 3. The Costs of this application shall be costs in the appeal.
13. Orders accordingly.

READ, DATED AND SIGNED AT BUNGOMA THIS 11TH DAY OF JULY, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Wasilwa for Appellant/Applicant

Mr. Alovi for the Respondent.

Bett C/A

