



Elick & another v Otsyula & 2 others (Environment & Land Miscellaneous Case E001 of 2024) [2024] KEELC 5045 (KLR) (3 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2024**

SM KIBUNJA, J

JULY 3, 2024

BETWEEN

BOSIRE MOGESA ELICK 1ST APPELLANT

KHUDNICK NYANGAU MOCHORWA 2ND APPELLANT

AND

SIMON MUSUNGU OTSYULA 1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

MIRIAM WANJIRU NJENGA 3RD RESPONDENT

RULING

1. The appellants have moved this court vide a notice of motion dated 22nd January 2024 seeking for inter alia:
 - a. That the Honourable Court be pleased to grant the applicant leave to appeal out of time against the judgement of the Honourable D.O Mbeja delivered on 16th November, 2023 in Mombasa CMCC ELC No. 68 of 2020 Simon Musungu Otsyula, Khudnick Nyangau Mochorwa & Three Others;
 - b. That this Honourable Court issues a stay of execution against the Judgment and Decree of Honourable D.O Mbeja delivered on 16th November, 2023 in Mombasa CMCC ELC No. 68 of 2020 Simon Musungu Otsyula, Khudnick Nyangau Mochorwa & Three Others and all consequential Orders and or proceedings be stayed pending inter partes hearing and determination of the intended appeal.
 - c. That any such further orders(s) which this Honourable Court deems just and expedient in the circumstances be issued.



d. That costs of this Application be provided.

The application is premised on fourteen (14) grounds on its face and supported by the affidavit of the 1st appellant, sworn on 22nd January 2024 among others deposing that on 25th July 2023, the aforementioned ELC 68 of 2020 came up for mention to confirm filing of submissions, where the court scheduled a judgment date of 19th October 2023; that the court did not deliver judgment on that date; that on 12th January 2024, he learnt judgement was delivered on 16th November 2023, when the 1st respondent demanded that he should not step onto Plot No. 505, Miritini, suit property; that the trial court had not issued a judgment notice for the 16th November, 2023 and his advocates could not inform the 2nd appellant or himself as they were also not aware of the judgment date; that on finding out that judgement had been delivered, he notified his advocates and instructed them to lodge an appeal, but they informed him that the time for filing an appeal had lapsed; that the intended appeal raises strong grounds; that the 1st respondent has already set in motion the process of execution; that the intended appeal will be rendered nugatory if the stay of execution is not granted; that the applicants are ready to offer security for the appeal; that the application is not a subversion of justice.

2. The 1st respondent opposed the application vide grounds of opposition dated 1st February 2024 inter alia that the application is fatally defective, bad in law and incompetent; the application does not satisfy the test for grant of stay of execution pending appeal and was only filed to frustrate and delay the 1st respondent from enjoying the fruits of judgment; the applicant has not offered any security for stay of execution; that the 1st respondent will be greatly prejudiced if the application is granted.
3. The applicants and the 1st respondent filed their submissions dated the 19th February 2024 and 9th May 2024 respectively, which the court has considered.
4. The following are the issues for determination by the court:
 - a. Whether the applicant has met the threshold for leave to appeal out of time to be granted.
 - b. Whether the applicant has met the threshold for stay of execution pending the filing and determination of the intended appeal to be issued.
 - c. Who bears the costs?
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings:
 - a. The application was made under section 79 G of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya, which states as follows:

“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 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 *Evans Kiptoo v Reinhard Omwonyo Omwoyo* (2021) eKLR the court was in agreement with the reasoning in the case of *Gerald M'limbine v Joseph Kangangi* [2008] eKLR, where the court stated that:

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period.”

- b. The above precedent and proviso in the said section 79 G of the *Civil Procedure Act* therefore means that a memorandum of appeal has to be filed, with the application for leave or extension of time, and then it becomes the duty of the court to admit the same out of time. This was the position in *Mugo & Others v Wanjiru & Anor* [1970] EA 482 where the court stated as follows:

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

- c. In the instant matter, there is no evidence that an appeal has been filed, and no draft memorandum of appeal has been annexed. Further to the dismay of this court, the applicant states that they have strong grounds of appeal, but the court cannot determine this without a draft memorandum of appeal being annexed.
- d. Similarly, for a stay of execution pending appeal order under Order 42 Rule 6 of the *Civil Procedure Rules*, cannot be granted where there is no existing appeal. From the foregoing conclusions, the applicant fails in the two main prayers in the application dated the 22nd January 2024.
- e. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the costs follow the event unless where ordered otherwise for good reasons. I see no reasonable grounds to depart from that general edict.

6. In view of the above determinations, the court find and order as follows:

- a. That the notice of motion dated 22nd January 2024 is without merit and is dismissed.
- b. The applicant to pay the cost of the 1st respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 3RD DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Applicants: M/s Ondieki for Omwenga

Respondents : M/s Juma for Mutubia for 1st Respondent.

LEAKEY – COURT ASSISTANT.



S. M. KIBUNJA, J.
ELC MOMBASA.

