



**Muhungi v Kariuki (Environment & Land Miscellaneous Case
E005 of 2024) [2024] KEELC 6451 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E005 OF 2024
LN GACHERU, J
OCTOBER 3, 2024**

BETWEEN

GRACE NJOKI MUHUNGI APPLICANT

AND

PATRICK MBURU KARIUKI RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 2nd April, 2024, brought under Sections 1A, 1B, 3A and 75 of the [Civil Procedure Act](#), and Order 42, Rule 6 and Order 51 (1) of the [Civil Procedure Rules](#), the Applicant herein Grace Njoki Muhungi, sought for the following Orders :
 1. That pending the hearing and determination of this application the Court be pleased to grant a stay of the Ruling delivered by Hon S. Mwangi, Senior Resident Magistrate on 27th September, 2023, and any subsequent Orders issued in this suit.
 2. That this Court be pleased to grant the Applicant leave to Appeal against the ruling delivered by Hon S. Mwangi, Senior Resident Magistrate on 27th September, 2023.
 3. That costs of this Application be provided for.”
2. The Misc. Application is anchored on the grounds set out on its face, and on the Supporting Affidavit of Grace Njoki Muhungi (the Applicant), sworn on 2nd April, 2024.
3. The Applicant averred that she was the Defendant in Muranga CMELC Case No. 35 of 2020, and the Respondent herein was the Plaintiff in the said suit wherein , a Consent Judgment was entered by the Court on 26th October 2022, without the Applicant’s knowledge. She further contended that she did not at any time instruct her Advocates on record in the suit before the trial Court namely, the Law Firm of Bonwonga & Co Advocates, to record a consent with the Advocates for the Plaintiff



- (now Respondent) to the effect that the Applicant had consented to pay Kshs.2,272,500/=, to the Respondent as claimed.
4. Dissatisfied with the conduct of the Law Firm of Bonwonga & Co Advocates, the Applicant retained the Law Firm of T.M. Njoroge Advocate, and instructed the latter Firm of Advocates to file an application to set aside the said consent judgment.
 5. In a ruling delivered on 31st May, 2023, the trial Court determined that the Law Firm of T.M. Njoroge Advocates, was not properly on record, hence had no legal standing to address the Court. The Applicant faulted the application lodged on her behalf by the Law Firm of T.M. Njoroge Advocates, dated 27th January, 2023, for containing extraneous matters.
 6. The Applicant contended that the Respondent is in the process of executing the said Consent Judgment dated 26th October, 2022. Her main contention is that she did not dispose of land parcel No. LOC.7/Gakoigo/3399 (the suit property), to the Respondent because she lacked the legal capacity to do so.
 7. It was her contention that during the time of the alleged purchase of the suit land by the Respondent, the same was registered in the name of Joyce Wambui Muhungi (deceased), and no succession proceedings were commenced to distribute the estate of the deceased. Further, that it was the Respondent who, through fraud, caused the suit property to be registered in the Applicant's name in order to facilitate the conveyance of the suit land from the Applicant to himself.
 8. She further averred that a Consent Judgment, is liable to be challenged on grounds that it was obtained through fraud, mistake or misrepresentation or any other valid reason in the eyes of the Court. The Applicant stated that the consent Judgment dated 26th October, 2023, having been issued without any instructions to her Advocates to that effect, the same should be set aside by this Court on grounds of misrepresentation.
 9. She urged the Court to set aside the Consent Judgment and allow her to defend the suit as per her Statement of Defence dated 10th July, 2020.

The Respondent's Response

10. The Respondent opposed this Misc. Application through the Replying Affidavit sworn by J.N. Kirubi (Advocate) on 19th April, 2024, in his capacity as the Respondent's Advocate on record. He averred that the instant Application is frivolous, vexatious and an abuse of the due process of the Court. It was his further averment that the Respondent is executing a lawful decree of the trial Court obtained following a Consent Judgment recorded in Court on 26th October 2022, between both the Advocates for the Applicant and the Respondent.
11. The Respondent further averred that the Applicant's attempt to set aside the consent Judgment dated 26th October 2022, vide an Application dated 26th June, 2023, was dismissed by the trial Court through a Ruling delivered on 27th September, 2023, on grounds of lack of merit.
12. It was the Respondent's further averment that the Applicant, instead of exercising her right of appeal against the ruling of the trial Court delivered on 27th September 2023, filed an Application dated 9th October, 2023, seeking a stay of execution of the ruling delivered on 27th September, 2023, and leave to appeal against the same.
13. Further, the Respondent's contended that the Applicant opted to move the wrong Court in her Application dated 9th October, 2023, whereas, in the circumstances, she should have filed an Appeal before this Court against the said Ruling.



14. Further, the Respondent averred that the Applicant's Application dated 9th October, 2023, was dismissed by the trial Court vide a Ruling dated 21st February, 2024. That the Applicant, instead of lodging an Appeal against the dismissal of her Application dated 9th October, 2023, opted to commence the current suit, which seeks the same prayers sought in her Application dated 9th October, 2023, which action demonstrates that the Applicant has misapprehended and misunderstood the law.
15. It was the Respondent's further averment that execution of the consent judgement is underway pursuant to the decree of the trial Court issued on 26th January, 2023, and not against the Ruling of the trial Court dated 27th September 2023, as claimed by the Applicant herein.
16. The Respondent also averred that the prayer numbered (3) in the instant Notice of Motion Application in so far as it seeks a stay of execution of the trial Court's Ruling dated 27th September, 2023, is frivolous, vexatious and abuse of the due process of the Court. It was further contended that the failure by the Applicant to annex the Ruling of the trial Court dated 27th September, 2023, to the instant Application renders the same defective.
17. The Respondent further contended that should this Court grant the Applicant the reliefs sought in the instant Application, the Court should impose certain conditions on the Applicant; namely, that the Applicant should deposit the decretal sum of Kshs.2,272,500/=, plus the interest accrued thereto from 26th October, 2022, being Kshs.431,775/=, because the dispute between the parties herein concerns a money decree resulting from a Consent Judgment recorded in Court on 26th October, 2022.
18. This Misc Application was canvassed by way of written submissions.

The Applicant's Submissions

19. The Applicant filed her written submissions dated 13th June, 2024, through the Law Firm of Tim Kariuki & Co Advocates, and she identified a single issue for determination as follows:

1. Whether leave should be granted to the Applicant to file an appeal against the ruling of the trial Court delivered on 27th September, 2023?

20. The Applicant set out the provisions of Section 75(1) of the *Civil Procedure Act* as read together with Order 43 (2) of the *Civil Procedure Rules*, to buttress the submissions that in the event that leave is sought in the Court making the impugned Order and the same is denied, then an aggrieved party is at liberty to move the Superior Court and then seek similar orders and not through an appeal.
21. It was further submitted that in its ruling delivered on 21st February, 2024 the trial Court did not address the Applicant's prayer seeking leave to appeal against the Orders of the trial Court rendered in the context of the Applicant's Application dated 9th October, 2023.

The Respondent's Submissions

22. The Respondent filed his written submissions dated 23rd May, 2024, through the Law Firm of Kirubi, Mwangi Ben & Company Advocates, and submitted that the Applicant has failed to honour the terms of the Consent Judgment dated 26th October, 2022.
23. It was further submitted that the Applicant chose to engage a new Firm of Advocates who commenced an Application dated 26th June, 2023, seeking to set aside all the proceedings emanating from the Consent Judgment dated 26th October, 2022, which Application was dismissed by the trial Court vide a Ruling delivered on 27th September 2023, due to lack of merit.



24. It was further submitted that the Applicant was entitled to appeal against the decision of the trial Court dated 27th September 2023, within thirty (30) days, but elected not to exercise her right of Appeal, instead she lodged another application dated 9th October, 2023, before the trial Court seeking both a stay of execution and leave to appeal out of time against the ruling dated 27th September, 2023.
25. The Respondent reiterated that the Applicant's application dated 9th October 2023, was dismissed by the trial Court on 21st February, 2024, for lack of merit and the Applicant has initiated the instant suit seeking the same reliefs sought in her dismissed application dated 9th October, 2023.
26. It was also submitted that the Applicant sat down on her rights as regards her right to appeal against the decision of the trial Court dated 27th September, 2023, as she did not appeal against the said ruling. That the instant suit has no bearing with the decision of the trial Court delivered on 21st February, 2024.
27. It was further submitted that the Applicant's failure to annex the ruling of the trial Court dated 27th September, 2023, to the instant Application renders this Misc. Application fatally defective.
28. Further, that the instant suit is rendered res judicata in light of the decision of the trial Court dated 21st February, 2024, as the same issues raised in the Applicant's Application dated 9th October, 2023, have been repeated in the present Application.
29. Further, that the decretal sum awarded by the trial Court has accumulated to Kshs.2,704,275/=, inclusive of interest. He urged the court to impose a condition on the Applicant to deposit the aforesaid amount in Court as security in the remote chance that the current Application is allowed.
30. This court has considered the pleadings herein, the annexures thereto, the rival written submissions and relevant provisions of law, and finds the issues for determination are;
 - i. Whether the instant Misc. Application is fatally defective for failure to attach the decision of the trial Court?
 - ii. Whether the Applicant is entitled to the Orders sought?
 - iii. Who shall bear the costs of the suit?

i) Whether the instant Misc. Application is fatally defective for failure to attach the decision of the trial Court?

31. In the case of Karanja (Suing as the Representative of the *Estate of David Karanja Ng'ang'a*) v *Kiboinet t/a Sweetland Consultant Limited & 2 others* (Environment & Land Case 45B of 2021) [2024] KEELC 3654 (KLR) (30 April 2024) (Ruling), the Court reasoned as follows:

“On whether the failure to attach the order/ruling would render the Application fatally defective, this Court notes that there is no requirement under Order 45 of the Civil Procedure Rules for an applicant to annex the order or ruling sought to be reviewed. This requirement appears to have arisen from practice. Being a procedural requirement, it is in some circumstances curable by Article 159 (2)(d) of the *Constitution* of Kenya 2010 and hence, in those rare instances, it is not fatal to the application.”



32. Further, the Court of Appeal in the case of *Peter Kirika Gitthaiga & another v Betty Rashid* (2016) eKLR, held as follows:

“Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court’s attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.”

33. Guided by the above jurisprudence from the Superior Courts, this Court finds and holds that the Applicant’s failure to attach the Ruling of the trial Court dated 27th September, 2023, is not a fatal defect, which would result in the automatic dismissal of the instant Application.

ii) Whether the Applicant is entitled to the Orders sought?

34. In the instant suit, the Applicant is seeking for leave of the Court to appeal against the decision rendered by the trial Court on 27th September, 2023.

35. Section 79G of the *Civil Procedure Act* 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 any time which the lower court may certify as having been requisite for the preparation and delivery 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.”

36. In the case of *Gitbau v Kagiri & another* (Civil Appeal 314 of 2023) [2024] KEHC 6320 (KLR) (30 May 2024) (Ruling), the Court declared as follows:

“It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time.”

37. Further, the Supreme Court, in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR, reasoned as follows:

“The underlying principles a court should consider in exercise of such discretion should include:

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”

38. The Court has perused the pleadings herein, annexures thereto, and rival written submissions of the parties herein, and this Court cannot avoid noting that the Applicant has not expressed or stated any reason whatsoever as to why the instant Application was brought outside the 30-days period stipulated under Section 79G of the *Civil Procedure Act*.
39. The Applicant has not even acknowledged that the instant Application has been brought outside the Statutory timelines. There being no cause or explanation availed by the Applicant herein, as to the timing of the instant Application, this Court is not minded to exercise its discretion in the Applicant’s favour to extend the time for the filing of the said appeal.
40. Accordingly, this Court finds and holds that the instant Misc Application is not merited. Consequently, this Misc. Application is dismissed entirely.

iii) who should bear costs of this Application.

41. Section 27 of the *Civil Procedure Act*, is very clear that costs are granted at the discretion of the court. However, Costs follow the event and are granted to the successful litigant. The Applicant’s suit has been dismissed, and therefore, the Respondent is the successful litigant, and thus is entitled to costs.
42. For avoidance of doubt, this Misc. Application herein is dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A, THIS 3RD DAY OF OCTOBER, 2024.

L. GACHERU

JUDGE

3/10/2024.

Delivered online in the presence of;

Joel Njonjo (Court Assistant)

N/A for the Applicant Though Ruling date was taken in the

presence of both advocates on

N/A for the Respondent 29/7/2024.

L. GACHERU

JUDGE

3/10/2024.

