



**Ohato v Hafula (Environment and Land Appeal E007 of 2023)
[2024] KEELC 6572 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E007 OF 2023
SM KIBUNJA, J
OCTOBER 9, 2024**

BETWEEN

HERMAN OHATO APPLICANT

AND

WILFRED DOMINIC HAFULA RESPONDENT

RULING

[Notice of Motion Dated 7th February 2023]

1. The Appellant's filed the notice of motion dated 7th February 2023 seeking for the following orders:

- “1. Spent.
2. Spent.
3. That the appeal herein be admitted out of time.
4. That upon having the instant appeal admitted there be a stay of execution of the judgment and the decree issued as against the defendant/appellant in Mombasa Civil Case No. 758 of 2011 Wilfred Dominic Hafula v Herman Ohato pursuant to the judgment made on the 15th day of March 2019 and a decree issued on the 18th day of November 2022 pending the hearing and determination of the instant appeal.”

The application is supported by the affidavit of Herman Ohato, the appellant, sworn on 7th February 2023, in which he inter alia deposed that the respondent filed a suit against him, being Mombasa ELC No. 758 of 2011, Wilfred Dominic Hafula versus Herman Ohato; that the suit was heard and set down for judgment on 4th July 2018; that on that date, the trial court directed that judgment would be delivered on notice, but he was never served;



that he only got to know the judgement had been delivered when he was served with a notice of attachment, warrants of proclamation, warrants of sale and auctioneer's fee note in execution of a decree on 31st January 2023; that on 3rd February 2023 he visited the court and perused the file and was aggrieved by the judgement therein, but by then the period for filing the appeal had already lapsed; that he has a formidable appeal with overwhelming chances of success and his application should be granted; that the respondent has no known means of compensating him if execution is carried out against him, and his appeal later succeeds."

2. The application was certified urgent on 8th February 2023 and fixed for hearing on the 15th February 2023. On that day, counsel for the appellant alleged he had served the counsel for the respondent but as he had not filed an affidavit of service, the hearing was adjourned to 9th March 2023. Come 9th March 2023, the appellant and his counsel did not attend court and the application was dismissed for non-attendance, and the matter was fixed for mention on 10th May 2023.
3. The record show that on 10th May 2023, the counsel for the appellant was in court and indicated having learnt of the dismissal of the application. He then sought for another mention date and promised to serve. A mention date of 26th July 2023 was fixed but no party or counsel attended Court and the matter was rescheduled to 25th October 2023. On that date counsel for the appellant sought for another mention date and undertook to serve. The matter was fixed for mention on 6th December 2023, but no party or counsel attended. The court fixed the matter for hearing on the 22nd February 2024, when counsel for the appellant sought for another date as he had not filed the affidavit of service. The matter was fixed for hearing on the 23rd April 2024, but put off to the 29th May 2024 upon counsel for the appellant indicating he had not filed an affidavit of service. On 29th April 2024, the appellant's counsel confirmed having served the application and as no reply had been filed, he sought for prayers 3 and 4 of the application. The court reserved the matter for ruling today.
4. The issues for determination by the court are as follows:
 - a. Whether there is any application for the court's consideration in view of the dismissal order of 9th March 2023.
 - b. Whether the appellant has met the threshold for stay of execution and extension of time orders to issue.
 - c. Whether there is any valid appeal before the court.
 - d. What orders to make.
5. The court has carefully considered the grounds on the application, the affidavit evidence, the record and come to the following findings:
 - a. There is no doubt that the application dated 7th February 2023 was dismissed for non-attendance on the 9th March 2023. That order was brought to the attention of the counsel for the appellant/applicant on 10th May 2023, and there is nothing on record to show or suggest that the dismissal order has been vacated or set aside and the application reinstated for hearing to date.
 - b. That it follows therefore, that by the time the counsel for the appellant/applicant was finally serving the application upon counsel for the respondent on 23rd May 2024, for hearing on 29th



May 2024, on which date he moved the court for prayers (3) and (4) to be granted, there was no valid application before the court.

- c. Further, by the time the court set down the application for ruling today, there was no valid application before the court as the only one dated 7th February 2023, filed by the appellant/applicant had long been dismissed on 9th March 2023. In view of the foregoing findings, the court do not need to make any determinations on the merits of the application as it is non-existent.
 - d. That as the application was dismissed more than one year ago, and noting there has been no application to reinstate it, and considering it had among others sought for the appeal to be admitted out of time, it follows there is no valid appeal before the court on which directions may be issued. The appeal commenced through the memorandum of appeal dated the 7th February 2023 should therefore be struck out, with no order as to costs.
 - e. The respondent has not participated in this matter in any way and there will be no order on costs.
6. Flowing from the foregoing, the court finds and orders as follows:
- a. That for avoidance of doubt, the appellant's/applicant's notice of motion dated 7th February 2023 seeking for the appeal to be admitted out of time and stay of execution was dismissed for non-attendance on the 9th March 2023.
 - b. That as the appeal commenced through the memorandum of appeal dated the 7th February 2023 was admittedly filed outside the statutory time, and there being no application for extension or enlargement of time pending, the said memorandum of appeal is hereby struck out.
 - c. There being no other matter pending, the file be closed.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 9TH DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellant/applicant : No Appearance.

Respondent : No Appearance.

Court Assistant – Leakey.

S. M. KIBUNJA, J.

ELC MOMBASA.

