



Onyagore v Azelwa; Azelwa (Suing on her own behalf and as the next of friend of Hamisi Azelwa) & 2 others (Objector) (Environment and Land Case Civil Suit 351 of 2009) [2023] KEELC 16311 (KLR) (6 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 351 OF 2009
JA MOGENI, J
MARCH 6, 2023**

BETWEEN

JAMES ONYANGO ONYAGORE DECREE HOLDER

AND

AGGREY TAIKOSH AZELWA JUDGMENT DEBTOR

AND

FAITH ANDREW AZELWA (SUING ON HER OWN BEHALF AND AS THE NEXT OF FRIEND OF HAMISI AZELWA) OBJECTOR

DAN JUNIOR AZELWA OBJECTOR

PATRICIA AZELWA OBJECTOR

RULING

1. Coming up for determination is the decree holder's application dated November 14, 2022 and filed on the even date, brought under sections 1A, 1B, 3 and 75 of the *Civil Procedure Act*, order 43 and order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law. The decree holder/applicant seeks the following orders:
 1. Spent.
 2. That the decree holder/applicant be granted leave to file an appeal against the ruling delivered on the October 27, 2022 by this honourable court.
 3. That the costs of this application be in the cause.



2. In response to the application, the judgment debtor filed grounds of oppositions dated November 18, 2022. The grounds were as follows:
 1. That the application is misconceived and does not lie.
 2. That the applicant is guilty of laches.
 3. That the application is an abuse of the court process.
 4. That the application has no merit.
3. The application was dispensed by way of written submissions. The applicant filed his submissions dated January 16, 2023 and filed on the even date. The judgment debtor did not file submissions.
4. The applicants case is as follows: -
 - a. The decree holder/applicant is dissatisfied with the ruling delivered on October 27, 2022 in the instant case.
 - b. The decree holder/applicant is desirous of appealing against the said decision hence seeking leave from this honourable court.
 - c. That on the March 31, 2021 a judgment was entered in favour of the decree holder/applicant against the judgment debtor/respondent for Kshs 3,852,093.
 - d. That the judgment debtor/respondent did not settle the said judgment at all and after investigations the decree holder/applicant confirmed that the sole asset of the judgment debtor/respondent capable of satisfying the decree was parcel of land Kakamega/Sergiot/2751.
 - e. That the court granted an order to attach and sale of the said parcel of land Kakamega/Sergiot/2751 belonging to the judgment debtor/respondent.
 - f. That on December 3, 2020, Nyaluoyo Auctioneers advertised in the Standard Newspaper a sale for the said parcel of land scheduled on December 17, 2020 to which it received no bid.
 - g. That upon the expiration of the notification of sale the same was re-issued to Remma Auctioneers and on March 14, 2022 Remma Auctioneers placed a notification of sale.
 - h. That upon the second advertisement for sale the objectors herein maliciously and mischievously filed an application dated April 22, 2022, on claims that the said parcel of land Kakamega/Sergiot/2751 was ancestral land.
 - i. That this honourable court found merit in the objectors' application dated April 22, 2022 therefore, allowing the said application.
 - j. That the parcel of land known as Eldoret Municipality Block 21(King'ong'o)/1696 was the decree holder/applicant's only lifetime investment to which he sold to the judgment debtor/respondent.
 - k. That moreover upon the second advertisement for sale the parcel of land Kakamega/Sergiot/2751 had found a ready buyer and the decree holder/



applicant stands to be greatly prejudiced if the orders sought herein are not granted.

- l. That the decree holder/applicant is financially incapacitated as he is a retiree with poor health who his children are still in school and in dire need of school fees and upkeep.
 - m. The intended appeal has overwhelming chances of success.
 - n. It is in the interest of justice and fairness that the decree holder/applicant be granted leave to file his appeal.
5. I have carefully considered the application, the grounds of opposition raised and the applicant's submissions and, in my view, the main issues arising for determination are whether the orders sought to be appealed against were appealable as of right and whether the applicant has established sufficient grounds for the grant of the orders sought.

Whether the orders sought to be appealed against were appealable as of right

6. It is the applicant's submission that appeals from an order under order 22 rule 51 (2) and 52 of the Civil Procedure Rules does not lie as of right and a party requires leave of court. That the grant of leave to appeal is a matter of the court's discretion which must, as a matter of course, be exercised judicially depending on the circumstances of each particular case.
7. The applicable law is found at section 75 of the Civil Procedure Act and order 43 rule 1(1) of the Civil Procedure Rules. From the reading of provisions of order 43(1) of the Civil Procedure Rules, it is clear that it sets out the orders from which appeals would lie as a matter of right; and at order 43(2) which is couched in mandatory terms and provides that any appeal from orders not listed in order 43(1)(1) 'shall' only lie with the leave of the court (emphasis mine); section 75 of the Civil Procedure Act then states that such leave to appeal shall be made to the court of first instance and can be made orally at the time the order is made or within fourteen days from the date of such order; and order 43(4) expounds on the order which includes an order granting the relief applied for or an order refusing such relief.
8. From a casual glance of the application dated April 22, 2022, the same was filed pursuant to order 51 rule 1, order 22 rule 51 (2) and order 22 rule 52 of the Civil Procedure Rules together with section 1A and 3A of the Civil Procedure Act. Thereafter, the orders issued on October 27, 2022 were also pursuant to order 51 rule 1, order 22 rule 51 (2) and order 22 rule 52 of the Civil Procedure Rules together with section 1A and 3A of the Civil Procedure Act.
9. In this case therefore, the challenged orders are in respect to provision of provision of accounts which fall under order 22 rule 51 (2) and order 22 rule 52 of the Rules and therefore not within those orders that are appealable as of right as rightly stated by the applicant.

Whether the applicant has established sufficient grounds for the grant of the orders sought?

10. The application before this court is one where the applicant is seeking leave to appeal from this court's orders. The procedure for obtaining leave to appeal is provided for under order 43(3) of the Civil Procedure Rules which states as follows: -
 - “(3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from,



either orally at the time when the order is made, or within fourteen days from the date of such order.”

11. In this regard, the court in the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR held that:

“In the instant matter the notice of motion dated December 18, 2015 pursuant to which the learned magistrate granted the orders of the same date sought to be appealed by the applicant did not fall under any of the orders set out under order 43 rule (1) in respect of which an appeal lies as of right... Thus the applicant did not have an automatic right of appeal against the order made on December 18, 2015 and therefore required to obtain the leave of the court as envisaged under section 75(1) of the *Civil Procedure Act* and order 43 subrule (3) of the Civil Procedure Rules. Under order 43 subrule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order.”
12. It is clear to me that the above relevant sections of the law is couched in mandatory terms and therefore this court is required to exercise its discretion on whether to grant the sought leave for appeal. The main issue that is alleged to be appealed by the applicant falls under order 22 rule 51 (2) and order 22 rule 52 of the Rules pursuant to its ruling dated October 27, 2022. As held above the issue clearly falls outside the issues in which appeals lie as of right and therefore the applicant ought to have sought leave of this court in order to pursue an appeal.
13. I note that the present application was filed on November 14, 2022 and the ruling that is being appealed was delivered on October 27, 2022. That is a period on 18 calendar days. The applicant ought to have sought the subject leave orally at the time the court delivered its ruling or within 14 days thereafter. The applicant submits that if there was any delay occasioned it was reasonable delay as the applicant had to apply and wait for the copy of the ruling from the court for purposes of annexing and marking it as annexure “J001”.
14. The general rule above is that every decree may be appealed from unless barred by some law. However, an appeal does not automatically lie against every order. Indeed, where time for filing of an appeal as stipulated in law or the rules has expired, the court is empowered to grant extension of such period. This power to extend the time for filing an appeal out of time is discretionary.
15. It is also trite that leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. This is because section 79 G of the *Civil Procedure Act* allows an appeal to be considered out of the period stipulated for filing of the same.
16. I associate myself with the sentiments of Sewe J, in *Edith Wairimu Njoroge v Brooks Holdings Co Ltd* [2018] eKLR that where an appeal does not lie as of right from an order but only with leave, such leave “was a prerequisite to the assumption of jurisdiction by this court on appeal.” In *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR the Court of Appeal held that the right of appeal goes to the court’s jurisdiction, is a fundamental matter and that the absence of statutory conferment of such right is not a mere technicality.
17. I have carefully considered the instant application, applicant’s submissions, the authorities cited to me and the relevant legal provisions as well as the circumstances of this case and I find that the present application has merit. The applicant has provided sufficient reason to warrant the grant of leave to



appeal out of time. A delay of 4 days is reasonable delay. There is *prima facie* grounds that merit judicial consideration. This court finds that the instant application is merited as there is sufficient ground to allow the same.

18. The upshot is that I hereby grant leave to appeal. The application dated November 14, 2022 is hereby allowed. Costs are awarded to the applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH 2023

MOGENI J

JUDGE

In the virtual presence of :-

Ms Morara for Decree Holder/Applicant

Mr Kibue for the Judgment Debtor/Respondent

Ms. C. Sagina: Court Assistant

