



**Keya v Wekesa (Environment & Land Case E059 of 2015)  
[2023] KEELC 21364 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21364 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E059 OF 2015**

**BN OLAO, J**

**NOVEMBER 9, 2023**

**BETWEEN**

**PATRICK OMONDI KEYA ..... APPLICANT**

**AND**

**FLORENCE AUMA WEKESA ..... RESPONDENT**

**RULING**

1. Judgment in this case was delivered by Omollo J on September 28, 2022 (not Omondi J as indicated in the Notice of Motion dated March 10, 2023 and which is the subject of this ruling). The record shows that it was delivered in the absence of the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> defendants although counsel for the 5<sup>th</sup> and 8<sup>th</sup> defendants were present. The Judge ordered that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do vacate the land parcel no Marachi/Elukongo/1293 within 120 days of delivery of the judgment or they be evicted therefrom. The suit as against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> defendants was dismissed.
2. By the aforesaid Notice of Motion, Patrick Omondi Keya who was the 1<sup>st</sup> defendant (the applicant for purposes of this application) seeks the following orders:
  1. Spent
  2. That this honourable Court be pleased to grant the applicant leave to file his appeal against the judgment of Hon Lady Justice A Omondi (read Omollo) in Busia ELC Case No 50 of 2015 delivered on September 28, 2022.
  3. That this honourable Court be pleased to order for stay of execution of the judgment delivered on September 28, 2022 pending the hearing and determination of the intended appeal.
  4. That costs of the application be in the cause.
3. The application is premised on the grounds set out therein and supported by the applicant's Affidavit dated March 10, 2023.



4. The gist of the application is that the applicant's intended appeal is meritorious with high chances of success and that the delay in filing it was because the court did not notify the parties as to when the judgment would be delivered. That the plaintiff is now planning to evict him yet he is among the beneficiaries to the suit land an issue which he says he raised during the trial but which was not considered by the court. That the application is made in good faith and no prejudice will be caused to the plaintiff.
5. When the application was placed before me on March 23, 2023, I directed that it be canvassed by way of written submissions. The applicant was to serve within 7 days and the plaintiff would respond within 14 days of service.
6. An affidavit of service filed by Hillary Okanga Ongwete a process server of this court shows that the plaintiff passed away on July 17, 2022.
7. The application is therefore not opposed. It is however not clear if a legal representative to the Estate of the deceased plaintiff has been appointed some 16 months now since her demise.
8. Although the Notice of Motion is not opposed, I shall consider it on the basis of the material before me.
9. I do not think that the demise of the plaintiff on July 17, 2022 can be disputed. That information was conveyed by her son to an officer of this court. I have not heard the Applicant dispute that averment as contained in paragraph 3 of the affidavit of service by Hillary Okanga Ongwete.
10. The applicant has annexed to his application a Notice of Appeal dated March 10, 2023 and lodged in this court's registry on March 22, 2023. That means that the Notice of Appeal was lodged 8 months after the demise of the plaintiff. In *Kabocha & 2 others -v- Kamau & another* CA Civil Application No Nai 37 of 1989 (1987 eKLR), Apaloo JA (as he then was) stated thus:

“It seems to me that the rules evinced a clear intent that an appeal by or against a party should not be negated by the fortuitous circumstances of the death of either party. So rule 77 for instance, provides that the death of the respondent shall not render an appeal incompetent and that a notice of appeal shall be served on his legal representative.”

The Judge went on to add further that:

“The only sense in which the appeal was inchoate before the 1<sup>st</sup> respondent's death, is that the appeal was not technically instituted within the requirement of rule 81. But that contingency was foreseen and catered for by sub-rule 2 of rule 83 which enacts that:

“An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted, but the court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.”

The above rule is now replicated in rule 87(2) of the *Court of Appeal Rules 2022* which reads:

“An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased person.”  
Emphasis mine.



In the absence of any evidence that there has already been appointed a legal representative to the Estate of the deceased plaintiff it is difficult to see how Rule 87(2) of the Court of Appeal Rules can aid the Applicant.

11. The Applicant has in his Submission dated March 31, 2023 cited the provisions of section 7 of the [Appellate Jurisdiction Act](#) which reads:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

No doubt this court has the jurisdiction to extend time for filing a Notice of Appeal. However, following the demise of the plaintiff on July 17, 2022, a fact which I would expect to be within the knowledge of the Applicant and which has not been controverted, and in the absence of a known legal representative to her estate, this court is not in any position to make orders as to who any Notice of Appeal shall be served. And courts do not act in vain.

12. The first limb of the Notice of Motion dated March 10, 2023 is for striking out.
13. The second limb of the Motion will also suffer the same fate for the same reasons.
14. And even if, for the sake of arguments, there was a legal representative to the deceased plaintiff's Estate, the applicant would have had to surmount the provisions of order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) by satisfying the following conditions:
1. Show sufficient cause.
  2. Demonstrate that he will suffer substantial loss unless the order for stay of execution is granted.
  3. Offer security.
  4. File the application without unreasonable delay.

See *Visharam Ravji Halai & another -v- Thornton Turpin (1963) Ltd* 1990 KLR 365, [Kenya Shell Ltd -v- Kabiru](#) 1986 KLR 410, *Mukuma v Abuoga* 1988 KLR 645 among other cases. Other than pleading that his appeal is meritorious with high chances of appeal, a matter which is not within the jurisdiction of this court, and that the application is made in good faith without prejudice to the deceased plaintiff, the application does not meet the threshold set out in the law and the above cited precedents.

15. The up-shot of the above is that having considered the Notice of Motion dated March 10, 2023 is incompetent. It is hereby struck out with no orders as to costs.

**BOAZ N. OLAO**

**JUDGE**

**9<sup>TH</sup> NOVEMBER 2023**

**RULING DATED, SIGNED AND DELIVERED TO THE APPLICANT ON THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023 IN OPEN COURT.**

**BOAZ N. OLAO**



**JUDGE**

**9<sup>TH</sup> NOVEMBER 2023**

