



**Kandie v Korir & another (Environment and Land Miscellaneous Application
E064 of 2022) [2023] KEELC 21226 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E064 OF 2022
EO OBAGA, J
NOVEMBER 2, 2023**

BETWEEN

HILLARY KANGOGO KANDIE APPLICANT

AND

SALLY JEMELI KORIR 1ST RESPONDENT

EDWIN KIPROP KORIR 2ND RESPONDENT

RULING

1. This is a ruling in respect of Notice of Motion dated 3/8/2023 in which the Respondents/Applicants are seeking stay of execution pending appeal. On 13/7/2023, this court delivered a ruling in which the Applicant/Respondent's application for eviction of the Applicants was allowed.
2. The Applicants contend that they have since appealed against the ruling of the court and that if stay of execution is not granted, they will suffer substantial loss. One of the reasons why the Applicants are preferring an appeal is that their application dated 9/2/2023 was not considered and that the court only considered the Respondents Notice of motion dated 19/12/2022.
3. The Respondent opposed the Applicants' application through a replying affidavit sworn on 8/8/2023. The Respondent contends that the Applicants' application is frivolous, vexatious, scandalous and an abuse of the process of the court. He further contends that the dispute between the parties was determined in ELC 794 of 2012 and there was no appeal against that decision.
4. The Respondent further states that the Applicants never sought leave to appeal against the ruling of 13/7/2022 and that they have not demonstrated that they will suffer substantial loss should stay be declined. The Respondent states that he is a medical doctor who is capable of compensating the Applicants should their appeal succeed.



5. I have carefully considered the Applicants' application as well as the opposition thereto by the Respondent. I have also considered the submissions by the parties herein. The issues which emerge for determination are firstly, whether the Applicants sought leave to appeal against the order of 13/7/2023. Secondly, whether the Applicants have preferred an appeal against the order of 13/7/2023. Thirdly, whether the Applicants have demonstrated that they will suffer substantial loss should stay be declined. Fourthly, which order should be made on costs.
6. On the first issue, Section 75 of the Civil Procedure Act provides orders from which a party can appeal as of right. Order 43 of the Civil Procedure Rules provides for the specific rules resulting in orders from which an appeal can be preferred as of right. Under order 22 of the Civil Procedure Rules, a party can only prefer an appeal as of right under rules 25,57, 61(3) and 73 which are all orders in execution.
7. Sections 152 A to I were introduced into the Land Act by the Land Laws (Amendment) Act, 2016. These rules specifically provide for the manner of eviction. Sections 152A to I fall under part XI – Miscellaneous. Though this section involves execution, it is not one of the orders under Rule 22 of the Civil Procedure Act where there is automatic right of appeal. The Applicants were therefore required to seek leave of court before preferring an appeal. When the impugned ruling was delivered, no leave to appeal was sought. An appeal preferred without leave is therefore a nullity. This is enough to dispose of this appeal, but I will nevertheless deal with the other issues.
8. On the second issue, order 42 Rule 6 (4) of Civil Procedure Rules provides as follows: -

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”
9. I have looked at the notice of appeal annexed to the Applicants' application as annexure 'S.E. 4(a)'. This Notice is brought pursuant to Rule 74 and 75 of the Court of Appeal Rules. By dint of the provisions of order 42 6(4), the Applicants are deemed to have filed an appeal to the Court of Appeal.
10. On the third issue, the Applicants are not serious in this respect. The Applicants' suit in ELC 794 of 2012 was dismissed with costs. They did not prefer any appeal to the Court of Appeal. When the Respondent applied for eviction under section 152A to I of the Land Act, the Applicants filed an application dated 9/2/2023 in which they contended that the suit was res judicata and that the Respondent ought to have filed for execution in ELC 794 of 2012. They were not contending that execution against them would have resulted in substantial loss.
11. In the present application, the Applicants are contending that their application of 9/2/2023 was not considered. A look at the ruling of 13/7/2023 shows that the court extensively considered the issues raised in the application dated 9/2/2023 and proceeded to dismiss it with costs to the Respondent. One then wonders what substantial loss the Applicants will suffer if they are not averse to execution going on but in ELC 794 of 2012. The Applicants are clearly out to delay the execution process for no apparent reason. This application is clearly an abuse of the process of court. I proceed to dismiss the same with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 2ND DAY OF NOVEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;



M/s Tum for Applicants.

Mr. Ogongo for Respondent.

