



**Waithaka v Waititu (Environment and Land Appeal
52 of 2020) [2022] KEELC 3702 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 52 OF 2020**

JG KEMEI, J

MAY 5, 2022

BETWEEN

KOMU WAITHAKA APPELLANT

AND

FELISTUS NJOKI WAITITU RESPONDENT

RULING

1. Before court is the respondent's notice of motion application dated January 31, 2022 seeking orders That;
 - a. This court be pleased to certify that the stay orders given on June 10, 2021 and issued on November 19, 2021 have lapsed.
 - b. The record of appeal dated August 11, 2021 and filed on August 27, 2021 be struck out with costs.
 - c. Costs be borne by the appellant.
2. The application is based on the grounds on the face of it and the supporting affidavit of even date of Felistus Wanjiku Waititu, the respondent. The gist of her prayers is that the appellant filed his notice of motion application dated December 3, 2020 seeking stay of execution and the same was granted on June 10, 2021. That the court allowed the said application on condition that the record of appeal would be filed within 45 days from June 10, 2021. That in blatant breach of the said orders, the appellant filed his record of appeal on August 27, 2021 without seeking extension of time to do so. As a result therefore, the stay orders lapsed automatically and the said record of appeal is an abuse of court process that ought to be struck out. Copies of the said court order, cover page of the record of appeal were annexed as 'A1' and 'A2' respectively in support.



3. The application is unopposed. On March 17, 2022, counsel for both parties took directions to canvass the application by way of written submissions. Notably, learned counsel Mr Kanyi for the appellant sought more time to allow the appellant execute the replying affidavit in opposition of the application. The court acceded to his request and further granted parties 14 days to file and exchange their submissions. As at April 21, 2022, none of them had complied.
4. As a matter of housekeeping, the court noted that the respondent vide a notice of change of advocates dated November 24, 2021 appointed the firm of Milimo Muthomi & Co Advocates to act for her in place of Macharia & Co Advocates. The firm of Macharia & Co Advocates according to the record of appeal herein were acting for the respondent in the trial court.
5. Order 9 rule 9 of the *Civil Procedure Rules* which provides that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court on application or by consent between the outgoing and incoming advocates. There is no evidence on record to show that the firm of Muthomi Milimo & Co Advocates is properly before court.
6. Be that as it may, a perusal of the court file is reveals that the appellant vide an application dated December 3, 2020 applied for stay of execution of the trial court judgement in Thika MCL&E No 117 of 2019, the subject of this appeal. That application was not opposed despite personal service upon the respondent – see return of service sworn on May 11, 2021 and filed on the same day. On June 10, 2021, the court (Lady Justice Gacheru) upon being satisfied that service was effected, ordered maintenance of *status quo* and directed the appellant to file his record of appeal within 45 days failing which the stay orders would automatically lapse.
7. The court reserved a mention date on July 28, 2021 to confirm compliance. On that date, Mr Warutere holding brief for Mr Kanyi Kiruchi informed the court that the appellant had not filed his record of appeal. There was no attempt to seek extension of time to do so noting 45 days period was lapsing around that time.
8. About 77 days later, on August 27, 2021, the appellant filed his record of appeal dated August 11, 2021. Even without moving the court formally by way of this application, it is evident that the court orders of June 10, 2021 were self-executory and without the appellant salvaging his late filing, the stay orders automatically lapsed.
9. The upshot of the forgoing is that there is no substantive record of appeal and/or supplementary record of appeal and the status quo orders granted on June 10, 2021 are no longer in force.
10. In light of this court’s mandate to expedite hearing of matters, I note that the appellant filed his application dated January 25, 2022 mainly seeking leave to file supplementary record of appeal to include critical documents that were inadvertently left out albeit out of the record of appeal. While this court has discretion to allow late filing of filing of documents, that power can only be properly exercised when the initially filed documents are properly before court. In this case, having found that the record of appeal itself was filed out of time and the status quo order in respect of the trial court judgment having lapsed, it therefore follows that there is no proper record of appeal herein. Consequently, a supplementary record of appeal cannot stand on its own.
11. In the end the application dated the January 31, 2022 is merited. It is allowed with costs in favour of the applicant.
12. Orders accordingly.



DELIVERED, DATED AND SIGNED AT THIKA THIS 5TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Ms. Muchemi holding brief for Kanyi

Respondent – Muthoni

Court Assistant - Phyllis

