



Kaburu (Suing as the Guardian ad-Litem and heir of the estate of the late Isaiah Mabellini) v Mabellini & 3 others (Land Case 65 of 2018) [2022] KEELC 13287 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 65 OF 2018
MAO ODENY, J
OCTOBER 5, 2022**

BETWEEN

ANN KINANU KABURU (SUING AS THE GUARDIAN AD-LITEM AND HEIR OF THE ESTATE OF THE LATE ISAIAH MABELLINI) PLAINTIFF

AND

**ORIANO MABELLINI 1ST DEFENDANT
AHMED HASSAN KOTAR 2ND DEFENDANT
LAND REGISTRAR MOMBASA 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion date 24th February 2022 by the 1st Defendant/Applicant seeking the following orders: -
 1. Spent
 2. That this Honourable Court be pleased to grant leave to the Applicant to appeal the ruling delivered virtually by Hon. J O Olola on 10th February 2022.
 3. That the Notice of Appeal dated 18th February 2022 and filed in Court on by the Applicant be deemed as properly on record.
 4. That the costs of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.



1st Defendant/applicant's Submissions

3. The application was supported by the affidavit and further affidavit of Peter M. Gichuru on 24th February 2022 and 14th March 2022 respectively who gave a background to the dispute and deponed that the Applicant is aggrieved by the ruling delivered on 10th February 2022 and therefore seeks for leave to lodge an appeal and that the Notice of Appeal already filed be deemed as properly on record.
4. It was the Applicant's case that the ruling in question had been reserved to be delivered on 11th November 2021 but the same was not delivered as the Judge was away on official duties. The Applicant further stated that he only became aware of the delivery on 18th February 2022 when counsel received an SMS communication from the 2nd Defendant that the same was delivered virtually on 10th February 2022.
5. Counsel submitted that the practice has always been for the court to directly serve parties with notices where a ruling or judgement had been reserved to be delivered on notice as per the Practice Direction No. 15 which states as follows; -

“Practice directions for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the global corona virus pandemic, is clear to the effect that “...the court shall notify the parties or their advocates by e-mail of dates reserved for the delivery of Judgment, Ruling or Order”.
6. Counsel further relied on Direction No 16 which provides that: -

“Where the Court is not able to deliver the judgment, ruling or order on the date reserved, it shall promptly notify the parties or advocates and reserve a new date for the delivery of the judgment, ruling or order and give further relevant directions as may be necessary in the circumstances”.
7. It was counsel's submission that if such directions had been complied with then the Applicant could have made the application for leave to file an appeal against the ruling as per Order 43(2) of the Civil Procedure Rules and that should leave not be granted, then the Applicant's desire to Appeal will have been curtailed.
8. Counsel relied on the cases of Nyutu Agrovet vs Airtel Networks Ltd [2015] eKLR; and Serephen Nyasani Menge v Risipah Onsase [2018] eKLR where the court held that where leave to appeal is a prerequisite before an appeal can be lodged, failure to seek and obtain the leave is fatal.
9. Counsel further relied on the case of James Wangalwa and another v Agnes Naliaka Cheseto [2012] eKLR, on the Applicant's right to Appeal as provided for by Article 48 of the Constitution which guarantees the right to access to justice for all persons and submitted that the Applicant has filed the application without delay hence the court should exercise its discretion and allow the application as prayed.

Plaintiff/respondent's Submissions

10. In response to the application counsel for the Plaintiff filed a replying affidavit dated 10th March 2022 whereby she opposed the application.
11. It was counsel's submission that it is not disputed that the ruling was to be delivered on notice as per the directions of the Court but when the same was ready for delivery, sufficient notice was issued to all



the parties. That a notice was issued by the Court and placed at the Court's notice board in Malindi for public attention and also posted at the Malindi Telegram page by the Court assistant where Advocates with active matters in Malindi Courts gets all the information including notices relating to matters in Malindi Law Courts.

12. Counsel submitted that the Applicant should have been diligent and followed up the case and further that the Applicant has not shown any prejudice that he will suffer by abiding by the orders of the ruling of 10th February, 2022.
13. Ms Chepkwony relied on the case of *Margaret Njamio Mbauni (Suing as Legal Representative of Catherine Nyaguthii Mbauni) v District Surveyor, Nyeri & 2 others; Gregory Maina Mbauni (Interested Party)* [2020] eKLR where the Court found that the Applicant had not established prima facie case to warrant leave to Appeal.
14. Counsel therefore urged the court to dismiss the application with costs.

Analysis and Determination

15. This is an application for leave to appeal against a ruling delivered on 10th February 2022.
16. The issue for determination is whether the Applicant has shown sufficient grounds for the relief sought.
17. An application for leave to appeal against the impugned ruling is anchored under Order 43 rule (1) and (2) of the Civil Procedure Rules Order 43 of the Civil Procedure Rules gives a long list of orders from which an appeal lies as of right.
18. Order 43 Rules (2), (3) and (4) of the Civil Procedure Rules provide as follows: -
 - “(2) An appeal shall lie with the leave of the court from any other order made under these Rules.
 - (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.
 - (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”
19. Order 43(2) provides that an appeal shall lie with the leave of the court from any other order made under the Rules which means that a party cannot file an appeal unless he/she has sought and obtained leave failure to which such appeal is fatal.
20. In the case of *Serephen Nyasani Menge v Risipab Onsase* [2018]eKLR(supra) the court held that: -

“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. I find that is the situation in the present matter. The application before this court



is for extension of time to bring an appeal out of time and is not one for leave to appeal. Such an application under the rules could only be made before the court that made the order.”

21. The Applicant made elaborate submissions as to why they did not seek for leave within the 14 days. The reasons given that the ruling was delivered virtually without Notice is not tenable as the court gave proper notices as has been the norm. The Applicant can only benefit from the discretion of the court in the interest of justice but not on the grounds that the notice given was not sufficient.
22. Since the advent of the Covid- 19 Pandemic Courts have embraced technology to ensure that there is access to justice of which the uptake has been tremendous. Counsel cannot be heard to say that the fact that they do not have a presence in Malindi, disadvantages them on what transpires in Court.
23. There are various forums litigants and counsel are notified of their cases namely, cause lists which are posted in notice Boards, Kenya Law Reports, WhatsApp, emails, Telegram of the Court which all Advocates in the Country who have cases in Malindi have an opportunity of joining, or should join if they have not yet joined, calling the relevant registry to find out information just to mention a few.
24. The Applicant sought for the Notice of Appeal filed to be deemed as properly filed. The same was filed without leave of the court and hence cannot be sanitized. In the case of. *Moffat Nyaga Kagau & 3 others v Patrick Opundo Owiti t/a Cousin Motor Works & 2 others* [2021] eKLR the Court struck out and Appeal which had been filed without the leave of the court.
25. Further the Court of Appeal case in CA Nairobi 86 of 2015 *Peter Nyaga Murake v Joseph Mutunga*, while making reference to failure to seek leave to appeal from an order stated: -

“without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water”.
26. The best that the court can do is to allow the application for leave to file an appeal and grant the Applicant 14 days to file a Notice of Appeal in the interest of justice failure to which the leave lapses. Costs to abide the outcome of the Intended Appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

