



**Ingosi v Ogutu & 2 others (Environment & Land Case 1157 of 2015)
[2022] KEELC 15122 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1157 OF 2015**

JA MOGENI, J

NOVEMBER 3, 2022

BETWEEN

REUBEN SHITSAMA INGOSI PLAINTIFF

AND

WILLIAM OCHIENG OGUTU 1ST DEFENDANT

ALBERT MOMANYI MAKORI T/A ALBERT MOMANYI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

1. The 1st defendant/applicant moved the court in the instant application by way of notice of motion application dated October 4, 2022 and filed on the even date. It is brought under sections 3A, 75 and 63 (e) of the *Civil Procedure Act* and order 34 rule 3 together with order 43 rule 2 of the *Civil Procedure Rules* 2010. The 1st defendant/applicant is seeking for the following orders:
 - a. Spent.
 - b. That this honourable court be pleased to grant leave to the 1st defendant/applicant to appeal the ruling/orders issued on September 27, 2022;
 - c. That the honourable court do stay all further proceedings in this suit pending the appeal;
 - d. That the costs of this application be provided for.
2. The application was supported on the grounds stated in paragraph (a) – (d) on the face of the application, the annexed affidavit sworn on October 4, 2022 by William Ochieng Ogutu, the 1st defendant/applicant herein. I do not need to reproduce them here.



3. The application is unopposed. When the application came up before for determination, I gave directions for its disposal by way of written submissions. A ruling date was reserved. By the time of writing this ruling, no submissions had been filed.
4. I have considered the notice of motion and the affidavit in support. I in turn have had time to analyze the emerging issues therein. The instant application relates to whether the applicant ought to seek leave to appeal the ruling/order issued on September 27, 2022 and whether the application for stay of proceedings is merited.

Whether the Applicant ought to seek leave to appeal the Ruling/Order issued on 27/09/2022.

5. In this case, the 1st defendant/applicant had filed an application dated June 7, 2022 seeking leave to file further list of documents and to recall the witness in the matter.
6. On September 27, 2022, the trial court dismissed the 1st defendant's application. The said application was founded upon the provisions of the law;
 - i. section 3 and 3A of the Civil Procedure Act: saving of special jurisdiction and powers and inherent powers of court.
 - ii. section 63 (e) of the Civil Procedure Act: supplemental proceedings
 - iii. Order 8 rule 3 and 5 of the Civil Procedure Rules: amendment of pleadings.
7. Section 75 (1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides that:

“75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with leave of the court making such order or of the court to which an appeal would lie if leave were grant –

 - a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - b. an order on an award stated in the form of a special case;
 - c. an order modifying or correcting an award;
 - d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - e. an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - f. an order under section 64;
 - g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - h. any order made under rules from which an appeal is expressly allowed by rules.”
8. Section 75 of the Civil Procedure Act must be read together with the provisions of order 43 rule 1 of the Civil Procedure Rules which sets out the orders and rules in respect of which appeals would lie as



of right. Order 43 rule 1(2) provides that an appeal shall lie with the leave of the court from any other order made under the rules.

9. Order 43 rule 1 of the *Civil Procedure Rules* on the other hand gives a long list of orders from which an appeal lies from as of right. It provides thus; “appeals from orders.”

“An appeal shall lie with as of right from the following orders and rules under the provisions of section 75 (1)(h) of the Act:

- (a) Order 1 (parties to suits);
- (b) Order 2 (pleadings generally);
- (c) Order 3 (frame and institution of suit);
- (d) Order 4, rule 9 (return of plaint);
- (e) Order 7, rule 12 (exclusion of counterclaim);
- (f) Order 8 (amendment of pleadings);
- (g) Order 10, rule 11 (setting aside judgment in default of appearance).
- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- (j) Order 19 (affidavits);
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- (m) Order 24, rules 5, 6 and 7 (legal representatives);
- (n) Order 25, rule 5 (compromise of a suit);
- (o) Order 26, rules 1 and 5(2) (security for costs);
- (p) Order 27, rules 3 and 10 (payment into court and tender);
- (q) Order 28, rule 4 (orders in proceedings against the Government);
- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security);
- (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers);
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);
- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);



(aa) Order 53 (judicial review orders).

(2). An appeal shall lie with the leave of the court from any other order made under these rules.”

10. It is therefore apparent that order 43 rule (1) of the [Civil Procedure Rules](#) above sets out the orders and rules in respect of which appeals would lie as of right. Under order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under order 43(1) leave to appeal must be obtained before such an appeal can be preferred. In this case, the challenged orders are in respect to provisions of filing of further list of documents which fall under order 8 of the rules as per the 1st defendant’s pleadings.
11. A comparison of the above provisions with the provisions upon which the 1st defendant’s application dated June 7, 2022 shows that the ruling in respect to which the application before me and the intended appeal does not literally fall within the scope of matters from which leave of the court is required. Appeal lies as of right from a ruling dealing with “amendment of pleadings”.
12. I hold the view that a purposive interpretation of the provisions of order 43 rule 1 (f) brings the intended appeal herein within the range of orders which are appealable as of right. My said finding is based on the fact that the substantive issue upon which the trial court dismissed the application dated June 7, 2022 were;
 - a. the further list of documents in which the 1st defendant sought to be introduced at that stage of the case and recall the witness mentioned in the application dated June 7, 2022.
13. In my considered opinion, as regards to order 43 rule 1 (f), the 1st defendant/applicant had an automatic right of appeal and does not require leave to appeal.

Whether The Application For Stay Of Proceedings Is Merited.

14. In the case of [Global Tours & Travels Limited](#); Nairobi HC Winding Up Cause No 43 of 2000, the court established the criteria for consideration for an order of stay of proceedings as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

15. The court then distilled the following three main principles to guide a court in such applications:
 - a. Whether the applicant has established that he/she has a *prima facie* arguable case.
 - b. Whether the application was filed expeditiously and



- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.
16. On June 7, 2022, the applicant moved to court seeking for orders for this court to grant leave to the 1st defendant to file further list of documents and re-call a witness. The court delivered its considered ruling on September 27, 2022 dismissing the application. It is this ruling that the 1st defendant/ applicant intends to appeal against in the Court of Appeal. They have sought leave to appeal the same. I have already held that they had an automatic right of appeal and does not require leave to appeal. The court is also unable to deduce if the applicant has an arguable appeal at this point.
17. The ruling which is the subject of this application was delivered on September 27, 2022 and this application was filed on October 4, 2022. The court is of the view that the application was filed timeously. The hearing of this case proceeded *inter partes* on various dates; from December 9, 2021 but was adjourned severally. The plaintiff closed their case on April 26, 2022 and the defendants' case was closed on June 2, 2022. The plaintiff has filed written submissions and the fate of this case is awaiting delivery of judgment which has been set down for November 10, 2022. There are therefore no further proceedings to be stayed in the suit as the hearing is already spent. This court is being called in aid to take action in vain.
18. The applicant has brought an application seeking leave to appeal the ruling of this court. It is clear that no appeal has been filed yet. There is also no draft appeal presented before this court. Seeing that the applicant sought for leave to appeal, it means that there are no orders of the superior court staying the proceedings in this case. In any case, following the hierarchical and adversarial system of litigation in this country this court cannot sit on appeal on its own ruling.
19. Section 3A of the [Civil Procedure Act](#) provides as follows;
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”
20. It is trite law that section 3A is applicable by the courts where there is a vacuum but not where there are provisions to cater for such as in this instance case.
21. Section 3A of the [Civil Procedure Act](#) relates to the wide powers of the court to exercise its discretion to the end of justice between the parties. This court already expressed itself in the ruling delivered on September 27, 2022 in respect to exercising its discretion to grant prayers to allow the 1st defendant to file a further list of documents and re-call a witness. This court takes the view that the 1st defendant/ applicant has not established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.
22. In the end the application dated October 4, 2022 is without merit and is dismissed with costs to the respondents.
23. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd Day of NOVEMBER 2022.

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MOGENI J

JUDGE



in the Virtual Presence of:

Mr Ochanda for 1st Defendant/Applicant

Mr Ongicho for 2nd Respondent

No appearance for the Plaintiff

Ms. Caroline / Yvette : Court Assistants

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MOGENI J

JUDGE

