



REPUBLIC OF KENYA



**Attorney General v Muriithi & 2 others (Civil Appeal
E025 of 2023) [2024] KEHC 4716 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E025 OF 2023**

SM GITHINJI, J

MAY 8, 2024

BETWEEN

THE HON ATTORNEY GENERAL APPELLANT

AND

JANE WAMBUI MURIITHI 1ST RESPONDENT

HALIMA JUMA TABU 2ND RESPONDENT

RENTCO EAST AFRICA LIMITED 3RD RESPONDENT

*(Being an Appeal from the Ruling of PM's Civil case No. E006 /2023
delivered on 4th July, 2023 by Honourable T.A.Sitati – SPM)*

RULING

1. For determination is a notice of motion dated 15th September 2023 filed by the Applicant for the following orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to issue a temporary stay of the ruling and all further proceedings of Honourable T.A Sitati in Lamu PMCC E006 of 2023 between Jane Wambui Muriithi v Rentco East Africa Limited & the Hon. Attorney General delivered on 4th July 2023 pending the hearing and determination of this Appeal.
 4. That the costs of this application be provided for.
2. The application which is brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 rule 6 of the Civil Procedure Rules is premised on the grounds numbered at the foot of it and



supported by the Affidavit sworn by Gabriel Ojwang on 15th September 2023 and a supplementary affidavit sworn on 14th November 2023.

3. The basis of the Applicant's case is that on 4th July 2023, the subordinate court dismissed its preliminary objection dated 11th May 2023 in PMCC E006 of 2023. That the Applicant now seeks to appeal the said ruling and has filed a memorandum and record of appeal challenging the said ruling.
4. The application is opposed by the 1st and 2nd Respondents who filed a replying affidavit which they jointly swore on 30th October 2023. According to the Respondents, the application is a tactic for forum shopping, an afterthought, bad in law, incompetent, an abuse of the court process, unreasonably delayed, brought in bad faith and overtaken by events. The Respondents deposed that the impugned ruling was to be delivered on 28th June 2023 which was subsequently declared a public holiday, hence the same was not delivered as scheduled. Consequently, the trial court delivered the ruling on 4th July 2023 in the absence of both parties.
5. The Respondent added the suit before the trial court has been certified for hearing and a hearing date issued. They added that the order sought herein were denied by the trial court on 15th September 2023 and 19th October 2023. To the Respondents, the appeal has no chances of success and that the Applicant has failed to demonstrate any sufficient cause to warrant stay of proceedings.
6. The application was canvassed by way of written submissions which I have perused and considered. I have equally considered the authorities cited to me by both counsel and pleadings. In my view the sole issue for determination is whether this court should issue a temporary stay of the ruling and all further proceedings in Lamu PMCC E006 of 2023.

Analysis and Determination

7. The decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from Order 42 rule 6 (1) of the Civil Procedure Rules which reads-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
8. The import of the above provision is that there must be an appeal properly on record for this court to exercise its discretion as to grant an order for stay of proceedings pending appeal. In this case, the impugned ruling was delivered on 4th July 2023 and the present intended appeal filed on 20th September 2023, about 77 days later.
9. Section 79G of the *Civil Procedure Act* provides that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order; Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.



10. It is evident that the present appeal was filed out of time and without leave of this court to admit it out of time. The Applicant never sought such leave in the present application. The effect of the Applicant's failure to seek such leave is that there is no appeal on record. In the absence of a subsisting appeal, the prayer for stay is in my view redundant. I am guided by the reasoning of the Supreme Court in *University of Eldoret & another v Hosea Sitienei & 3 others* [2020] eKLR where the Court expressed: -

“(37) Having said so, we echo our previous position that filing of the Notice of Appeal is a jurisdictional prerequisite. The prevailing circumstances specific to this case make it very difficult for the Court to evaluate any satisfactory reasons that excuse the applicants from this apparent non-compliance. Moreover, as we noted in *Nicholas Salat* case, the purported filing of a Notice of Appeal and Petition of Appeal without the requisite leave cannot be sanctified by the Court, notwithstanding that a case number was issued to the applicants. The alleged Notice of Appeal and Petition of Appeal therefore have to be struck out from the Court record for having been ‘filed’ without Court sanction and out of time. The Notice of Appeal not having been filed on time, the Court cannot resuscitate anything in this matter.”

11. In the circumstances, I decline to grant the orders sought. The outcome is that the notice of motion dated 15th September 2023 is hereby dismissed with costs to the respondents.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF MAY, 2024.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Kilonzo for the Respondent

Ms Rutto is holding brief for Mr Ojwang for the Appellant

