



**Ganesh Engineering Works Limited & 3 others v Yamini Builders Limited; Makandi (Objector) (Petition E005 of 2023) [2024] KEHC 13907 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13907 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
PETITION E005 OF 2023  
JN NJAGI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**GANESH ENGINEERING WORKS LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
BANSONS HOLDINGS (KENYA) LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
BHANDERI ENTERPRISES LIMITED ..... 3<sup>RD</sup> PLAINTIFF  
DIPAK BHANDERI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**YAMINI BUILDERS LIMITED ..... DEFENDANT**

**AND**

**WINFRED MAKANDI ..... OBJECTOR**

**RULING**

1. The Objector/Respondent has filed an Amended Notice of Preliminary Objection dated 30<sup>th</sup> August 2024 challenging the competence of the plaintiffs/Applicants' Application and Notice of Appeal both dated 28<sup>th</sup> March 2024 on the grounds:
  1. That the Honourable court has no jurisdiction to hear and determine the said application granted that there is no subsisting and legally valid Notice of Appeal filed by the Plaintiffs/Applicants in light of the provisions of Rule 77 of the Court of Appeal Rules, 2022.
  2. That the timeline for filing the Notice of Appeal by the Plaintiffs/Applicants has not been extended and/or enlarged by the Court of Appeal under Rule 4 of the Court of Appeal Rules 2022 hence the Notice of Appeal is incompetent.
  3. That the application and the Notice of Appeal filed in his matter are incompetent for failure to comply with mandatory timelines and should be struck out in limine with costs.



2. The brief facts of the case are that the plaintiff/Applicants were dissatisfied with the ruling of this court delivered on the 28<sup>th</sup> February 2024 in which the court issued orders prohibiting the plaintiffs/ judgment creditors from advertising land parcel reference No.209/20076 designated Nairobi Block 160/1097 for sale and lifted the proclamation of attachment of the said property. The Applicants filed a Notice of Appeal and an application for stay of execution dated 28<sup>th</sup> March 2024. The Objector / Respondent filed the Preliminary Objection contending that the Notice of Appeal was filed out of time and therefore that there is no competent Notice of Appeal filed.
3. The Preliminary Objection was disposed of by way of written submissions of the counsels appearing for the parties.

### **Objector's Submissions**

4. The Objector submitted on two issues, first whether the Notice of Appeal dated 28<sup>th</sup> March 2024 is valid and whether the application for stay of execution should be struck out and secondly, whether this court has jurisdiction under Order 42 of the Civil Procedure Rules to grant an order for inhibition as sought by the Applicants.
5. The Objector submitted that Section 77 of the Court of Appeal Rules, 2022 provides that:
  1. Any person who desires to appeal to the Court shall give notice in writing which notice shall be lodged in duplicate with the registrar of the superior court.
  2. Every such notice shall subject to rule 84 and 97 be so lodged within fourteen days of the decision against which it is desired to appeal.
6. It was submitted that the plaintiffs/Applicants' Notice of Appeal was filed on the 28<sup>th</sup> March 2024 which is well out of the 14 days period provided for under Rule 77(2) yet the Applicants have not sought for extension of time to file the Notice of Appeal or to validate the notice that was filed out of time. Therefore, that the Notice of Appeal is incompetent, invalid and cannot stand.
7. It was submitted that without a valid appeal, the application for stay of execution pending appeal is incompetent and should be struck out. That the basis of the application is the existence of a valid appeal pending at the Court of Appeal. That a valid Notice of Appeal invokes the jurisdiction of the Court of Appeal to hear and to determine the appeal and consequently, in the absence of a valid Notice of Appeal, the jurisdiction of the Court of Appeal has not been invoked appropriately and therefore there is no valid pending appeal for the purposes of Order 42 of the Civil Procedure Rules. Hence the application for stay of execution pending appeal, which is predicated on the existence of a valid pending appeal, must fail and be struck out. In short that there is no substratum on which to anchor the orders sought.
8. The Objector submitted that this court has no jurisdiction to hear and determine the application for stay of execution as the notice filed is invalid and can only be regularized by the extension of time under Rule 4 of the Court of Appeal Rules, 2022. The objector relied on the case of Sammy Kuria Ndung'u v Samuel Mbugua Ikumbu (2021) eKLR where the Court held:

Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal not the High Court.



9. The Objector also relied on the case of Philemon Sing'oei v Daniel Butuk & another (2021) eKLR where the Court of Appeal held that:

The next issue is whether the applicant has met the threshold for stay of execution. The applicant has admitted that they neither filed a notice of appeal on time nor filed an application for leave to extend time to file the same.

If the court grants the order for stay, what would the stay be hinged on, pending what as there is no appeal that has been filed. There was no application or order to show that there was any notice filed within the prescribed time.

As much as the court is not dealing with an application for leave to file a notice of appeal, no proper reasons have been advanced to explain the delay in filing the same. The country has experienced COVID 19 pandemic and adaptations have been made to deal with the challenges of access the justice. All persons must adapt to enable the wheels of justice to move without hiccups.

I have considered the application, submissions by counsel and find that the applicant's application for stay of execution lacks merit for the reasons above and is dismissed with costs.

10. On the grant of order for inhibition, the Objector submitted that this court has no jurisdiction under Order 42 of the Civil Procedure Rules to grant an order for inhibition as sought by the Applicants as the jurisdiction of the court is limited to stay of execution of the order or decree pending the hearing of an appeal. It was submitted that the ruling delivered on 29<sup>th</sup> February 2024 did not grant positive implementable orders that the Plaintiffs/Applicants were directed to implement. That this Court merely allowed the application by the Objector with costs and prohibited the Applicants' attempts to execute against the Objector's suit property.

### **Plaintiffs/Applicants' Submissions**

11. The Plaintiffs/Applicants in their response to the Preliminary Objection submitted that this court in its ruling on 29<sup>th</sup> February 2024 granted the Applicants 30 days right of appeal, hence the allegation that the Notice of appeal was filed out of time is unfounded and misplaced. It was submitted that the order granting the Applicants the right of appeal within 30 days was never set aside or appealed against. Therefore, that his court has jurisdiction to determine the Plaintiffs' application for stay as the Notice is valid and properly on record.
12. It was submitted that the Applicants have since filed the appeal pursuant to filing the Notice of Appeal and in the premises the application seeking for stay of execution is proper, merited and competently before this Court.
13. On the issue of orders for inhibition, the Applicants submitted that the purpose of an inhibitory order is to preserve the property and to prevent further dealings so that a decree is not rendered nugatory. The Applicants relied on the case of In the Matter of Estate of Mathagu Titia (Deceased), Embu Succession Cause No.566 'A' of 2013, where the court reiterated the conditions for grant of an order for inhibition as: that the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.; that the refusal to grant orders of inhibition would render the applicant's suit nugatory and that the applicant has arguable case.



14. The Applicants also relied on the holding in the case of *In the Matter of the Estate of Julius M'timitu Aliasitimitu Mbui (Deceased)* where it was held that:

“Section 68(1) of the *Land Registration Act*, 2012, gives this court discretion to inhibit registered dealings on land for a particular time or until the occurrence of a particular event. As such, an inhibition order is an order which is in the nature of a prohibitory injunction restraining dealings on land pending further orders by the court. The purpose of the said order is to preserve the property from acts that would otherwise render a court order incapable of being executed and/or to give an opportunity to hear and decide the matter. Issuance of prohibitory orders is also provided for under the provisions of order 22 rule 48 (1) of the Civil Procedure Rules.”

15. From the foregoing, the Applicants submitted that this court has jurisdiction to grant an order of inhibition for purposes of preserving the subject property.

### **Analysis and Determination**

16. I have considered the grounds in support of the preliminary objection and the grounds in opposition thereto. The issues for determination are, first whether the Notice of Appeal was filed out of time and secondly, whether the application for stay of execution is merited.

Whether the Notice of Appeal was filed out of time

17. Rule 72 (1) and (2) of the Court of Appeal Rules 2022 requires a person who desires to appeal to the Court of Appeal to lodge a notice in writing with the Registrar of the superior court within fourteen days of the decision against which it is desired to appeal.
18. The ruling of the court in this case was delivered on 28<sup>th</sup> February 2024. The Plaintiff/Applicant did not lodge the Notice of Appeal until the 28<sup>th</sup> March 2024 which was a month after the delivery of the ruling. There was thus no compliance with Rule 77 (2) of the Court of Appeal Rules 2022 which required such notice to be filed within 14 days of the delivery of the ruling.
19. The Plaintiff/Applicant states that this court granted it 30 days right of appeal upon delivery of the ruling. They argue that the Notice of Appeal was filed within the 30 days granted by the court and therefore that the Notice of Appeal is validly before the court and the application for stay of execution is competently before the court.
20. It is indeed true that this court upon delivery of the ruling granted the Applicant 30 days right of appeal in case it was dissatisfied with the ruling. It is however clear to me that the period granted by the court of 30 days was done in error as the period stipulated by the Court of Appeal Rules is 14 days. The Applicant cannot rely on a period given in error to argue that the Notice of Appeal was validly lodged. This court has no power to amend the clear provisions of the law. The error was not deliberate and is highly regretted.
21. In view of the fact that the Notice of Appeal was not lodged within the 14 days stipulated by the Court of Appeal Rules 2022, there is no Notice of Appeal validly before this court. I find that the Notice of Appeal was filed out of time. The Applicant's application for stay of execution can only be competently before this court where there is a valid Notice of Appeal lodged with this court. That being the case, the Applicant should have approached the Court of Appeal for extension of time as this court has no jurisdiction to extend time on a matter that lies within the jurisdiction of the Court of Appeal - see *Sammy Kuria Ndung'u v Samuel Mbugua Ikumbu* (supra). This court therefore has no basis on which to hear and determine the issues raised in the application.



22. The upshot is that the court finds merit in the Preliminary Objection. Consequently, the application dated 28<sup>th</sup> March 2024 is dismissed.
23. Since it is the court that was at fault in granting the wrong period by which the Applicant could file the appeal, I order each party to bear its own costs to the application and the Preliminary Objection.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mrs Rotich for Plaintiff/Applicant

Miss Malombo HB for Mr. Gomba Defendant

30 days right of appeal.

