



REPUBLIC OF KENYA



**Kwanzwi & another v Bwoyi & 7 others (Civil Appeal E139 of 2024)
[2024] KEHC 16020 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E139 OF 2024
REA OUGO, J
NOVEMBER 12, 2024**

BETWEEN

DAVID EBITONYI KWANZWI 1ST APPELLANT

MARTIN NYONGESA WASIKE 2ND APPELLANT

AND

DAVID BWOYI 1ST RESPONDENT

BENARD WASIKE 2ND RESPONDENT

ROBERT WANGILA 3RD RESPONDENT

BENSON WAFULA 4TH RESPONDENT

THOMAS WAFULA 5TH RESPONDENT

CHRISTINE BWOYI 6TH RESPONDENT

JOSTINE MALABA 7TH RESPONDENT

DAMARIS WAFULA 8TH RESPONDENT

RULING

1. In a Motion dated 23.9.2024 the Appellants/ Applicants (hereinafter the applicants they seek the following orders;
 - i. Spent
 - ii. There be a stay of execution of the Judgment, Decree, and all consequential orders issued on 24th July 2024 by the trial magistrate in Webuye Civil case No. 068 of 2019 pending the hearing of this application interpartes.



- iii. There be a stay of execution of the judgment, decree and all consequential orders issued on 24th July 2024 by the trial magistrate in Webuye Civil Case No E068 of 2019 pending the hearing of the intended appeal herein.
 - iv. The Applicant be granted leave to file an appeal out of time.
 - v. The draft memorandum of appeal filed herewith be deemed to have been duly filed.
 - vi. Costs of the application be provided for.
2. The application is supported by the applicants' affidavit . The application was opposed. I have considered the said affidavits and the oral submissions by the parties.
 3. I agree with the respondents' Counsel submission that the decree by the trial court order is not capable of being stayed as the suit was dismissed with costs. Further no costs have been assessed by the respondent hence no execution process has begun. I find that the applicants have failed to persuade this court that the stay is warranted.
 4. On the issue of filing the appeal out of time the applicants aver that they were not issued with the proceedings in good time and that had that been done they would file the appeal out of time. I agree with the submissions of the respondent's counsel that the applicants could have filed a memorandum of appeal as they waited for proceedings. The respondents have also attacked the memorandum of appeal is a general statement.
 5. However, it is apparent that the applicants are desirous of pursuing an appeal against the decision of the lower court. I will exercise my discretion and grant the applicant's leave to file an appeal out of time. This appeal, HCCA E139 of 2024, ought not to have been opened by the registry. The registry should have opened a Miscellaneous Application File. The file appeal shall be closed and a proper appeal file opened once the applicants file their appeal. The applicants shall file an appeal within 14 days from the date of this Ruling. Costs shall abide by the appeal.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 12TH DAY OF NOVEMBER 2024.

R. E.OUGO

JUDGE

In the presence of:

David Ebitonyi Kwanzwi

Martin Nyongesa Wasike -Applicants

Mr. Athung'a For the Respondents

Wilkister – C/A

