



**Alvine Brooks Limited v Kirunyu (Environment & Land Case
E007 of 2022) [2024] KEELC 42 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 42 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E007 OF 2022**

BM EBOSO, J

JANUARY 18, 2024

BETWEEN

ALVINE BROOKS LIMITED PLAINTIFF

AND

GEOFFREY KIMANI KIRUNYU DEFENDANT

RULING

1. The subject of this ruling is the defendant's notice of motion dated 7/11/2023, through which the defendant seeks an order of stay of execution of the Judgment rendered in this suit on 21/9/2023, pending the hearing and determination of an appeal in the Court of Appeal. Particulars of the said appeal were not identified by the applicant. The application was vehemently opposed by the plaintiff. The application is supported by an affidavit sworn by the defendant/applicant on 8/11/2023.
2. The defendant's case is that he has preferred an appeal against the Judgment through a notice of appeal dated 25/10/2023. He has exhibited the notice of appeal dated 25/10/2023. He adds that his advocates have written a letter to the Deputy Registrar of this Court, requesting certified copies of proceedings for the purpose of the appeal. He further contends that the appeal shall be rendered nugatory if the order sought is not granted. He adds that the plaintiff will not suffer prejudice if the orders sought are granted.
3. The plaintiff opposes the application through a preliminary objection dated 16/11/2023 and a replying affidavit sworn by John Ruigi Gicharu on an even date. The plaintiff contends that the defendant is in violation of rule 75 (1) and (2) of the *Court of Appeal Rules*, 2010, given that he prepared and filed the exhibited notice of appeal outside the prescribed limitation period of 14 days from the date of Judgment. The plaintiff further opposes the application on the ground that the exhibited notice of appeal was not signed by the Deputy Registrar of this Court. The plaintiff contends that in the absence of a competent notice of appeal as required under rule 75 of the *Court of Appeal Rules*, no competent appeal can be instituted against the Judgment of this court, to warrant the grant of the orders sought.



The plaintiff further faults the defendant for failing to serve the notice of appeal as required under rule 77(1) of the [Court of Appeal Rules](#) 2010.

4. Further, the plaintiff opposes the application on the ground that the Judgment of the Court has been executed, adding that, following the defendant's failure to avail completion documents, conveyance documents were executed by the Deputy Registrar of this Court and the decree of the Court was fully enforced. It is the case of the plaintiff that the application dated 7/11/2023 has been overtaken by events, given that the suit property was registered in the name of the plaintiff on 2/11/2023 and the Land Rates Register at the County Government was duly updated.
5. The application was canvassed orally in the virtual court on 4/12/2023. The applicant's counsel, Mr Kelvin Mogeni faulted the defendant's previous advocates for failing to "act promptly to secure the interests of the defendant." Noting that the suit property had been registered in the name of the plaintiff, counsel urged the court to nonetheless preserve it. Counsel added that the defendant had since filed an application in the Court of Appeal seeking leave to file an appeal out of time. Counsel submitted that should the property be transferred to a third party, there will be substantial loss. Lastly, counsel submitted that security may not be critical in the circumstances of the application, noting that the plaintiff has both the actual land and the title. Counsel submitted that the defendant was nonetheless ready to provide security.
6. I have considered the application, the response to the application, and the parties' respective oral submissions. I have also considered the relevant legal frameworks and jurisprudence. The single question to be determined in this ruling is whether the criteria for granting an order of stay of execution pending appeal has been satisfied. I will be brief in my analysis and determination.
7. This court's jurisdiction to grant an order of stay of execution pending appeal is regulated by the criteria contained in Order 42 rule 6 (2) of the [Civil Procedure Rules](#) which provides as follows:
 - "(2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the appellant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the appellant."
8. The application under consideration is a formal motion that was brought more than 45 days after this court rendered the impugned Judgment. The Judgment was rendered in the presence of both counsel. At the time of bringing the application, the defendant did not disclose to the court the fact that the notice of appeal which he exhibited and relied on was in breach of rule 75 of the [Court of Appeal Rules](#). It, however, emerged through the plaintiff's response and also during the hearing of the application that, as at the time of hearing the application, there was no competent notice of appeal as required under the law. Indeed, counsel for the applicant submitted that there was pending in the Court of Appeal, an application for an order enlarging the limitation period for lodging an appeal against the Judgment of this Court. Put differently, at the time of hearing the application which is the subject of this ruling, there was no competent appeal pending before the Court of Appeal, more than 72 days after the date of the impugned Judgment. I say so because a competent appeal in the Court of Appeal is initiated through the filing and service of a notice of appeal within the prescribed limitation period.



9. The view which this Court takes, in the above circumstances, is that in the absence of an order enlarging the time for lodging an appeal, this Court cannot exercise its jurisdiction under Order 42 rule 6 of the *Civil Procedure Rules*. The Court will in the circumstances, strike out the application dated 7/11/2023 without venturing into its merits. For avoidance of doubt, the applicant will be at liberty to canvass his plea for an order of stay in the appropriate court should the Court of Appeal enlarge the limitation period.
10. For the above reasons, the application dated 7/11/2023 is struck out. The defendant/applicant will bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF JANUARY 2024

B M EBOSO

JUDGE

In the presence of:

Mr Rapando for the Plaintiff

Mr Chacha for the Defendant

