



**Keibukwo Investments Limited & another v Sayani Investment Limited & 3 others
(Civil Application E078 of 2021) [2025] KECA 305 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 305 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E078 OF 2021
DK MUSINGA, K M'INOTI & M NGUGI, JJA
FEBRUARY 21, 2025**

BETWEEN

KEIBUKWO INVESTMENTS LIMITED 1ST APPLICANT

SANDANI LIMITED 2ND APPLICANT

AND

SAYANI INVESTMENT LIMITED 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

CHIEF LANDS REGISTRAR 3RD RESPONDENT

REGISTRAR OF SURVEY 4TH RESPONDENT

(Being an application to deem the notice of appeal dated 12th February 2021 as withdrawn and to lift or set aside the injunctive orders issued on 1st April 2021 from the judgment of the Environment and land Court at Nairobi (Okong'o, J.) dated 4th February 2021 in ELC No. 72 of 2018)

RULING

1. In the application dated 26th June 2023, the applicant/1st respondent, Sayani Investments Limited (hereafter 'the applicant'), seeks an order that the notice of appeal dated 12th February 2021 filed by the respondent/1st applicant, Keibukwo Investments Limited (hereafter 'the respondent'), be deemed as withdrawn. It seeks, secondly, an order that consequent upon the grant of the first order above, the orders of injunction issued on 1st April 2022 restraining it, its directors, servants or agents from selling, charging and or in any manner disposing of the interest in the properties known as LR No. 209/923, 209/924 and 209/925, and staying execution of the judgment and decree of the ELC (Okong'o, J.) of 4th February 2021 be lifted and set aside. The applicant also prays for the costs of the application.



2. The application is based on some ten grounds set out on its face and on a supporting affidavit sworn on 26th June 2023 by Karim Jetha, a director of the applicant. The applicant's case is that the judgment in the matter was delivered on 4th February 2021 and the respondent filed its notice of appeal on 12th February 2021. That as required under rule 84 of this Court's Rules, the respondent should have filed its record of appeal within 60 days of filing the notice of appeal, that is on or about 12th May 2021, subject to a certificate of delay.
3. The applicant asserts that the proceedings of the trial court were ready from 25th November 2022 but the respondent has failed to file its record of appeal; that taking into account the period for typing the proceedings, the respondent ought to have filed its record of appeal within 60 days of 25th November 2022, that is on or before 17th February 2023, but no record of appeal had been filed yet; that the delay in filing and prosecuting the intended appeal is prejudicial to it, and the continuation of the injunctive and stay orders without any appeal amounts to an abuse of the Court process.
4. The applicant avers that it is in the interests of justice that the injunctive and stay orders be lifted and set aside. It further avers that by the time the restraining orders of 1st April 2022 were issued, the Registrar of Titles had already rectified the register to expunge title number I.R. 180647 in respect of LR No.209/20737.
5. The respondent opposes the application through an affidavit sworn on 23rd September 2023 by its Managing Director, Henry Kiprop Some. Mr. Some avers that he has the authority of the respondent and Sadhani Limited, the 2nd applicant, to represent its views on the matter. Mr. Some agrees with the applicant's averments with respect to the requirements of rule 84 of this Court's Rules that the record of appeal should be filed within 60 days of filing of the notice of appeal; that under rule 89(1)(d) and (e) of the said Rules, an appellant is required to include the typed proceedings of the trial court; and that the respondent was required, under rule 84, to have lodged the record of appeal on or before 12th May 2021.
6. He avers, however, that the said requirement was subject to a certificate of delay on account of the typing of proceedings of the trial court. Mr. Some avers that the respondent is a stranger to the averment by the applicant that the typed proceedings were ready from 25th November 2022; that concurrent with filing of the notice of appeal on 12th February 2021, the respondent's counsel had simultaneously lodged with the trial court a letter dated 12th February 2021 requesting for the typed proceedings; and that its advocates had thereafter followed up with the court registry but had received repeated indications that the said proceedings were still being processed.
7. Mr. Some avers that the respondent's advocates received indications, through 'unofficial channels', that the proceedings were ready for collection; that immediately upon receipt of the said indication, the respondent's advocates wrote to the registry on 30th June 2023 requesting to be supplied with the proceedings together with a certificate of delay; that it was not until 17th July 2023 that the trial court, through its known email address, communicated, in reaction to the letter dated 12th February 2021, to confirm that the certified copies of the proceedings were indeed ready for collection; and the said proceedings were certified by the Deputy Registrar on 14th July 2023.
8. The respondent avers that it then obtained a certificate of delay dated 24th July 2023 which confirmed that its advocates, the firm of Echessa & Bwire Advocates, applied for typed proceedings on 21st February 2021; that they were informed on 17th July 2023 that the proceedings were ready for collection; that the period required for preparation and delivery of the certified copies of the proceedings was from 21st February 2021 to 17th July 2023, a period of 885 days; and the Deputy



Registrar therefore certified that 885 days were taken in typing the proceedings and should accordingly be excluded in computation of time.

9. The respondent avers that in accordance with rule 84 of the *Rules of this Court*, it has lodged the record of appeal and instituted an appeal, being Civil Appeal No. E772 of 2023- *Keibukwo Investment Limited & Another v. Sayani Investment Limited & 3 Others*. It is the respondent's averment, therefore, that there is no delay on its part and no prejudice has been occasioned to the applicant; that the preparation of typed proceedings remains an administrative role of the court; and that no blame can be visited upon it for any delay in preparation thereof.
10. With respect to the respondent's averment that the Chief Land Registrar has effected the judgment of 4th February 2021, the respondent avers that the said averments are the reason it takes issue with the conduct of the applicant and the substance of the judgment of the trial court; and that it is inconceivable that during pendency of the suit for determination of ownership and a valid title to the respondent, the applicant, in collusion with the other respondents, would effect a charge over the suit property. It is the respondent's averment, therefore, that for these reasons, it would be in the interests of justice that the orders issued by this Court on 1st April 2022 remain in force to safeguard the suit properties, which are the subject of the appeal, from further illegal disposition to third parties.
11. The respondent avers that in view of the omnibus nature of the orders of this Court issued on 1st April 2022, it matters not whether rectification had been effected by the time the order was being issued, as the applicant and the 3rd respondent (Sayani Investments Limited and the Chief Land Registrar) were at all material time parties to the proceedings which resulted in the said order; and that their surreptitious collusion to hurry the enforcement of the order of the trial court in order to defeat the possible effect of the respondent's application, which resulted in the order of 1st April 2022, cannot be a basis for defeating the said order.
12. It is the respondent's averment further that the said order remains an enforceable order which cannot be defeated by the rectification of the register as relates to the respondent's title No. I.R 180647 LR No. 209/20737; and cannot therefore be lifted or set aside. It is its averment that the interests of justice would be best served by the continued preservation of the subject matter of the appeal by sustaining the orders of 1st April 2022.
13. At the hearing of the application, learned counsel, Mr. Muthui, appeared for the applicant, while learned counsel, Mr. Mukuha, appeared for the respondent.
14. Mr. Muthui, highlighting the applicant's submissions dated 13th December 2023, reiterated the averment that the proceedings in the matter were ready for collection on 25th November 2022; that it was only after the applicant filed the present application on 26th June 2023 that the respondent woke up from its slumber and requested for the proceedings and a certificate of delay; that this was well after it was served with the application, which shows that the delay is for a period exceeding 5 months.
15. With respect to its second prayer, it was submitted for the applicant that the orders granted on 1st April 2022 have been overtaken by events; that in a ruling of this Court in Civil Application No. E273 of 2023, between the same parties on the same subject matter delivered on 15th December 2023, the Court found that the certificate of title that was the subject of the ruling had already been cancelled by the Chief Land Registrar, and the Court declined to grant the orders for stay under rule 5(2)(b) that were being sought.
16. In highlighting the respondent's submissions dated 16th December 2023, Mr. Mukuha submitted that the respondent applied for the proceedings in due time and followed up with the Deputy Registrar; and that it filed the record of appeal within 60 days of receipt of the certificate of delay on 24th July 2023.



17. Mr. Mukuha submitted that the respondent had not received an email dated 25th November 2022, apparently indicating that the proceedings were ready, which email, he submitted, was between counsel for the applicant and the court, and was not copied to counsel for the respondent. He submitted that the certificate of delay duly confirms that the court took a maximum of 885 days to complete the typing of the said proceedings, and relied on the case of *Ratemo Oira T/a Ratemo Oira & Company Advocates v Blue Shield Insurance Company* [2010] eKLR with respect to the period within which a record of appeal is to be filed, which is to be based on the certificate of delay. The respondent submitted that it had duly complied with the timelines for filing of the record of appeal, and any adverse orders in terms of striking out the notice or record of appeal would be highly prejudicial to it.
18. With regard to the question whether the orders issued on 1st April 2022 could continue to subsist, counsel admitted that indeed, the applicant had, during the pendency of the application that sought to stay the execution of the judgment of the trial court, effected the cancellation of the said title. He submitted, however, that the order of 1st April 2022 was an omnibus order, one for stay of execution of the judgment and the other for preservation of the suit property pending hearing and determination of the appeal. If, as contended by the applicant, the order for stay of execution had been overtaken by events, the need for preservation of the suit property had not; and that in the ruling of 1st April, 2021, the Court had found it necessary to preserve the suit property pending hearing and determination of the appeal. The respondent therefore urged the Court not to grant the orders sought by the applicant.
19. We have considered the application, the affidavits in support and opposition thereto, and the submissions of the parties. Two issues arise for determination before us from the pleadings and submissions. First, whether the respondent's notice of appeal dated 12th February 2021 should be deemed as withdrawn. Secondly, which issue is predicated by the applicant on the outcome of the first, whether the stay and injunctive orders issued by this Court on 1st April 2021 should be lifted or set aside.
20. With regard to the first issue, there is no dispute with respect to the law. Rule 84 requires that the record of appeal should be filed within 60 days of the filing of the notice of appeal. The proviso to rule 84(1) provides for the issuance of a certificate of delay to account for the time taken to obtain, from the trial court registry, the documents enumerated under rule 89.
21. The parties are in agreement that since the notice of appeal was lodged on 12th February 2021, the record of appeal ought to have been filed on 12th May 2021, subject, however, to the certificate of delay. The dispute between the parties arises with respect to the date on which the proceedings were ready.
22. The applicant averred that the proceedings were ready by 25th November 2022, according to an email it received from the court on that date. The respondent avers that, on the contrary, it received notification on 17th July 2023 that the proceedings were ready; that the proceedings were certified by the Deputy Registrar on 14th July 2023; and that it obtained a certificate of delay dated 24th July 2023 indicating that it had taken 885 days to prepare the proceedings.
23. We have examined the documents placed before us and find no reason to disbelieve the averments on behalf of the respondent. It has placed before us communication indicating that it was notified that the proceedings were ready on 17th July 2023. It has a certificate of delay indicating a total of 885 days as the period it took to prepare the proceedings. While the applicant, in its submissions, impugns the authenticity of the certificate of delay, it has not formally challenged the certificate, and we see no reason to doubt it.
24. As to whether, as averred by the applicant, the proceedings were ready on 25th November 2022, we note Mr. Muthui's admission that the email to this effect was not copied to counsel for the respondent.



Nor, it would appear, was the email to the respondent's counsel copied to the applicant's counsel. This would appear to be a major failure on the part of the court registry, but it cannot be laid at the feet of the respondent. The respondent avers that it filed Civil Appeal No. E772 of 2023 within 60 days of the certificate of delay. It has not therefore failed to take a step in the appeal so as to entitle the applicant to seek to have its notice of appeal deemed as withdrawn. Accordingly, our response to the first issue in this application is in the negative: there is no basis to deem the notice of appeal dated 12th February 2021 as withdrawn.

25. Having so found, we do not find it necessary to delve into the second issue: whether the orders issued on 1st April 2022 should be set aside or lifted. We note, however, the submissions of the respondent's counsel and the concession by counsel for the applicant: that while the orders, intended to preserve the subject matter, may have been overtaken by events as the Chief Land Registrar cancelled the respondent's title in enforcement of the judgment dated 4th February 2021, such cancellation was done during the pendency of the ruling in which the orders of the Court of 1st April 2022 were issued; and that it was effected on 20th December 2021, while the application was argued on 28th April 2021.
26. The said orders, being intended to preserve the subject matter which we were informed, during the hearing hereof, is registered in the name and is in the possession of the applicant, shall remain in force as directed in the said order pending hearing and determination of the respondent's appeal, Civil Appeal No. E772 of 2023. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR.

