



REPUBLIC OF KENYA



**Nduati & another v Ndung’u (Civil Application E212 of 2023)
[2024] KECA 329 (KLR) (28 March 2024) (Ruling)**

Neutral citation: [2024] KECA 329 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E212 OF 2023
PO KIAGE, JA
MARCH 28, 2024**

BETWEEN

DAMARIS WANJIKU NDUATI 1ST APPLICANT

NJOROGE NDUATI 2ND APPLICANT

AND

PETER NJOROGE NDUNG’U RESPONDENT

(An application for stay of execution of judgment and decree of the Environment and Land Court at Nairobi (Lucy Mbugua, J.) dated 11th May, 2023 in ELC Misc. No. 17 of 2013)

RULING

1. Before me dated 22nd May 2023 is a motion on notice that seeks more than half a dozen prayers, some of which can only be handled by a full bench. The one that I, as a single judge, can handle is number 4 which asks me, to “grant the applicants leave to appeal out of time and/or allow extension of time to file an appeal against the judgment and decree delivered on 11th May 2023 [by] the Hon. Lady Justice Lucy Mbugua.”
2. The grounds on the face of the motion state that the applicants have well-founded and arguable grievances against the said judgment and have filed a notice of appeal against the same. The rest of the grounds speak to the prayers for stay of execution which I cannot handle and which, in my thinking, are best pursued separately by an application for the same, as I do not think it proper or practicable that this motion should be severed and addressed piecemeal twice over.
3. In the supporting affidavit of Njoroge Nduati, the 2nd applicant expressed as sworn on the same 22nd May 2023, the applicants say that the impugned judgment improperly allowed the respondent’s claim against them and equally erroneously dismissed their counterclaim against him. They prepared a notice of appeal timeously on 15th May 2023 and promptly wrote to the deputy registrar of the superior



court below bespeaking proceedings on the same day. To show how arguable their appeal is, they have annexed a draft memorandum of appeal and have isolated at least four points in respect of which they say the learned judge erred.

4. Regarding the delay, all they aver at paragraph 10 is that the failure to file the record of appeal within time was not intentional but

“an inadvertent error having not been furnished with typed proceedings and certified copies of judgment and decree of the trial court by the corresponding registry.” They swear that they presented the application without undue delay and it is in the interest of justice that the orders sought be granted.

5. The application was opposed by a replying affidavit by the respondent that was rather strangely sworn and filed nearly three months later on 17th August 2023. The respondent gave a background to the dispute between the parties and lauded the judgment of the learned judge as well-reasoned. He termed the motion as frivolous as the applicants have no arguable appeal, but it is apparent he was speaking to the stay of execution part of the motion which I steer clear of.
6. I have very carefully perused the replying affidavit but I have not seen any averment that speaks to the application for extension of time under Rule 4 of the Court of Appeal Rules. The request for leave to file the record out of time seems not to have been answered or resisted by the respondent.
7. Having considered the motion and the two affidavits, I find it most curious that the applicants filed it in the first place. Having lodged the notice of appeal on 15th May 2023, the applicants had sixty (60) days within which to lodge the record of appeal. It is, therefore, rather mind-boggling to see that just 7 days after filing notice of appeal, they filed an application for extension of time. Of course by the time the motion was listed for hearing before me as a single judge dealing with the Rule 4 plea for extension of time, on 24th October 2023, the 60 days were long past. Thus, what may have been valid and within time when the applicants chose to seek extension of time may well have been rendered belated by the applicants' own act.
8. As there really was no delay, one of the main matters for my consideration at my discretion, namely the length of delay, really does not apply since the motion was brought not merely within time, but before time. Had the matter been listed before me within 60 days of the notice of appeal I would have struck it out as pre-mature but now that I heard it after the 60 days and without any idea whether the applicants filed the record within time, I have to be pragmatic to be just.
9. The order that commends itself to me in the rather peculiar circumstances of this case is that the prayer (5) of the motion is allowed. The record of appeal (if not yet filed) shall be filed and served within fourteen (14) days of today. In case such record has already been filed outside of the 60 days prescribed by our Rules, leave is hereby granted to regularize such filing so that the said record be and is hereby deemed to be properly lodged.
10. I cannot, and therefore do not, make any pronouncement on the prayers for stay of execution under Rule 5(2)(b).
11. The costs of the motion shall be in the appeal or intended appeal, as the case may be.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2024.

P. O. KIAGE



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

