



Ndung'u v Gitau & another; Waweru (Intended Third Party) (Civil Application E097 of 2022) [2023] KECA 1580 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KECA 1580 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E097 OF 2022
AO MUCHELULE, JA
MAY 31, 2023**

BETWEEN

PETER MBURU NDUNG'U APPLICANT

AND

SAMSON WAWERU 1ST RESPONDENT

SAMSON WAWERU GITAU 2ND RESPONDENT

AND

ESTHER NJERI WAWERU INTENDED THIRD PARTY

(An application for extension of time to file and serve the Memorandum of Appeal and the Record of Appeal out of time in an intended appeal against the Judgment of the High Court of Kenya at Murang'a (J. G Kemei, J.) dated 11th March 2021 In ELC 179 of 2017)

RULING

1. The applicant and one Virginia Njeri Ndung'u in amended originating summons dated 9th December 2008 sued Samson Waweru (1st respondent) and Samson Waweru Gitau (2nd respondent) in the Environment and Land Court at Muranga seeking a declaration that they had become entitled to Land Parcel Loc.7/Kamahuha/644 by adverse possession following their uninterrupted and continuous possession of the land since 1968. The proceedings revealed that the land was registered in the name of the 1st respondent who sold it to the 2nd respondent. The 2nd respondent died and was replaced by his widow Esther Njeri Waweru (Intended Third Party). The suit was opposed. The learned J.G. Kemei, J. heard it orally. He found it unmerited and dismissed it with costs on 11th March 2021.
2. Aggrieved by the judgment the applicant filed a notice of appeal dated 17th March 2021, which he served. By an application dated 20th August 2021 under Rule 5(2)(b) of the Court of Appeal Rules, the applicant and Virginia Njeri Ndungu applied for stay of execution pending the hearing and



determination of the intended appeal, and for injunction to restrain the respondents and those acting under them from interfering with the suit property until then. The application was on 1st April 2022 dismissed because it was seeking the stay of negative orders, the suit having been dismissed. This Court noted, however, that the intended appeal had arguable grounds.

3. The applicant through an application dated 6th December 2021 under Rules 4 and 5 of the Court of Appeal Rules, sought the extension of time and for orders of status quo in respect of the suit property. The Intended Third Party opposed the application. The matter went before a single Judge of this Court who found that the application was devoid of merit, and was dismissed with costs. The Judge observed that the application had sought extension of time to file an appeal out of time and yet the notice of appeal had been filed within time. He had not sought to file and serve the record of appeal out of time, if that was what he had wanted.
4. In the present application dated 24th November 2022, the applicant now seeks the extension of time to file and serve the Memorandum of Appeal and the Record of Appeal out of time. He has come on the same grounds and reasons that he raised in the application dated 6th December 2021. He stated that upon the delivery of the Judgement he instructed his advocates who filed the notice of appeal. He then sought for typed proceedings which were made available on 30th July 2021. A certificate of delay was issued on 18th November 2022. The record is therefore ready for filing if leave is granted. He sought the order for status quo to protect the suit property in the meantime.
5. The Intended Third Party opposed the application. Her case was that the delay had not been explained, and that this Court had previously dealt with and dismissed the request for stay and also dealt with and dismissed application for extension of time. She swore that, there was no prejudice to the applicant if the application is not allowed. This was because the suit property was still in the name of the deceased and that the impugned judgment had dismissed the applicant's suit, and had not ordered his eviction.
6. This application was brought about 18 months after the notice of appeal was lodged, and about one year since the receipt of the certificate of delay that followed a certified copy of proceedings from the superior court. The explanation for delay must be that, in the intervening period, the applicant had tried stay and tried extension of time, both of which were unsuccessful.
7. Stay was declined by this Court as shown in the foregoing. The issue of status quo must therefore fail.
8. Section 7 of the [Civil Procedure Act](#) provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

9. This Court dealt with the issue of extension of time and did not allow it. The applicant had a proper notice of appeal on record, and instead of seeking extension of time to file the Memorandum of Appeal and Record of Appeal, asked for extension of time to file an appeal. That request was not allowed. He cannot be allowed to litigate in instalments. Res judicata would not allow such. Parties must come to court with all their causes of action, just like they must sue all the persons they intend to sue. They must bring forward their whole case ([Kenya Commercial Bank Ltd -v- Benjoh Amalgamated Ltd](#), Civil appeal No. 107 of 2010 as consolidated with Appeals Nos. 137 of 2010 and 174 of 2010). The doctrine of *res judicata* is based on the principle of finality which is a matter of public policy; the doctrine prevents a multiplicity of suits, and ensures that litigation comes to an end ([John Florence](#)



10. In conclusion, I find that I have no jurisdiction to deal with the issue of extension of time which has already been heard and determined by this Court between the same parties. The application is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2023

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

