



REPUBLIC OF KENYA



KENYA LAW
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**Kaloki v Hinga (Civil Appeal (Application) E663 of 2022)
[2023] KECA 892 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 892 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E663 OF 2022
HM OKWENGU, JA
JULY 24, 2023**

BETWEEN

CHARLES PAUL KALOKI APPELLANT

AND

ANNE MUMBI HINGA RESPONDENT

(Application under Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Section 7 of the Appellate Jurisdiction Act, and Rule 4 of the Court of Appeal Rules, Article 159 of the Constitution and all enabling provisions of law)

RULING

1. On March 9, 2022, the Environment and Land Court (ELC) (Oguttu Mboya, J), dismissed for want of prosecution, a suit that had been filed by the applicant Charles Paul Kaloki. This was following the failure of the applicant's advocate to call evidence in proof of the applicant's case after his request for adjournment had been declined. The applicant subsequently applied to have the order of dismissal set aside, but by a Ruling dated June 30, 2022, the learned Judge dismissed the application, holding that it had rendered under Order 17 Rule 4 of the *Civil Procedure Rules*, a determinative decision in regard to the applicant's case, and was, therefore, functus officio.
2. The applicant has now filed a motion dated February 14, 2023 in which he seeks several orders. First is leave to appeal out of time against the ruling of the ELC (Oguttu Mboya J.) delivered on March 9, 2022. Second is that the leave to appeal out of time operates as a stay of execution. Third is that the appeal No. E663 of 2023 be deemed as duly filed and served. Fourth is that the memorandum of appeal amended on January 10, 2023 be deemed as being properly on record, and the final prayer is that the costs of the motion be provided for.
3. It is worthy of note that the applicant had filed a Record of Appeal in regard to Civil Appeal No 663 of 2022. Although there is no indication as to when the record of appeal was filed, an examination of



that record reveals that it is dated January 10, 2023 and is in regard to an appeal against the Ruling and order of the ELC delivered on March 9, 2022.

4. As per the grounds set out in the notice of motion and the supporting affidavit sworn by Fozah Onyimbo the applicant's advocate, the applicant is aggrieved by the Ruling of the learned Judge as it has the effect of a judgment barring him from presenting his case; and because of that, he stands to lose his parcel of land where his family is currently residing without being given an opportunity to be heard. The applicant wishes to appeal against the Ruling and believes that the intended appeal has high chance of success. However, the time for filing an appeal has lapsed hence the orders sought. He pleads that unless the orders sought are granted, the respondent will remove him and his family from the suit property, which is his family home.
5. The applicant has also filed written submissions in which he pleads that the Court has inherent powers under Rule 1(2) of the Court of Appeal Rules and Section 95 of the Civil Procedure Rules "to put right that which would otherwise be an injustice". He maintains that shutting him away from the seat of justice without any valid reason will be tantamount to rendering justice on technicalities.
6. Citing Richard Ncharpi Leiyagu vs IEBC & 2 Others [2013] eKLR the applicant urges that the right to a hearing is not only constitutionally entrenched but is also the cornerstone of the rule of law and is a valued right. That since the applicant has given an explanation that led him to filing the appeal out of time and has already filed an appeal, his application should be allowed.
7. The notice of motion has been opposed through a replying affidavit sworn by the respondent. She swears that there is no appeal or record of appeal, and therefore the appeal referred to as No. E663 of 2022 ought to be struck out. She contends that no notice of appeal against the Ruling of March 9, 2022 was lodged with the Registrar of the ELC as required. She maintains that there is nothing to be stayed and the orders sought are therefore not tenable.
8. As regards the draft memorandum of appeal, she points out that nothing has been placed before the Court for consideration, and therefore, no leave to amend can be granted. In addition, that no grounds of appeal have been set out in the application to warrant a consideration as to whether there is an arguable appeal. She urges the Court to dismiss the application motion as it is premature, lacks merit, and is an abuse of the court process.
9. It is apparent from the prayers under which the applicant has brought his motion, that it is an omnibus application. From the prayers sought in the motion, it is evident that the stay of execution. Whereas I do have powers as a single judge under Rule 4 of the Court of Appeal Rules to extend time for the doing of any act authorized or required by the Rules, I do not have powers as a single judge to grant orders for stay of execution as Rule 55(2)(b) requires such an application to be heard by a full bench. To this extent, the application is improperly before me.
10. Be that as it may, the principles for the exercise of this Court's discretionary powers under Rule 4 of the Court of Appeal Rules as laid down in various decisions (Karny Zabarya & Another vs. Shalom Levi [2018] eKLR; Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016] eKLR), requires that an applicant lays a basis for the exercise of the Court's power by giving a plausible explanation for the delay in filing the appeal. The factors relevant in this regard includes the length of the delay, the reason for the delay and the prejudice, if any, that the respondent is likely to suffer.
11. In this case, the applicant has not given any reason for the delay in filing the appeal. While it may be understandable that no notice of appeal was filed as the applicant's advocate pursued an application for setting aside the order of dismissal, that application was dismissed on June 30, 2022, and yet the applicant has not given any reason as to why no action was taken from June 30, 2022 until February



14, 2023 when the applicant brought his motion. This delay of more than 7 months from the time the motion for review was dismissed has not been explained.

12. I find that there has been inordinate delay in filing the application for extension of time without any plausible reason. There is therefore no basis upon which this Court can exercise its discretion to extend time. As regards the application for stay, as already stated, such an application can only be considered under Rule 5(2)(b) of the Court of Appeal Rules, as read with Rule 55(2)(b) of the Court of Appeal Rules. Needless to state that I have no jurisdiction to deal with this prayer.
13. The upshot of the above is that the notice of motion dated February 14, 2023 is not only defective, but also lacks merit. Accordingly, it is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

