



REPUBLIC OF KENYA



KENYA LAW
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**Macharia v Kihonge (Civil Application E065 of 2022)
[2023] KECA 1193 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1193 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E065 OF 2022
F SICHALE, FA OCHIENG & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

JOHN THUO MACHARIA APPLICANT

AND

ELIZABETH MUTHONI KIHONGE RESPONDENT

(Being an application for stay of execution of the judgment and decree of the Environment and Land Court at Nyahururu (Y.M. Angima, J.) dated 22nd September 2022 in ELC Case No. 57 of 2019 (Formerly Nakuru HCCC No. 112 of 2003))

RULING

1. Before us is an application brought pursuant to rules 1(2) and 5(2)(b) of the *Court of Appeal Rules*. The applicant, John Thuo Macharia, is seeking to stay execution of judgment and orders issued by the Environment and Land Court (E&LC) at Nyahururu on 22nd September 2022 in Nyahururu E&LC Case No 57 of 2019, formerly Nakuru HCCC No 112 of 2003. The applicant also prays that the costs of the application be in the cause. The application is supported by an affidavit sworn by the applicant on 17th October 2022. The application is premised on the grounds, inter alia, that judgment was entered against the applicant requiring him to vacate the suit land, parcel number Nyandarua/Silanga/2018. The applicant was also required to grant the respondent vacant possession of the suit parcel within 30 days. Additionally, the applicant was ordered to pay to the respondent, Elizabeth Muthoni Kahonge (Suing as the legal representative of Joseph Kahonge Muthondu (deceased)), damages of Kshs 5,000,000, as well as the costs of the suit. The applicant averred that his advocates had requested the trial court for proceedings with a view to filing the Memorandum of Appeal and the Record of Appeal in due course. According to the applicant, the respondent would not suffer any prejudice should the orders sought be granted.
2. The application was opposed by way of an affidavit sworn on 31st October 2022 by counsel for the respondent, Ms Eunice Wamucii Ndegwa. The respondent averred that there is no Notice of Appeal on



record and neither has she been served with the notice as required under rule 79 of the *Court of Appeal Rules*. The respondent deposed that the letter be-speaking the proceedings has also not served upon her as required under rule 79(2) of the Rules of this Court. Another contention by the respondent is that she will suffer prejudice if the orders sought are granted because the matter herein started way back in 2003. Additionally, the respondent asserted that the applicant has another application No E041 of 2022 pending before this Court through which the applicant seeks leave to appeal against a ruling issued by the trial court. In the end, the respondent urged us to dismiss the application for want of merit with costs.

3. When this matter came up for virtual hearing before us, Mr. Gwandaru appeared for the applicant while Ms Ndegwa appeared for the respondent. Mr. Gwandaru had filed his written submissions which he sought to rely on and he made a brief oral highlight of the same. Ms Ndegwa on the other hand sought to rely on the replying affidavit while making an oral response to Mr. Gwandaru's submissions.
4. In his submissions, Mr. Gwandaru argued that the intended appeal was arguable and the applicant would suffer substantial loss if the orders of stay were not granted. Counsel pointed out that the intended appeal seeks to challenge the effect of the judgment of the trial court on the applicant's non-derogable right to fair hearing under Article 50(1) of the *Constitution*. Counsel stated that the trial court erred by failing to consider the applicant's evidence, thereby reaching a decision which was not sound in law. Counsel also pointed out that the intended appeal will be rendered nugatory if stay orders are not granted as the applicant would be evicted from the parcel of land where he has lived for a long period of time. Counsel relied on the High Court decision in *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR to urge that the purpose of a stay order is to preserve the subject matter of the dispute. Counsel additionally relied on another High Court decision in *Ena Investment Ltd v Bernard Ochau Mose & 2 others* [2022] eKLR to submit that an application for stay of execution should be filed without delay and that the instant application has indeed been brought without delay as it was lodged within one month of the trial court's judgment. Counsel further urged that the applicant should not be compelled to deposit security for costs in this case. In reply to the respondent's argument that there is no appeal before this Court, counsel stated from the bar, that there is a Notice of Appeal dated 5th October 2022. Counsel signed off by urging us to allow the application.
5. In response to the applicant's submissions, counsel for the respondent submitted that there is no Notice of Appeal on record and therefore no stay orders can issue in the circumstances. Counsel also asserted that the appeal, if any, will not be rendered nugatory.
6. We have duly considered the pleadings and the submissions of the parties in this application. The respondent has questioned our jurisdiction on the ground that the applicant has not filed a Notice of Appeal. Indeed, the applicant has not annexed any Notice of Appeal to his pleadings. It took counsel, in a move equal to giving evidence from the bar and upon being prompted, to mention to the Court that he had filed a Notice of Appeal on 5th October 2022. On her part, the respondent contends that she has never been served with any Notice of Appeal in this matter. The respondent's averment that she has never been served with a Notice of Appeal was not rebutted by the applicant. It is also observed that no such document has been exhibited before this Court or even alluded to in the pleadings filed by the applicant.
7. Under Rule 5(2)(b) as read with Rule 77 of the *Court of Appeal Rules, 2022*, the jurisdiction of this Court to order a stay of execution, issue an injunction or stay any further proceedings can only be invoked once a Notice of Appeal has been lodged. According to the provisions of section 107 of the *Evidence Act*, the onus of proving the existence of a valid Notice of Appeal is with the applicant. In this case, he has not discharged this obligation. The Supreme Court in *Patricia Cherotich Sawe*



v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR underscored the importance of a Notice of Appeal thus:

“(28) What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: “litigation must come to an end”.”

8. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court ruled that:

“A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

9. This Court on its part in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR held that:

“At the stage of determining an application under Rule 5 (2) (b) there may or there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.”

10. It is clear from the cited authorities that the jurisdiction of an appellate court is unlocked by the filing of a notice of appeal; and without the notice, the appellate court has no power to do anything. There being no Notice of Appeal on record, this Court is therefore bereft of jurisdiction to determine the instant application. At this juncture, we are reminded of the words by this Court in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR that:

“Jurisdiction is everything. Without it, a court has no power to make one more step.... A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. Consequently, we down our tools and strike out the notice of motion dated 17th October 2022.

12. As for the issue of costs, we find no reason to depart from the rule that ordinarily costs follow the event. The application having been struck out, the applicant shall meet the respondent’s costs for this application.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023

F. SICHALE

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JUDGE OF APPEAL



F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

