



REPUBLIC OF KENYA



KENYA LAW
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**Mwasi & 5 others v Mbaruk (Environment and Land Appeal
30 of 2018) [2024] KEELC 3820 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 30 OF 2018**

SM KIBUNJA, J

MAY 15, 2024

BETWEEN

ANGELINA KALAMBA MWASI & 5 OTHERS APPELLANT

AND

MBARUK AYUB ALI MBARUK RESPONDENT

RULING

1. The respondent moved the court through the notice of motion under certificate of urgency dated the 24th April 2024 seeking for *inter alia*, stay of execution of the ruling delivered on 20th September 2023 by Hon. J. Nyariki, pending the hearing and determination of this application, and thereafter appeal No. E006 of 2020, before the Court of Appeal. The application is premised on the seven (7) grounds on its face and supported by the affidavit of Mbaruk Ayub Ali Mbaruk, sworn on the 24th April 2024.
2. On the 26th April 2024, the court certified the application as urgent, and directed that application be served in two days and evidence of service be filed; respondents to file their replies in seven (7) days after service and temporary stay order was granted to last until the hearing date of 13th May 2024.
3. On the 13th May 2024, Ms. Gatimu h/b for Mwanzia for the respondent was the only counsel who was present. The counsel submitted that the Appellants were served and were absent. That an affidavit of service to that effect had been filed and urged the court to grant their application. The court set down the application for ruling today.
4. I have today perused the record, both manual and the CTS, and noted that no affidavit of service in terms of Order 5 Rule 15 of the *Civil Procedure Rules*, or any other document has been filed since the date of filing of the application. The court is left wondering in which record the affidavit of service Ms. Gatimu claimed to have been filed, evincing service of the application upon the Appellants, was filed as it is definitely not this one. The learned counsel misled the court, and I can only take it that the counsel wanted to, as it were, steal a match, by getting the court to issue the orders sought on the motion, on



the belief that the appellants had been served, and opted not to challenge the application. That would have resulted to a contravention of the law and specifically Article 50 of *the Constitution*, 2010.

5. Parties and indeed their advocates have a duty under section 1A(3) of *Civil Procedure Act* chapter 21 of Laws of Kenya “to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.” The failure by the respondent, who is the applicant in the application dated the 24th April 2024, to comply with the directions/orders issued on the 26th April 2024, and for counsel to mislead the court that the appellants had been served and affidavit of service filed, while knowing that was not the case runs counter the above provision.
6. I am of the view that the respondent/applicant is undeserving of the ex parte stay order issued on the 26th April 2024, that in any case lapsed on the 13th May 2024. The failure to comply with the orders of 26th April 2024 on service and filing of affidavit of service leads the court to conclude that the respondent/applicant sense of urgency in his application is no longer there. The certification of the application as urgent should therefore be reviewed and vacated.
7. That having come to the above conclusions, the court orders as follows:
 - a. That order 1 of 26th April 2024 certifying the application as urgent is hereby reviewed, and set aside.
 - b. That contrary to the respondent’s/applicant’s counsel submission of 13th May 2024, the court has confirmed that order 2 of 26th April 2024 on service of the application and filing of affidavit of service has not been complied with. That the order of 13th May 2024 placing the application for ruling is therefore reviewed and set aside.
 - c. That the respondent/applicant is hereby granted last opportunity to serve the application and file evidence of service in seven (7) days.
 - d. The appellants to file and serve their replies in fourteen (14) days after service.
 - e. That a date for hearing of the application to be fixed.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 15TH DAY OF MAY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellants: M/s Kinvua

Respondent: M/s Gatimu

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

