



**Muturi & 2 others v Delei (Environment and Land Appeal
E001 of 2023) [2024] KEELC 4929 (KLR) (25 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4929 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E001 OF 2023
MN GICHERU, J
JUNE 25, 2024**

BETWEEN

JOHN MUYA MUTURI 1ST APPELLANT

LUCY NJERI MUTURI 2ND APPELLANT

MOSES SALAA MUTURI 3RD APPELLANT

AND

ANDREW KEKUTA DELEI RESPONDENT

RULING

1. This ruling is on the notice of motion dated 6/7/2023. The motion which is brought under Orders 42 rules 6 and 3 and 51 of the Civil Procedure Rules and Sections 1A, 3A, 75, 78 and 79 G of the Civil Procedure Act and all other enabling provisions of law seeks two (2) main residual prayers.
 - i. Leave to appeal out of time and
 - ii. Stay of execution of the lower court's decree and consequential orders.
2. The motion is based on eleven (11) grounds and is supported by an affidavit by Lucy Njeri Muturi dated 6/7/2023. It has eleven (11) annexures. The gist of the motion is as follows. Firstly, in January 2018 the applicants instructed the law firm of Barongo Ombasa to institute a suit against the defendant for trespass on L.R. Ngong/Ngong/19626 upon which Chief Magistrate's Ngong ELC Case No. 8 of 2018 was filed. Secondly, the applicants would follow up regularly with their advocate on the progress of the case and he would advise them to wait. Thirdly, on 16/1/2020, they received a boundary disputes summons from the Land Registrar which followed a request by the defendant. It required them to avail themselves on 31/1/2020 for the determination of the boundary dispute. Fourthly, upon receipt of the summons, the applicants went to their advocate who wrote to the Land Registrar requesting that the boundary determination exercise be put off until the determination of the suit. Fifthly, on 31/1/2020,



the Land Registrar visited the suit land accompanied by the District Surveyor and the applicants informed him of the ongoing case. It is then that the Registrar informed them of the judgment delivered by the court and he had come to enforce the judgment and the decree. Sixthly, the applicants' advocate informed them that he was not aware of the judgment. Eventually, in October 2021, they confirmed that a judgment had been delivered on 26/6/2019 through the consent of the advocates. Seventhly, the applicants did not instruct their advocate to enter into any consent. Eighthly, it is only now that it is dawning on the applicants that they are to be evicted from the land that they claim. Ninthly, the Lower Court has dismissed their application to set aside the consent judgment.

Finally, for above and other reasons, they pray that their application be allowed.

3. The motion is opposed by the respondent who has sworn a replying affidavit dated 30/8/2023 in which he replies as follows. Firstly, the motion has been overtaken by events because the Lower Court has issued an eviction notice in a ruling dated 24/1/2023. Secondly, the applicants have not demonstrated good and sufficient cause for not filing their appeal for a period of close to four (4) years. Thirdly, there is no good reason advanced for setting aside the consent entered into on behalf of the applicants by their counsel and they are estopped from denying the consent.

For the above and other reasons, the respondent prays for the dismissal of the motion.

4. Counsel for the parties filed written submissions on 28/2/2024 and 8/5/2024 respectively. The respondents counsel identified the following issues for determination.
 - a. Is there good and sufficient cause for not filing the appeal in time?
 - b. Whether there is good and sufficient cause for not filing on time the appeal against the judgment dated 27/6/2019 and the decree extracted on 27/11/2019.
 - c. Whether there is good and sufficient cause to issue a stay of execution or enforcement of the orders issued by the Lower Court in a ruling dated 21/10/2022.
 - d. Who bears the costs.

On the other hand, the applicants' counsel identified two issues.

 - a. Whether the applicants ought to be granted stay of execution.
 - b. Whether the security for the due performance of the decree has been provided.

5. I have carefully considered the motion dated 6/7/2023 in its entirety including the affidavits, grounds and the submissions by learned counsel for the parties. I find that it is the submissions by the respondent's counsel that relate to the motion. The ones by the applicant refer to the notice of motion dated 16/8/2023. The directions of 13/12/2023 are clear on which motion the court would rule on. It is the one dated 6/7/2013.

6. On the issue of whether there is good and sufficient cause for not filing the appeal in time, I find that no good or sufficient cause given by the applicants. The proviso to Section 79 G of the Civil Procedure Act provides as follows.

“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he has good and sufficient cause for not filing the appeal in time”.

The court therefore has discretion in deciding whether to allow an application to file an appeal out of time and the appellant must demonstrate good and sufficient cause. I am not satisfied that good and sufficient cause has been shown by the applicant. The Lower Court suit concerned a boundary



dispute. There is nothing in the pleadings in the Lower Court to prove that the boundary was ever determined by the Land Registrar yet when the Land Registrar sought to determine the dispute, the applicants sought to put the determination in abeyance. That was not proper. There was no way of proving trespass before determining the boundary dispute. Secondly, the applicants cannot blame their own advocate. He was the representative of their choice. The consent that the advocate entered into was the best way to resolve the dispute. This finding covers the second issue.

7. Regarding the third issue, I find that there is no good reason for staying the enforcement of the orders issued by the Lower Court on 21/10/2022. The appeal not having been filed on time, all other applications that depend on it cannot stand. The applicants have come out as parties who are not in any hurry to resolve the dispute with the respondent. They filed a suit in 2018 and failed to prosecute it for 2 years. When the boundary dispute was given a hearing date, they did not want the exercise to proceed. After their application was dismissed on 23/5/2022, they remained dormant for more than one year before filing the current suit. The Constitution of Kenya at Article 159 provides that justice shall not be delayed. The Environment and Land Court Act at Section 3 provides that land cases be heard expeditiously. The same provision is to be found in Sections 1A and 1B of the Civil Procedure Act. The reason for the law requiring expedition is to ensure that land is released to development and investment and not to be tied up in endless litigation.

For the above stated reasons, I find no merit in the motion dated 6/7/2023 and I dismiss it with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 25TH DAY OF JUNE 2024.

M.N. GICHERU

JUDGE

