



**Wambugu & another v Kahawa Sukari Residents & Plot Owners Welfare Association & 2 others; County Executive Committee Member Lands, Housing, Physical Planning, Municipal Administration & Urban Development Kiambu County Government & 3 others (Interested Parties) (Environment and Land Appeal E006 of 2024) [2024] KEELC 5005 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5005 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E006 OF 2024**

**JG KEMEI, J  
JUNE 27, 2024**

**BETWEEN**

**JOHN K WAMBUGU ..... 1<sup>ST</sup> APPELLANT  
EUNICE W KIUMI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KAHAWA SUKARI RESIDENTS & PLOT OWNERS WELFARE ASSOCIATION ..... 1<sup>ST</sup> RESPONDENT  
SAMWEL MWANIKI WAITHAKA ..... 2<sup>ND</sup> RESPONDENT  
EDWARD WAIGANJO ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**COUNTY EXECUTIVE COMMITTEE MEMBER LANDS, HOUSING, PHYSICAL PLANNING, MUNICIPAL ADMINISTRATION & URBAN DEVELOPMENT KIAMBU COUNTY GOVERNMENT ... INTERESTED PARTY  
DIRECTOR PHYSICAL PLANNING & URBAN DEVELOPMENT, KIAMBU COUNTY GOVERNMENT ..... INTERESTED PARTY  
COUNTY GOVERNMENT OF KIAMBU ..... INTERESTED PARTY  
KAHAWA SUKARI LIMITED ..... INTERESTED PARTY**



## RULING

1. Before Court is the Appellants/Applicants' Notice of Motion Application dated 17/1/2024 expressed under Sections 3, 3A & 79 (G) of the Civil Procedure Act, Order 42 Rule 6 (1), Order 51 CPR, Section 13 (1) & (4) of the Environment and Land Court Act, Section 61(4) of the Physical and Land Use Planning Act 2019 (hereinafter PLUPA) and Article 159 (2) (d) Constitution of Kenya seeking Orders that;
  - a. Spent.
  - b. The proposed Appellants be granted leave to appeal out of time against the whole determination and order of the Chairperson County Physical and Land Use Planning Committee issued on 26<sup>th</sup> June 2023 in Appeal No. CGK/KCLC/010 of 2023.
  - c. The Memorandum of appeal filed by the proposed Appellant herewith be deemed as duly filed.
  - d. There be a stay of execution of the whole determination and orders of the County Physical and Land Use Planning Committee Appeal No. CGK/KCLC/010 of 2023 pending the hearing and determination of this Application inter partes.
  - e. There be a stay of execution of the whole determination and orders of the County Physical and Land Use Planning Committee Appeal No. CGK/KCLC/010 of 2023 pending the hearing and determination of the instant appeal.
  - f. Costs of be in the cause.
2. The Application is premised on grounds that on 26/6/2023 the County Physical and Land Use Planning Liaison Committee (hereinafter the Liaison Committee) delivered its determination in No. CGK/KCLC/010 of 2023 in favor of the Respondents. That aggrieved with the determination the Appellants filed Thika ELC JR E002 of 2023 seeking to review and nullify the entire proceedings and the impugned Order. That this Court in dismissing the Judicial Review, directed the Appellants to pursue an appeal against the said Order. That as the time of the Judicial Review dismissal, the stipulated time to appeal had lapsed hence the instant Application. That the intended appeal raises substantial questions of law and unless the orders sought herein are granted, the appeal will be rendered otiose and result in a miscarriage of justice. That the application has been timeously filed and it is in the interest of justice that the Appellants be heard.
3. Annexed to the motion is the Supporting of Affidavit of even date of John Wambugu, the 1<sup>st</sup> Appellant. Rehashing the above grounds, he annexed the copy of Notification of Determination as JKM-1, copy of the Ruling in Thika JR E002 of 2023 as JKM-2, and JKM-3 being the copy of the memorandum of appeal.
4. Opposing the application, the 2<sup>nd</sup> Respondent Samuel Mwaniki Waithaka swore his Replying Affidavit on 29/2/2024. He avowed that the complaint before the Liaison Committee was the Appellant's undertaking construction contrary to the approved plans registration number RRU-SD-CPD001-AA1494 and irregularly obtaining Occupation certificate number for development application number RRU-SD-CPD001-AA1494 serial 2768 dated 4/8/2021. That in its determination the Liaison Committee ordered that; -

SUBPARA a.



“That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties are hereby ordered to issue Enforcement Notice compelling the Respondents to comply with the approved plans registration number RRU-SD-CPD001-AAA1494 dated 15<sup>th</sup> November 2018.

- b. That failure by the Respondents to comply with the Enforcement Notice, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties are hereby compelled to ensure compliance with the said Enforcement Notice within ninety (90) days from the date of its issuance and service to the Respondents.
  - c. That the Occupation Certificate for development application number RRU-SD-CPD001-AAA1494 serial number 2768 dated 5<sup>th</sup> August, 2021 is hereby declared null and void.
  - d. That the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Interested parties are hereby ordered to cancel the said Occupation Certificate serial number 2768 dated 5<sup>th</sup> August, 2021 with immediate effect.
  - e. Parties to bear their own costs.”
5. That the said determination is competent and proper and the intended appeal is a mere academic exercise and the application is premature and ought to be dismissed.
  6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties filed their Grounds of Opposition dated 6/3/2024. They accused the Appellants of indolence for initially pursuing an appeal in the guise of Judicial Review proceedings; surpassing the laid down mechanism of appeal as stipulated under Section 72(4) PLUPA; that the gist of the intended appeal is challenging the jurisdiction of the Liaison Committee to hear an appeal outside the statutory timelines laid down in Section 61(3) PLUPA; in light of the forgoing the appeal revolves around a question of fact on operationalization of the Liaison Committee and the same should be declined; the appellants willfully failed to exhaust the laid down mechanisms for redress and have now come to Court with unclean hands .
  7. In a rejoinder, the Appellants filed a Further Affidavit dated 8/4/2024. They averred that the option to file Judicial Review was in good faith and that it is trite law that the existence of alternative remedy is not in itself a bar to seeking Judicial Review. That it is imperative for this Court to look at the manner the Liaison Committee conducts its proceedings comparing the determination of Nairobi Liaison Committee in determining a similar complaint but arriving at an opposite finding as per KJW-1, copy of the notification in Nbi Appeal No. E005 of 2024. That as a consequence there are now two conflicting Rulings which violate the doctrine of stare decisis and therefore the Appeal also raises a matter of public interest.
  8. On 9/4/2024 directions were taken for parties to canvass the Application by way of written submissions.
  9. The Appellants through the firm of Wambugu & Muriuki & Co. Advocates filed submissions dated 23/4/2024. Two issues were drawn for determination to wit; whether the Applicants have satisfied the threshold required for leave to be granted and whether execution ought to be stayed.
  10. On the first issue, reliance was placed on Section 79G of the *Civil Procedure Act* and the Supreme Court case of Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR and submitted that the delay is due to the Thika Judicial Review proceedings that they had filed. That the accusation of indolence cannot stand because the appellants were actively pursuing a different mechanism by way of Judicial Review. They urged the Court not to oust them



from the seat of justice on the strength of the Court of Appeal case in Kamlesh Mansukhalal Damki Patni Vs. Director of Public Prosecution & 3 others [2015]eKLR. Impugning the Liaison Committee jurisdiction, the Appellants argued that the determination and orders issued were made per incuriam as it was rendered in ignorance of a constitutional or statutory prescription.

11. Secondly, the Appellants posited that an order for stay of execution as enshrined under Order 42 rule 6(1) of the Civil Procedure Rules is a discretionary order guided by the principles set out in the case of Butt Vs. Rent Restriction Tribunal [1982] KLR 417. That they have demonstrated that the impugned Liaison Committee order amount to denial of their constitutional right to property. That the substantial loss arising therefrom cannot be quantified and no prejudice will be suffered by the Respondents if the Application is allowed.
12. On behalf of the Respondents, the firm of Ogamba Nyakundi & Co. Advocates filed submissions dated 4/5/2024. In similar fashion, they drew two issues for the Court to determine; whether the Applicants should be granted leave to appeal out of time and whether the grant of such leave should operate as stay.
13. Answering the first issue in the negative, the Respondents cited the principles to be considered in granting extension of time as stated in the Court of Appeal case of Njoroge Vs. Kimani [2022] KECA 1188 (KLR) at para 11 that;

“An Applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the Court will use its discretion to grant the application.”
14. Regarding stay of execution, the Respondents maintained that the Appellants have not satisfied the preconditions contained in Order 42 rule 6 of the Civil Procedure Rules and urged the Court to dismiss the Application with costs.
15. Sylvia Muchiri Legal Counsel for the County Attorney filed submissions dated 3/5/2024 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. It was submitted that no plausible explanation has been proffered as to why he Appellant did not file their appeal within time as laid down under Section 72(4) PLUPA and Section 16A *Environment and Land Court Act*. That the appellants have failed to establish any substantial loss they stand to suffer as a result of the impugned Order. That having failed to comply with the approved plans, the appellants have no good will to the planning authority. That the application is guilty of laches and an abuse of Court process and is ripe for dismissal with costs.
16. Having read and considered the rival pleadings and submissions before me, the main issue for determination is whether the Application is merited addressed as follows.

### **Leave to appeal out of time**

17. Section 79G of *Civil Procedure Act* provides for time for filing appeals from Subordinate Courts to this Court to be filed within a period of thirty days from the date of the decree or order appealed against. The proviso is to the effect that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.
18. Section 95 of *Civil Procedure Act* states that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.



19. Therefore, in considering an application for enlargement of time, the Court exercises discretionary power. The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others [2014]eKLR stipulated the following principles to guide Courts in determining exercising such discretion;
- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
  - c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
20. It is not disputed that the Appellants in the first instance opted to file Judicial Review proceedings to channel their grievances against the Liaison Committee determination. Upon dismissal of the Judicial Review, they approached this Court vide the instant Application, a move the Respondents and Interested Parties vehemently object to as frivolous and abuse of Court process. They unanimously submit that the Appellants bypassed the laid down mechanism of appeal in statute and contend that the application has been filed inordinately late.
21. The instant application was filed on 23/1/2024 a period of seven months since delivery of the Liaison Committee determination and over one month after delivery of the Judicial Review Ruling dated 13/12/2023 by this Court, differently constituted (Eboso J). The right to fair hearing and trial as enshrined under Article 50 (1) & (2) respectively of *the Constitution* has two facades that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body. See the Supreme Court decision in Hussein Khalid and 16 Others Vs. Attorney General & 2 Others [2019] eKLR. Guided by the foregoing binding precedent and purely in the interests of justice, I grant the prayer for leave to appeal out of time.

### **Stay of execution**

22. The legal provisions for stay of execution pending appeal are anchored in Order 42 rule 6 (1) & (2) of the Civil Procedure Rules that; -
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem



just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

23. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss, timely filing of the Application and the furnishing of security. An order for stay of execution is discretionary upon proving sufficient cause by satisfying the aforesaid conditions.
24. On substantial loss, save for deposing that the appeal is arguable I am afraid the Applicants have not established the loss they stand to suffer if the prayer stay is not granted. Substantial loss is the cornerstone of for granting stay. That is what has to be prevented and merely stating that the appeal will be rendered otiose does not mount to substantial loss. A reading of the impugned Liaison Committee Orders reproduced in para.5 above show that the Liaison Committee found that the Applicants had contravened the approved drawing/plans earlier approved for single dwelling maisonettes. The Liaison Committee directed the Interested Parties to issue an Enforcement Notice for the Applicants to comply with. It appears from the Applicant’s Supporting Affidavit that the Applicant is also challenging the Liaison Committee jurisdiction to entertain the dispute before it. The totality of the forgoing is the Applicants have not demonstrated substantial loss they stand to suffer.
25. Was the application timeously filed? This issue has been adequately answered under the limb for leave to file appeal out of time. Lastly no offer for security has been offered by the Applicant.
26. In the end the Application partially succeeds as follows; -
- a. The Application is allowed in terms of Prayer 2 only.
  - b. The Applicants to file and serve their Memorandum of Appeal & Record of Appeal within 15 days.
  - c. Costs be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27<sup>TH</sup> DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kiprotich for 1<sup>st</sup> and 2<sup>nd</sup> Appellants

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents – Absent but served

1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties – Absent but served.



Court Assistant – Phyllis

