



Chepkonga & another v Kibii & another (Suing as the legal representatives of the Estate of the Late Isaiah Kibii Boswony - Deceased) (Environment and Land Appeal E003 of 2023) [2024] KEELC 5772 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**L WAITHAKA, J
JULY 24, 2024**

BETWEEN

CHEBIEGON CHEPKONGA 1ST APPELLANT

JOSEPH KIPKEMOI CHEPYEGON 2ND APPELLANT

AND

KENNETH KIPCHIRCHIR KIBII 1ST RESPONDENT

ROSE JEPKORIR KOIMA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
ISAIAH KIBII BOSWONY - DECEASED**

RULING

1. By notice of motion dated 6th November 2023, the appellants herein seek leave to amend their Memorandum of Appeal.
2. The application is premised on the grounds that they omitted to join two crucial parties to the appeal; that the parties they omitted to join were defendants in the lower court proceedings and that the parties they want to join to the appeal are necessary in the implementation of the outcome of the appeal.
3. The application is supported by the affidavit of the appellants' advocate, Raymond Kiprok Kipkenei, in which the grounds on the face of the application are reiterated.
4. The application is opposed by the respondents on among other grounds the ground that the Memorandum of Appeal sought to be amended is none existent; that the appellants have not proved that the memorandum sought to be amended exists and that they were not served with the Memorandum of Appeal sought to be amended and that the intended amendments are not sought in good faith and will not assist the court deal with the matters in controversy.



5. Terming the appeal an academic exercise, the respondents have averred that the subject matter of the appeal to wit the property known as Baringo/Sabatia/103/875 (formerly Baringo/Sabatia/531) has since been sold and transferred by the appellants to third parties (Amina Omar and Fatuma Rashid).
6. It is the respondents' case that the intended amendments and the appeal will seriously prejudice them as they would be required to deal with an appeal which is moot, the subject matter thereof having been sold by the appellants. Besides filing a response to the application dated 6th November 2023, the respondents filed the notice of motion dated 8th December 2023 seeking to strike the appellants' Memorandum of Appeal, if any. They also seek to strike out the appellants' application for leave to amend the appeal, dated 6th November 2023 and the Memorandum of Appeal dated 2nd June 2023.
7. The application is premised on the grounds on its face and on the supporting affidavit of Kenneth Kipchirchir Kibii sworn on 8th December 2023. The grounds urged in support of the application are more or less the same as those given in opposition to the appellants' application for leave to amend their Memorandum of Appeal. These are that the appellants did not file and serve their appeal within the time stipulated in law making the appeal time barred and bad in law; that the appellants have not demonstrated that they filed any Memorandum of Appeal within the time stipulated by law for filing an appeal making the intended amendment to be lacking substratum and that the appellants have no proprietary interest in the suit property having transferred it to third parties.
8. In reply to the respondents' application, dated 8th December 2023, the appellants filed grounds of opposition dated 19th December 2023 and a preliminary objection of an even date. Through the grounds of opposition and the preliminary objection, the appellants contend that the application is inept, ambiguous, bad in law; that strangers have been joined in the proceedings; that the Memorandum of Appeal was filed on time save for the record itself hence the entire appeal is secure; that the appeal is based on the findings but not the alleged property hence valid; that there is no evidence of service of order or existence of order at the time of the alleged transfer and that court lacks jurisdiction to hear and determine the matter. Further, that the respondents seek to introduce strangers to the appeal, which is unprocedural.
9. In a rejoinder, the respondents filed a supplementary affidavit asserting the grounds taken up in support of their application.
10. The applications and the preliminary objection were disposed of by way of written submissions.

Appellants Submissions

11. In the appellants written submissions dated 7th May 2024 in respect of the respondent's application, it is submitted that the question as to whether the subject matter of the suit is in existent or not is not a ground of appeal; that this court has no jurisdiction to execute the decree of the lower court; that the mandate of this court is to uphold or fault the judgment of the lower court and that once this court delivers its judgment, it is the function of the lower court to execute the orders emanating from this court. The appellants urge this court to focus on the appeal and not to be distracted to address extraneous matters which do not fall within its mandate.
12. On whether there is a valid Memorandum of Appeal in this case, it submitted that the court record shows that there is a Memorandum of Appeal dated 13th February 2023 and filed on 15th February 2023 (the court is referred to attached copy of invoice and original receipt). It is pointed out that judgment of the lower court was delivered on 16th January 2023 and the appeal filed on 15th February 2023 on the 29th day from the date of delivery of the judgment appealed from.



13. Reference is made to Section 79G of *Civil Procedure Act* and submitted that the appellants complied with the law regarding filing appeals. Terming the application by the respondents an abuse of the process of the court, based on the provisions of Order 42 Rule 2 and Sections 1A, 1B and 3A of the *Civil Procedure Rules* and Act respectively; the case of *D.T Dobie & Co. (Kenya) Ltd v Muchina*; Article 50(i) of the *Constitution* and the case of *Pinnacle Project Ltd v Presbyterian church of East Africa, Ngong Parish & Another* (2018) eKLR the appellants urge this court to dismiss the respondents' application with costs to them;
14. Regarding the preliminary objection, it is contended that the respondents seek to introduce persons who were not parties to the appeal (Obadiah Kipkurui Yator, Koibatek Land Registrar, Koibatek Mogotio), which is unprocedural and submitted that introduction of strangers into the appeal ousts the jurisdiction of the court to hear and determine the appeal.
15. Issue of the validity of the memorandum of appeal is replicated, as herein above.

Respondents submissions

16. In their submissions dated 23rd February 2024, it is submitted that the appellants' preliminary objection dated 19th December 2023 is totally misconceived and does not constitute a true preliminary objection; that the appellants being the ones who filed the appeal cannot be heard to claim that the court's lacks jurisdiction to determine the issues raised in their application dated 6th November 2023 and response thereto.
17. It further submitted that the parties said to be strangers to the appeal were parties in the suit appealed from hence are necessary parties in the appeal.
18. On whether the suit property exists, it is submitted that it is the respondents' cardinal duty to bring to the court all relevant and material facts in full exercise of candour because a court of law is not invited to act in the darkness or even in vain by dealing with and/or adjudicating over an "academic appeal". It is further submitted that keeping the fact of existence or otherwise of the suit property from the court would be wrong and an attempt to play lottery with the judicial process and is prejudicial to other parties.
19. On whether the appeal exists, the respondents have reiterated their pleaded position concerning the appeal, that it is none existent; and stated they challenged the appellants to demonstrate that the appeal was filed and served within the time provided in law but failed to do so.
20. The respondents submit that the only inference that can be drawn from the failure of the appellants to adduce evidence capable of proving that the appeal was filed and served within the time provided by law, is that no appeal was filed. Reference is made to the case of *Trans Mara Sugar Company Ltd v Obaga* (Civil Appeal No.106 of 2022) (2023) KEHC 19481 (KLR) 25th May 2023 (Judgment); *Addi Maingi Gitau v. Loise Wanjiru Mwangi* (2020) e KLR which appeals were struck out for being undated/lacking the court's receiving stamp and or for being undated and unsigned and the court is urged to strike out the instant appeal for similar reason.

Analysis and Determination

21. I have carefully read and considered the application by the appellants, the response by the respondents and the application by the respondents and the response thereto.
22. The sole issue for the court's determination is whether the appellants have made a case for being granted leave to amend their appeal. In that regard, whilst the respondent contend that the appeal sought to



be amended is none existent, there exists a Memorandum of Appeal, dated 13th February, 2023 and filed on 15th February, 2023 in the court file. The Memorandum of Appeal is accompanied by a court filing fee receipt No.FSCQ-0004221 dated 15th February, 2023.

23. Being the ones who desired judgment based on the allegation that there does not exist a valid Memorandum of Appeal filed in this appeal, the burden was on the respondents to prove that fact which fact they failed to prove.
24. Further, I agree with the appellants that the issue of transfer of the suit property does not vitiate the appeal.
25. Being of the view that no prejudice would be occasioned on the parties if the appellants' application is allowed, I allow the application dated 6th November, 2023 in terms of prayer 1.
26. The costs of the application shall be in cause.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 24TH DAY OF JULY 2024

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:

Mr. Kipkeni for the Appellant

Ms. Kiget holding brief for Mr. Arusei for the Respondent

Court Asst.: Alex

