



**Mbuthi v Muthui & another (Environmental and Land Originating
Summons 15 of 2021) [2024] KEELC 5479 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 15 OF 2021**

LG KIMANI, J

JULY 22, 2024

**IN THE MATTER OF: SECTION 38 OF THE LIMITATION OF ACTIONS
ACT AND ORDER 37 RULES 7 AND 13 OF THE CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF: ACQUISITION OF TITLE BY ADVERSE POSSESSION

AND

IN THE MATTER OF: LAND PARCEL NUMBER MATINYANI/MUTULU/716

BETWEEN

ONESMUS KASAKI MBUTHI PLAINTIFF

AND

PAUL SAITI MUTHUI 1ST DEFENDANT

FRANCIS MUSYOKA MUTHUI 2ND DEFENDANT

RULING

1. The 2nd defendant/applicant filed the Notice of Motion dated 28th of November 2023 seeking the following orders:-
 1. Spent.
 2. Spent.
 3. That there be a stay of execution on the Judgment and orders of this court made on 21.9.2023 pending the hearing and the final determination of the Applicant's Appeal herein.
 4. That the costs of this application be met by the Plaintiff/Respondent.



2. The grounds in support of the application are that this court rendered judgment in favour of the Plaintiff on 21st September 2023 and being dissatisfied with the judgment, he filed a notice of appeal on 5.10.2023. He stated that the effect of the judgment is that a portion of the suit land Matinyani/Mutulu/716 measuring 1.5 acres will be transferred to the Plaintiff. The Applicant is apprehensive that if the judgment is executed the appeal will be rendered nugatory.
3. The application is supported by the affidavit of the Applicant where he deposed that the appeal has a good chance of success and has been filed without undue delay. He further stated that if the judgment is executed his appeal will be rendered nugatory and he is likely to incur substantial loss. Further, the respondent shall suffer no prejudice if the stay orders are granted.
4. The applicant confirmed that he is willing to abide by such terms and conditions the court may impose for granting the application.
5. It is therefore the applicant's contention that it is in the interest of justice and fairness that this court grants the order of stay pending appeal.

The Plaintiff/ Respondent's Reply

6. The Plaintiff/Respondent filed a Notice of Preliminary Objection dated 11th January 2024 on the following grounds:
 1. The motion is bad in law as the 2nd defendant has not filed an appeal within the time frame provided for by Rule 84(1) of the *Court of Appeal Rules*.
 2. This honourable court has no jurisdiction to entertain a motion for a stay of execution pending a hearing and determination of the appeal where no appeal has been lodged.
 3. The motion is thus incompetent, an abuse of the court process and should be struck out with costs.
7. The Respondent filed a replying affidavit deposing that he has always had the suit land where he was born and brought up.
8. He stated that no appeal has been filed, contrary to Rule 84(1) of the *Court of Appeal Rules* which requires one to lodge an appeal within 60 days after lodging the Notice of Appeal. He also contends that the 2nd defendant has not filed the requisite application to institute an appeal out of time. He also pointed out that the 2nd defendant has not offered security for costs and has not annexed a draft Memorandum of Appeal for the court to appreciate the basis of the intended appeal.
9. It is his view that there has been an inordinate delay in filing the instant motion filed 2 months from the date of the judgment. Further, this application is only an academic exercise and a waste of the court's judicial time.

The 2nd Defendant/Applicant's Supplementary Affidavit

10. The applicant filed a supplementary affidavit deposing that at the time he filed the application, the respondent had not commenced execution of the judgment/decreed. He stated that he filed an application to enlarge the time to file the appeal to the Court of Appeal and applied for certified copies of the proceedings to enable him to prepare and file the record of appeal.
11. He further stated that he has been advised by his advocates on record that the Notice of Appeal remains active until it is withdrawn or struck out by the court of appeal.



The 2nd Defendant/Applicant's Written Submissions

12. Counsel for the Applicant submitted that the preliminary objection had no merit and relied on Rule 84 of the [Court of Appeal Rules](#), 2010. The rule provides that once a notice of appeal is lodged it remains active until it is struck out by the Court of Appeal. Further, it was submitted that Rule 4 of the [Court of Appeal Rules](#) provides for the extension of time, which application he has already filed and is pending determination. They therefore pray that the notice of preliminary objection be dismissed with costs.
13. Relying on the requirements for the grant of stay as stipulated under Order 42 rule 6(2) of the [Civil Procedure Rules](#), it was submitted that the applicant stands to suffer substantial loss since he and the family of the late Muthui Mwinzi are going to lose a portion of their land measuring 1.5 acres. Once examination proceeds, the Respondent will be at liberty to deal with the disputed parcel as he wishes which acts dispossess the applicant of the land rendering the intended appeal an academic exercise. They cited the authority case of [Sundiata Nathan Mutende v. Willy Mwololo Muindi](#)(2020)eKLR Justice Angote.
14. Regarding the second condition on the grant of the orders sought, it was submitted that the instant application was brought without delay, noting that the respondent is yet to serve them with the decree. They relied on the authority in the case of [Amal Hauliers Limited v. Abdulnasir Abubakar Hassan](#) (2017) eKLR where the court found that there was no inordinate delay when an application was filed 4 months after judgment.
15. On the third issue of security, the Applicant highlighted that he is willing to abide by such terms and conditions as the court may impose for granting the application. He urged the court to give directions on the question of security and stated that he was ready to comply.
16. The applicant further relied on the holding in the case of [MFI Document Solutions Ltd v. Paretto Printing Works Limited](#) (2021) eKLR where the requirements for grant of stay of execution as set out by the court of appeal in the case of [Butt v. Rent Restriction Tribunal](#) (1982) KLR 417 and urged the court to allow the application with costs.

Plaintiff/Respondent's submissions

17. Counsel for the Respondent submitted that there being no formal appeal filed, it would be erroneous to grant a stay of execution pending an appeal that is not there. Counsel further pointed out that the applicant had not lodged an application for extension of time of filing the instant application.
18. The respondent therefore submits that the application lacks merit and should be dismissed with costs.

Analysis and Determination

19. The Applicant seeks a stay of execution of the judgment of this court delivered on 21st September 2023. The application is brought under Order 22 Rule 22 and 42 Rule 6(2) of the [Civil Procedure Rules](#)(2010). Order 22 rule 22(1) provides that:

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been



made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

20. Order 42(6) provides that:

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

21. The case of [HGE v SM](#) [2020] eKLR summarized the principles governing grant or refusal of stay of execution thus:

“An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely

- (a) that substantial loss may result to the applicant unless the order is made,
- (b) that the application has been made without unreasonable delay, and
- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v. African Virtual University](#) [2015] eKLR.”

22. The court has considered the application herein, the affidavits in support and opposing the same the Preliminary Objection and submissions by Counsel for the parties.



23. The court will first consider the preliminary objection filed by the Respondent dated 11th January 2024. The objection is on the grounds that the appeal has not been filed within the time frame of 60 days as provided for by Rule 84(1) of the [Court of Appeal Rules](#) and there being no appeal filed, the court should not entertain the instant application.
24. The nature of a preliminary objection was summarized in the jurisprudence of the celebrated case of *Mukisa Biscuit Manufacturer Ltd v Westend Distributors Ltd* (1969) EA 696 as per law JA, thus:
- “...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”
- Sir Charles Newbold P in that case stated:
- “...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
25. The court is satisfied that the preliminary objection contains pure points of law that do not require a further ascertainment of facts beyond looking at the record.
26. The Respondent contends that an appeal was not filed within 60 days of filing of the Notice of Appeal. Rule 84(1) of the [Court of Appeal Rules](#) provides that:
1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
 - (a) a memorandum of appeal, in four copies;
 - (b) the record of appeal, in four copies;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with subrule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
 2. An appellant shall not be entitled to rely on the proviso to subrule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondent.
27. From the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#), this court may only entertain an application for stay of execution of decree pending appeal when there is in existence an appeal to the Court of Appeal. Sub rule 4 provides that for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. This court is thus under an obligation to look at the Rules of the Court of Appeal to ascertain whether a Notice of Appeal has been filed in accordance with those rules and whether an appeal is deemed to have been filed.



28. It is noted that the applicant filed a Notice of Appeal on 5th October 2023 which is within the time provided under Rule 77 (2) of the *Court of Appeal Rules* that notice of appeal be filed within fourteen days after the date of the decision for which appeal is lodged. As per Rule 84 (1) of the *Court of Appeal Rules*. The Rule provides that the applicant was required to file the appeal within sixty days after the date when the notice of appeal was lodged. The court’s computation shows that the sixty days expired on 4th December 2023.
29. The proviso to Rule 84 (1) shows that where an application for a copy of proceedings in the superior court has been made within thirty days after the date of the decision against which it is desired to appeal, time stops running for the purpose of filing the appeal until the registrar of the superior court certifies the time that was required for the preparation and delivery to the appellant of such copy of proceedings.
30. In the present case, the applicant attached to his supplementary affidavit a letter that was received in the court registry on 29th January 2024 where the applicant’s Counsel sought to be supplied with certified copies of proceedings to enable them to proceed with the process of appealing to the Court of Appeal. It is noted that the said letter was not filed within 30 days from the date of the decision of this court, the letter is not copied to the Advocates for the Respondent herein and there is no proof that the said letter was served on the Respondent. This is in contravention of Rule 84 (2) of the Court of Appeal Rules which provides that the letter referred to above must be in writing and a copy of the application served upon the respondent.”
31. Failure by the applicant to comply with the proviso to Rule 84 (1) and (2) of the *Court of Appeal Rules* means that the applicant was required to lodge his appeal within 60 days from the date the Notice of Appeal was filed. He did not do so.
32. Rule 85(1) of the *Court of Appeal Rules* provides that:
- “If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.”
33. The applicant states that he has filed an application to the Court of Appeal dated 9th February 2024 seeking extension of time within which to file the appeal. This is an admission that the appeal was not filed within the required time.
34. The court is of the view that having failed to lodge the appeal within the stipulated time, the provisions of Rule 85 (1) of *Court of Appeal Rules* apply and the applicant is deemed to have withdrawn the Notice of Appeal. In the court’s view, the making of an order by the Court of Appeal that the Notice of Appeal has been withdrawn was not mandatory upon failure to file the appeal within time the Notice of Appeal was automatically deemed as withdrawn. This court cannot therefore entertain the present application.
35. The court finds and holds that the preliminary objection dated 11th January 2024 has merit and is upheld. The application dated 28th November 2023 is found to be improperly before the court and the same is hereby struck out with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF JULY, 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE



The ruling read in open court and virtually in the presence of-
Musyoki Court Assistant
M/S Kiama for Respondent
M/S Makau holding brief for Mutia for Defendant/Applicant

