



Ngugi & 5 others v Wanyoike & 6 others (Environment & Land Case 204 of 2017) [2024] KEELC 5664 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 204 OF 2017**

LN GACHERU, J

JULY 18, 2024

BETWEEN

THOMAS NGARACHU NGUGI 1ST APPLICANT

MARY NJAMBI NGUGI 2ND APPLICANT

AND

SIMON KURIA KUNGU 1ST PLAINTIFF

DAVID MWAURA KANGETHE 2ND PLAINTIFF

JOSEPH GITAU WAITHERA 3RD PLAINTIFF

JOHN NDEGWA KANGETHE 4TH PLAINTIFF

AND

JOHN WILFRED WANYOIKE 1ST DEFENDANT

FRANCIS NJUGUNA KARANJA 2ND DEFENDANT

JOHN IRUNGU WAWERU 3RD DEFENDANT

DAVID NGIGE MWANGI 4TH DEFENDANT

MBIYU MWAURA 5TH DEFENDANT

COUNTY GOVERNMENT OF MURANG'A 6TH DEFENDANT

ATTORNEY-GENERAL 7TH DEFENDANT



RULING

1. The matter for determination is the Notice of Motion Application dated 20th December, 2022, which is premised under Order 43 (2) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#). In the said Application, the Plaintiffs/Applicants sought the following reliefs from the Court:
 1. That this court do grant leave to the Plaintiffs/Applicants to appeal against the ruling delivered herein and communicated to the Plaintiffs/Applicants via email on 8th December 2022.
 2. That the costs of this application be provided for.
2. The Application is supported by the grounds stated thereon, and on the Supporting Affidavit of Gibson Kamau Kuria, SC. sworn on 20th December, 2022. The genesis of the current Application is that the Plaintiffs filed a Memorandum of Appeal anchored on Order 49 Rule 7 (2) and (3) of the [Civil Procedure Rules](#) before this Court on 6th December, 2022 challenging the decision of the Deputy Registrar not to issue a certificate of delay to them.
3. The Plaintiffs/Applicants sought the setting aside of the Deputy Registrar's decision, and a further order directing the Deputy Registrar to issue them with a certificate of delay as per their draft and with any other amendments as directed by the Court.
4. In response to the Plaintiffs/Applicants' Memorandum of Appeal filed on 6th December, 2022, this Court, through its decision dated 8th December, 2022, issued the following directives:
 - “(1.) An Appeal cannot be filed in a substantive suit; the applicant should have filed an application for review and setting aside.
 - (2) This is a closed matter and cannot be re-opened through an appeal.
 - (3) Alternatively, the Appellant should have filed a substantive appeal which can stand on its own.
 - (4) Thus, the Court declines to issue any orders.”
5. It is the Plaintiffs'/Applicants' contention that they have filed a Notice of Appeal before the Court of Appeal against this Court's decision dated 8th December, 2022, and are seeking this Court's leave to appeal against the said decision pursuant to the provisions of Order 43(2) of the Civil Procedure Rules, which stipulates that a party aggrieved by a decision of the Court made under Order 49 of the Civil Procedure Rules, can only appeal against that decision with the leave of this Court.
6. The Plaintiffs/Applicants further contended that according to the provisions of Rule 41 of the Court of Appeal Rules, where leave to appeal against a decision is required, such application for leave may be made informally at the time when the decision against which it is desired to appeal is given, or through a formal application within fourteen (14) days of such decision.
7. The Plaintiffs cited the case of *Sango Bay Estates and Another V Dresdner Bank* [1971] EA 17, to anchor the proposition that an application for leave to appeal, the Applicant must show that the intended Appeal raises grounds that merit judicial consideration.
8. The Plaintiffs/Applicants averred that their Intended Appeal merits judicial consideration on the following grounds:



- i. This Court issued the orders communicated on 8th December, 2022, without hearing the parties substantively on the application before it.
 - ii. This Court violated the principle of natural justice which mandates that before an adverse order is made against a party, that party must be heard.
 - iii. This Court violated the Plaintiffs' rights under Article 48 of *the constitution* to access justice through an appeal against a Deputy Registrar's decision as provided for under Order 49 of the *Civil Procedure Rules*.
 - iv. This court's decision has the net effect of shutting out the Plaintiffs from the Appellate process which is their constitutional right.
 - v. This Court in effect held that it lacked jurisdiction to hear the appeal against a Deputy Registrar's decision contrary to the provisions of Order 49 of the Civil Procedure Rules.
 - vi. This Court ignored the fact that Deputy Registrar's decision was a ministerial act which is appealable to a judge in chambers under Order 49 of the Civil Procedure Rules.
 - vii. This Court erred in holding that the Plaintiffs ought to have filed an application for review and setting aside the Deputy Registrar's decision contrary to the law as set out in Order 49 of the Civil Procedure Rules.
 - viii. This Court ignored the doctrine of precedent as set out by the court of Appeal in the case of Speaker of the *National Assembly V James Njenga Karume* [1992] eKLR where the Court held that where there exists a clear procedure for the redress of any particular grievance prescribed by *the constitution* or legislation, that followed must be strictly followed by litigants.
 - ix. This Court erred in declining to hear the appeal before it on merit.
 - x. This court exercised its discretion wrongly.
9. The Plaintiffs/Applicants relied on the case *Re Estate of Mbiyu Koinange (Deceased)* [2015] eKLR, to buttress the argument that an Applicant for leave to appeal need not demonstrate that his proposed Appeal has an overwhelming chance or probability of success, rather an Applicant is required to present an arguable and reasonable appeal.
 10. Further reliance was sought in the decision of the Court in the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* (2012) eKLR, in support of the contention that the right of Appeal is a constitutional right, that actualizes the right of access to justice, protection and benefit of the law. Further, that anything that renders an Appeal nugatory impinges on the very right of appeal.
 11. The Plaintiffs/Applicants also cited the decision of the Court in *Selle V Motor Boat* [1968] EA 123, to anchor the proposition that the function of the Court of Appeal is to reconsider the evidence on record, evaluate it itself and draw its own conclusion without being bound by the findings of this Court.
 12. The Application is opposed by the Defendants/Respondents through the Replying Affidavit of JEREMIAH N. MBUTHIA Advocate, sworn on 7th February, 2024. The deponent who is an advocate of the High Court in the conduct of the present matter averred that the Plaintiffs/ Applicants have filed multiple Applications since the matter was disposed of via a Judgment dated 30th November, 2020, which have had the effect of tying up the Defendants/Respondents in endless litigation.



13. Further, the Defendants/Applicants refuted the Plaintiffs' contention that all actions taken under Order 49 rule 7 of the Civil Procedure Rules, should be appealed to this Court. They contended that Order 49 rule 7 of the Civil Procedure Rules, provides for only specific circumstances that an Appeal with regard to a decision by the Deputy Registrar, will be lodged in this Court, and those circumstances exclude the Deputy Registrar's refusal to issue a certificate of delay.
14. The Defendants/Respondents characterized the Plaintiffs/ Applicants as indolent litigants, who have failed to prosecute their Appeal, and urged the Court to dismiss the instant Application, with costs.
15. The Application was canvassed by way of written submissions.

Plaintiffs' Submissions

16. The Plaintiffs/ Applicants filed their written submissions dated 5th March, 2024 through the Law Firm of Kamau Kuria & Kiraitu Advocates. The Plaintiffs/ Applicant reiterated the averments contained in the Supporting Affidavit of Gibson Kamau Kuria, SC. dated 20th December, 2022.
17. It was submitted that when this Application came up for hearing on 5th February, 2024, the 5th Defendant/ Respondent stated that he would oppose the said Application, but he opted to file a one (1) page submissions dealing with quantum in a running down matter which is unrelated to the issues raised in the application.
18. Further, they submitted that the 5th Defendant is estopped from questioning the contents of the Supporting Affidavit of Gibson Kamau Kuria, SC. dated 20th December, 2022.
19. The Applicants cited the provisions of Order 49, Rule 7 (2) of the *Civil Procedure Rules*, to buttress their submission that this Court erred in holding that the Plaintiffs/Applicants ought to have filed an Application for review and setting aside of the Deputy Registrar's decision dated 25th November, 2022. They submitted that Order 49 Rule 7(2), of the Civil Procedure Rules, states that Appeals against the decision of the Deputy Registrar shall be made to a Judge in chambers.
20. The remainder of the Plaintiffs/Applicants submissions reproduced the averments set out in the Supporting Affidavit of Gibson Kamau Kuria, SC. dated 20th December, 2022.
21. The 5th Defendant/Respondent filed his submissions dated 28th March 2024, in opposition of the instant Application. It was his submissions, that even though the Plaintiffs/Applicants relied on the case of *Sango Bay Estates and Another V Dresdner Bank* [1971] EA 17) to state that all that is required of them when seeking leave is to have grounds of Appeal, that merit serious judicial consideration, if the order sought to be appealed was made in exercise of judicial discretion, a rather strong case will have to be made.
22. It was submitted that the ruling issued by the court on 8th December 2022, was borne out of judicial discretion, then the ground for issuing leave should be higher. That the Plaintiffs/Applicants should prove that they have a prima facie Appeal with probability of success.
23. It was also submitted that refusal to issue a certificate does not fall under Order 49 rule 7(1) of *Civil Procedure Rules*, does not fall under the orders referred to in the above order.
24. The 5th Defendant/Respondent urged the court to dismiss the instant Application with costs
25. This court has carefully considered the instant Notice of Motion, the grounds for, against it, the rival written submissions and the relevant provisions of law, and finds the single issue for determination is; - whether the Plaintiffs/ Applicants are entitled to the Orders sought?



26. According to Section 75 of the [Civil Procedure Act](#), an Appeal shall lie as of right from the following orders:

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted:

(1)

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) an order under section 64;
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.”

27. The instant Application is brought under Order 43 of the [Civil Procedure Rules](#) which provides as follows:

“1.

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—
 - (a) Order 1 (parties to suits);
 - (b) Order 2 (pleadings generally);
 - (c) Order 3 (frame and institution of suit);
 - (d) Order 4, rule 9 (return of plaint);
 - (e) Order 7, rule 12 (exclusion of counterclaim);
 - (f) Order 8 (amendment of pleadings);
 - (g) Order 10, rule 11 (setting aside judgment in default of appearance).



- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - (j) Order 19 (affidavits);
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);
 - (n) Order 25, rule 5 (compromise of a suit);
 - (o) Order 26, rules 1 and 5(2) (security for costs);
 - (p) Order 27, rules 3 and 10 (payment into court and tender);
 - (q) Order 28, rule 4 (orders in proceedings against the Government);
 - (r) Order 34 (interpleader);
 - (s) Order 36, rules 5, 7 and 10 (summary procedure);
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);
 - (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
 - (v) Order 41, rules 1 and 4 (receivers);
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - (x) Order 45, rule 3 (application for review);
 - (y) Order 50, rule 6 (enlargement of time);
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
 - (aa) Order 53 (judicial review orders).
- a. An Appeal shall lie with the leave of the court from any other order made under these Rules.”
- (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.



- (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”

28. The Court will borrow from the decision of the court in the case of *Simon Kalachbu v Yuasa International Limited & another* [2021] eKLR, where the Court:

“Order 43 of the Civil Procedure Rules gives a long list of orders from which an appeal lies from as of right. It therefore follows that if one wishes to appeal on an order that is not on the list under Order 43 of the *Civil Procedure Rules*, one must seek leave of court that made that very Order. The said Order 43 is the procedural Order for Section 75 of the *Civil Procedure Act*”.

29. Further, in the case of Peter Nyaga Muvake V Joseph Mutunga [2015] eKLR, the Court stated as follows:

“...Section 75 of the *Civil Procedure Act* Cap 21, stipulates the thematic orders from which appeals lie as of right. Appeals from other orders lie only with leave of the court. An order made under Order 42 Rule 6 is not exempt from the requirement of leave. It does not lie as of right. In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. as the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked.”

30. Further, in the case of Direct line *Insurance Co. Ltd v Onyango (Civil Appeal E345 of 2022)* [2022], the Court declared as follows:

“It is then clear that under order 43(2) an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under order 43(1) leave to appeal must be obtained before such an appeal can be preferred. (See *Mutungi J in Serephen Nyasani Menge v Rispab Onsase* [2018] eKLR)... The appellants ought to have sought leave before filing this appeal. In *Stephen Omondi Juma v Sprocer Auuor Rabote* [2022] eKLR, Aburili J was faced with a similar issue as the issue before me. She cited a Court of Appeal decision and stated that: “As was emphatically stated in *Nyutu Agrovet Ltd vs Airtel Networks Ltd* [2015] eKLR, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. Further, that the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of section 75 of the *Civil Procedure Act* and order 43 of the *Civil Procedure Rules*, to seek and obtain leave from the lower court to appeal to this court.”

31. The Plaintiffs/Applicants have sought the Court’s leave to lodge an appeal against its decision rendered on 8th December 2022. Because the current Application is premised on Order 43 (2) of the *Civil*



Procedure Rules, the Plaintiffs/Applicants were bound to seek the Court's leave prior to lodging an appeal against its decision at the Court of Appeal which condition the Plaintiffs have fulfilled.

32. The Court whose leave is sought to file an Appeal is required to satisfy itself that the prospective appeal raises issues worthy of judicial consideration. (See the holding in the case of *Sango Bay Estates and Another V Dresdner Bank* [1971] EA 17).

“It is then clear that under order 43(2) an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under order 43(1) leave to appeal must be obtained before such an appeal can be preferred. (See Mutungi J in *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR)... The appellants ought to have sought leave before filing this appeal. In *Stephen Omondi Juma v Sprocer Awuor Rabote* [2022] eKLR, Aburili J was faced with a similar issue as the issue before me. She cited a Court of Appeal decision and stated that: “As was emphatically stated in *Nyutu Agrovat Ltd vs Airtel Networks Ltd* [2015] eKLR, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. Further, that the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of section 75 of the Civil Procedure Act and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”

33. The rule is that one arguable issue is sufficient, and the issue does not need to succeed on Appeal. (See the decision in *Vaghjiyani Enterprises Ltd v Osundwa & Company Advocate (Civil Application E234 of 2023)* [2024] KECA 81 (KLR).

34. The Court too will also rely in the case of *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR, where the Court reasoned as follows:

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication.”

35. The Court too, will rely in the case of *Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023)* [2024] KECA 2 (KLR), where, the Court held as follows:

“An arguable appeal was not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One was sufficient. For a point to be arguable it needed merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and was worthy of the court's consideration. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there was no rule that it must be so. One could raise such grounds on the face of the motion and even in the supporting affidavit. The appeal was eminently arguable.”

36. The Plaintiffs/Applicants argued and submitted that they were condemned unheard by this Court in the process of leading up to its decision dated 8th December, 2022. Further, the Plaintiffs/ Applicants asserted their rights as set out under Article 48 of the Constitution, which they claim were violated by this Court in issuing the decision dated 8th December, 2022.



37. Further, the Plaintiffs/Applicants contended that the court disregarded the provisions of Order 49 of the Civil Procedure Rules, and failed to adhere to the doctrine of precedent in making the decision dated 8th December, 2022.
38. The Court holds and finds that the issues raised in the Plaintiffs/ Applicants prospective Appeal are worthy of consideration by the Appellate Court.
39. The upshot of the foregoing is the Plaintiffs'/Applicants' Application dated 20th December, 2022, is found merited. Accordingly, the Court grants the Plaintiffs/Applicants the leave sought to file the said Appeal.
40. Owing to the length of time spent in litigation since Judgment was rendered in the matter on 30th November 2020, the Court directs each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JULY 2024.

L. GACHERU

JUDGE

18/7/2014

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Mr Munyori for the Plaintiffs/Applicants

N/A for the Defendants/ Respondents

L. GACHERU

JUDGE

18/7/2014

