



**Wambui v Kahawa Sukari Residents & Plot Owners Welfare Association & 5 others; Kahawa Sukari Limited (Interested Party) (Environment and Land Appeal E002 of 2023) [2025] KEELC 709 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 709 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E002 OF 2023  
JM ONYANGO, J  
FEBRUARY 19, 2025**

**BETWEEN**

**MILKAH WAMBUI ..... APPELLANT**

**AND**

**KAHAWA SUKARI RESIDENTS & PLOT OWNERS WELFARE ASSOCIATION ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MWANIKI WAITHAKA ..... 2<sup>ND</sup> RESPONDENT**

**EDWARD KIGANJO ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY PHYSICAL AND LAND USE PLANNING LIAISON COMMITTEE, KIAMBU COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR PHYSICAL PLANNING & URBAN DEVELOPMENT, KIAMBU COUNTY GOVERNMENT ..... 5<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**KAHAWA SUKARI LIMITED ..... INTERESTED PARTY**

*(Being an appeal from the decision of County Physical and Land Use Planning Liaison Committee given on 30/6/2023 in Complaint No. Cgk/Kck/016)*

**RULING**

1. Two Preliminary Objections fall for determination in this ruling. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Preliminary Objection (P.O) dated 6/5/2024 and the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents' P.O dated



30/4/2024. Through the P.O dated 6/5/2024 the 1st, 2nd and 3rd Respondents seek dismissal of this Appeal on the following grounds:

- i. That the appeal was filed out of time without leave of the honourable court and contradicts section 16 A (1) & 19(2) of the Environment & Land Court Act and section 72 (4) of the Physical Land Use and Planning Act.
  - ii. That the appellant has not given good and sufficient cause for filing the appeal out of time as dictated by Section 79G of the *Civil Procedure Act*.
  - iii. That for reasons stated above, the instant appeal is unmeritorious and being an abuse of the court process should be dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
2. The 4<sup>th</sup>, 5th and 6th Respondents' P.O is predicated on the following grounds:
- i. That the 4th Respondent is a quasi-judicial committee established under section 76 of the Physical Land Use and Planning Act 2019 and thus the 4th Respondent should be struck off from the proceedings.
  - ii. That section 89 of the *Physical and Land Use Planning Act* 2019 indemnifies public officers acting under the said Act therefore the committee which constitutes of members sworn in to the committee to act as public officers and thus the committee has been irregularly and/or illegally joined in this matter.
  - iii. That the appeal herein should be struck out and dismissed pursuant to section 19 (2) of the Environment & Land Court Act.
  - iv. That section 72 (4) of the Physical Land Use and Planning Act 2019 provides that an appeal from the decision of the liaison committee should be filed within 30 days. The 4<sup>th</sup> respondent rendered its determination on 30/6/2023 whilst the instant appeal was filed on 30/1/2024.
  - v. That section 16 A (1) of the Environment & Land Court Act provides that appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order. The Appellant has taken 120 days to file the appeal.
  - vi. That the appellant has not satisfied this honourable court with a good and sufficient cause for not filing the appeal in time pursuant to section 79G of the *Civil Procedure Act*.
  - vii. That owing to the foregoing, the instant appeal is unmeritorious, an abuse of the court process and should be dismissed with costs to the 4th, 5th and 6th respondents.

The court directed that the Preliminary Objections be canvassed by way of written submissions.

### **Appellant's submissions**

3. The Appellant filed their written submissions dated 4/9/2024 filed by M/s Wachakana & Co. Advocates. The Appellant identified the following four issues for determination: (i) whether the preliminary objection dated 6/5/2024 by the Respondents meets the fundamental threshold of a Preliminary Objection; (ii) whether the appellant's appeal, being Civil Appeal No. ELCEPA E002 of 2023 is merited; (iii) whether the Preliminary Objection has any merit and therefore whether the orders sought should be granted; and (iv) who should bear the costs of the suit.
4. On whether the Preliminary Objection dated 6/5/2024 meets the threshold of a Preliminary Objection, counsel for the appellant submitted that the 1st, 2nd and 3rd Respondents raised a PO on a point of law that the Appellant's appeal was filed out of time without leave of the honourable court.



- Further, that it contradicts sections 16 A (1) and 19 (2) of the Environment & Land Court Act and section 72 (4) of the Physical Land Use and Planning Act, hence it ought to be dismissed with costs.
5. Counsel further submitted that the impugned judgment was rendered on 30/6/2023 hence an appeal challenging the same ought to have been filed on or before 11/8/2023. Counsel added that the Appellant filed this appeal on 14/7/2023 which was within the prescribed time. The Appellant subsequently amended the Memorandum of Appeal on 16/1/2024.
  6. On whether the Appellant's appeal is merited, counsel for the Appellant contended that the appeal is merited. Counsel further contended that the County Government of Kiambu under the Chairperson County Physical Land Use and Planning Liaison Committee was biased when it made a finding compelling the appellant to restore the ground over Plot No. 1659 Kahawa Sukari Limited within 90 days. Counsel faulted the County Physical Land Use and Planning Liaison Committee for failing to note that the appellant had duly complied with the conditions for the issuance of a development permit.
  7. On whether the PO was merited, counsel relied on Articles 48 and 50(1) of *the Constitution* of Kenya, 2010. Counsel argued that the purpose of the justice system is to hear and determine disputes fully. Counsel reiterated that the Appellant filed the Memorandum of Appeal within time on 14/7/2023 while she was acting in person. She later on appointed the firm of M/s Wachakana & Company Advocates to act on her behalf, they in turn filed the Amended Memorandum of Appeal dated 15/1/2024. Counsel added that the Respondents did not file any response to the appeal save for filing the POs.
  8. On who should bear the costs of the appeal, counsel relied on section 27 of the *Civil Procedure Act* to submit that the aim of awarding costs is to reimburse the successful party for amounts expended in the case. Counsel asserted that a successful party could however be denied costs by the court but the court ought to give reasons for arriving at such a decision.

### **Respondents' Submissions**

9. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed written submissions dated 20/1/2024 through M/s Ogamba Nyakundi & Company Advocates. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents relied on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' written submissions.
10. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> contended that section 16 A (1) of the *Environment and Land Court Act* provided that appeals from subordinate courts and local tribunals shall be filed within 30 days from the date of the decree or order. Counsel further contended that section 72(4) of the Physical Land Use and Planning Act 2019 provides that an appeal from the decision of the Liaison Committee should be filed within 30 days. Counsel argued that there is no evidence on record to show that an appeal has been filed against the decision of the Liaison Committee rendered on 30/6/2023. Counsel added that neither have the 1st, 2nd or 3rd Respondents been served with an appeal. The 1st, 2nd and 3rd Respondents were only in possession of the Amended Memorandum of Appeal dated 15/1/2024 which was contained in the Record of Appeal dated 30/1/2024.
11. A Preliminary Objection was defined in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West end Distributors Ltd* (1969) E.A. 696 by Sir Charles Newbold as follows:

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...



12. Further, in the case of *Oraro v Mbaja* [2005] KLR 141 the court stated that:

“A ‘Preliminary Objection’ correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

### **Analysis and Determination**

13. Having carefully considered the two POs, the response thereto and the rival submissions, I am of the view that the issues for determination are as follows:

- i. Whether the appeal was filed out of time.
- ii. Whether the 4th Respondent has been irregularly and/or illegally joined in this appeal.

### **Whether the appeal was filed out of time**

14. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contend that they were not served with a Memorandum of Appeal but were instead served with an Amended Memorandum of Appeal dated 15/1/2024. They further contend that the Appellant filed the purported Appeal out of time in violation of section 16 A (1) of the Environment and Land Court and Act and section 72(4) of the Physical Land Use and Planning Act 2019. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents also assert that the Appellant filed the instant appeal out of time, on 30/1/2024 which was more than 30 days from the date of the impugned decision was rendered.

15. A perusal of the court record shows that the Appellant filed a Memorandum of Appeal dated 13/7/2023 on 14/7/2023. The court record also reveals that the Appellant was acting in person at the time. The appellant later appointed the firm of M/s Wachakana & Company Advocates on 9/10/2023 to act on her behalf. The said firm subsequently filed the Amended Memorandum of Appeal dated 15/1/2024.

16. The court is of the view that the Appellant filed the Memorandum of Appeal within the stipulated period, hence the appeal was not filed out of time. However, there is no evidence on record that the Appellant served the Respondents with the said Memorandum of Appeal within 7 days or at all. Order 42 rule 12 of the *Civil Procedure Act* provides as follows:

“Service of memorandum

Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”

17. The rules are silent on the consequences of failure to serve the Memorandum of Appeal within the stipulated period of 7 days. A perusal of the court record shows that the appeal was admitted on 17/7/2023 and the court directed that the appeal be fixed for mention for directions on 2/10/2023. The Appellant was directed to serve both the Memorandum of Appeal and the Mention Notice upon



the Respondents. A notice was sent out to the Appellant via email on 31/7/23 notifying her that the matter had been fixed for mention on 2/10/2023. On 2/10/2023, neither of the parties in the appeal were present for the mention before the Honourable Deputy Registrar. The court noted that the email sent out to the Appellant was addressed to a wrong email address. The suit subsequently came up for mention on 16/1/2024 when the Appellant informed the court that she intended to file an Amended Memorandum of Appeal. The court directed the Appellant to file and serve the same.

18. The court notes that it inadvertently failed to comply with order 42 rule 12 by sending the notice to the wrong email address. The Appellant should therefore not be penalized for a mistake occasioned by the court.

#### **Whether the 4th Respondent has been irregularly and/or illegally joined in this appeal**

19. The 4<sup>th</sup> Respondent is a quasi-judicial authority and hence it ought not be sued, unless in judicial review proceedings. Nonetheless, the misjoinder of the 4<sup>th</sup> Respondent to the suit does not render the suit fatally incompetent.
20. The Court of Appeal in *William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others* (2016) eKLR held that:

“Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

21. In view of the above, the court finds the POs dated 30/4/2024 and 6/5/2024 unmerited, therefore they are both dismissed.
22. The general rule on costs espoused under section 27 of the *Civil Procedure Act* is that costs follow the event. However, this court is alive to the fact that the failure to serve the Memorandum of Appeal upon the Respondents, partly contributed to the filing of the POs. In the circumstances, each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19<sup>TH</sup> DAY OF FEBRUARY 2025**

**J. M ONYANGO**

**JUDGE**

In the presence of:

Mr Nyakundi for the 1st – 3rd Respondent

Mr Wakasa Were for Mr Wachakana for the Appellant

Mr Nyakundi also holding brief for Ms Muchiri for the 4th – 6th Respondents

Court Assistant - Hinga

