



REPUBLIC OF KENYA



**Mathu & 3 others v Stuart (Enviromental and Land Originating Summons E009 of 2023) [2024] KEELC 7403 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7403 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023**

**AE DENA, J**

**OCTOBER 31, 2024**

**BETWEEN**

**KARIUKI MATHU ..... 1<sup>ST</sup> APPLICANT  
NJERI MATHU ..... 2<sup>ND</sup> APPLICANT  
NGUGI MATHU ..... 3<sup>RD</sup> APPLICANT  
NJANJA MATHU ..... 4<sup>TH</sup> APPLICANT**

**AND**

**COLIN STUART ..... RESPONDENT**

**RULING**

**The Application**

- 1 This ruling is the subject of two applications dated 9<sup>th</sup> August 2024 and 25<sup>th</sup> September 2024 brought by way of Notice of Motion. The former application was filed by the Respondent Collin Stuart. The application seeks the following verbatim orders; -
1. Spent
  2. Spent
  3. That this Honourable court be pleased to grant leave to the Respondent/Applicant to file an appeal out of time against the judgement delivered herein on 22<sup>nd</sup> July 2024 and further that the Notice of Appeal dated 9<sup>th</sup> August 2024 filed herein be deemed as properly filed with leave of the court.
  4. That this Honourable court be pleased to issue a stay of execution of the judgement of delivered herein on 22<sup>nd</sup> July 2024 pending the hearing and determination of this application.



5. That this Honourable court be pleased to issue a stay of execution of the judgement of delivered herein on 22<sup>nd</sup> July 2024 pending the hearing and determination of the intended Appeal
  6. That costs of this Application be provided for.
2. The application is premised on the grounds on its face and the affidavit of Colin Stuart sworn on 9<sup>th</sup> August 2024. The deponent pleads with the court to deem the Notice of Appeal dated 9/8/24 as properly filed and attaches the same. That he had instructed his previous counsel to file appeal which he did not following an attack by thugs on 3/8/24 resulting into a 4 days delay in filing the appeal. That he also had to procure the services of new counsel. The hospital admission records were annexed. It is further stated that the order of stay is required to protect the suit property so that the appeal is not rendered nugatory. That no prejudice shall be suffered by the decree holders but the applicant and his family as he stands to lose his only land and home.

### **Response**

3. The application is opposed through the Replying affidavit of Kariuki Mathu on behalf of the decree holders herein sworn on 26/8/24. That the applicants waited for the last minute to file the notice of appeal herein. That it is doubtful that there was no one in the firm of Alata & Company advocates to file the notice other than Mr. Ng'ang'a. The respondents wants the firm to confirm by affidavit the admission and if the said Mr. Ng'anga was handling the brief. Recalling the orders sought in the OS which were allowed in the judgement it is averred that the present application is an afterthought intended at delaying the respondents from realizing the fruits of the judgement.
4. It is further deponed that on 11/3/24 the applicant with intent to deprive the Respondents their interest as bonafide purchasers of the suit property calculatedly transferred the same to one Stacy Oluoch Ojuang. Copies of the transfer, green card and title deed were attached. That all this was undertaken during the pendency of the proceedings yet the firm of Alata & Company Advocates failed to make a disclosure to the court. That the applicant cannot come back to this court and seek equity when his hands are tainted. That the applicants' actions were an abuse of the court process and waste of the precious judicial time. It has resulted into a judgement that cannot be executed as the court was not aware of the transfer. That the said Stacy Oluoch Ojuang is considered the current proprietor and the applicant nolonger has any interest in the suit properties. That it is therefore uncertain what the Applicant is seeking leave to appeal a judgement for which he has already transferred the property.
5. Referring to paragraph 8 of the supporting affidavit to the effect that the applicant's family applicant stood to suffer irreparable loss, it is stated it can only imply that the said Stacy Oluoch Ojuang is a proxy to the said Colin Stuart. That the transfer was to conceal the identity of the actual owner to defeat justice. That the applicant is underserving of the orders sought. That the applicant does not stand to suffer any irreparable loss as he nolonger has an interest in the suit properties.

### **Submissions**

6. The application was canvassed by way of written submissions which parties filed and exchanged.

### **Analysis And Determination**

7. I have considered the application, the responses thereto and the submissions of the parties. The question that stands out for determination is whether the Applicant has met the threshold for the grant of the orders sought. The application has two limbs firstly to admit the Notice of Appeal as duly filed and to stay the execution of the judgement of this court.



8. The application is brought under the provisions of Orders 9 Rule 9, 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 75 of the Civil Procedure Act chapter 21 of the Laws of Kenya. It is noteworthy that the order sought under the provisions of order 9 rule 9 has already been granted.
9. On the leave to file the Notice of Appeal out of time this is upon the discretion of the court. It is important that this is not confused with the filing of an appeal out of time. It is also important to note that this is an appeal to the Court of Appeal and not an appeal from the subordinate court to the High Court. Leave to appeal out of time is the preserve of the Court of Appeal and not this court. I will therefore limit myself to the filing of the Notice of Appeal before this court.
10. It is trite that the notice should be filed within 14 days from the date of judgment or ruling which is the subject of appeal. See Rule 77 of the Court of Appeal Rules (Legal Notice 40 of 2022). I find no harm in applying the principles enunciated by the Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR as a guidance though the same were for an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-a.Extension of time is not a right of any 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 by 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 respondent if the extension is granted;f.Whether the application has been brought without undue delay.’

11. Applying the above guidance to the application herein, the judgement of this court was delivered on 22<sup>nd</sup> July 2024. The Notice of Appeal exhibited in the application is dated 9<sup>th</sup> August 2024. From the court filing system it was filed on even date. The delay is approximately 4 days. The reasons given are that the advocate handling the matter was hospitalised following an attack by thugs. The admission sheet was attached and which the respondent’s doubt. I think a delay of 4 days is not inordinate in the circumstances of this case. I will give the benefit of doubt to the applicants. In any case they have now appointed a new counsel in the matter. I will also look at it from the interests of justice.
12. An order of stay of execution has also been sought pending the determination of the intended appeal. Has the applicant met the prerequisite for grant of orders of stay of execution pending appeal? The provisions of Order 42 rule 6(2) of the Civil Procedure Rules is on stay of execution and stipulate; -

“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.
13. Arising from the law the main criteria is that an applicant must demonstrate to the court that they will suffer substantial loss in the absence of an order for stay execution - see the Court of Appeal pronouncement in Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 that ‘Substantial loss in its various forms is the cornerstone of both



jurisdictions for granting stay. I have noted that it is submitted at paragraph 16 of the Applicants submissions that the decree holders have not shown any kind of prejudice they will suffer should the orders sought be granted. From the above provisions of the law the burden is on the applicant to prove they will suffer substantial loss should the orders not be granted. It is not on the decree holder.

14. The Applicant has deponed at paragraph 7 of the Supporting affidavit that they require an order of stay of execution so that the said appeal is not rendered nugatory. Further at paragraph 8 that in the absence of the orders he stands to lose '....my only known parcel(s) of land or home and more so, the intended appeal will be rendered nugatory if the subject matter herein is not preserved.....'. Evidence has already been led by the decree holder that the suit properties have since been transferred to a 3<sup>rd</sup> party. This has not been denied by the Applicant. Therefore to me there is no irreparable loss to be suffered the subject matter having been transferred. Infact there is nothing to protect for the benefit of the Applicant. In this regard the Applicant has failed to prove they will suffer irreparable loss or any loss.
15. The applicant submits at paragraph 17 as to arguability of the appeal and its merits, that land issues are emotive and if one loses land there is no replacement and that such issues should be resolved to the highest court. For me the intended appeal herein is against the judgement of this court and for purposes of this application the arguments are misplaced. I would not comment on whether the intended appeal is arguable or not.
16. The upshot of the foregoing is that
  1. The court grants the leave to file the Notice of appeal out of time against the judgement delivered herein on 22<sup>nd</sup> July 2024 and further that the Notice of Appeal dated 9<sup>th</sup> August 2024 filed herein shall be deemed as properly filed.
  2. The orders seeking stay of execution are hereby declined
  3. The costs of this application shall abide the outcome of the intended appeal.

#### **Application Dated 25<sup>th</sup> September 2024**

17. The second application dated 25<sup>th</sup> September 2024 was filed under Certificate of Urgency by Julia Stuart before the determination of the application dated 9<sup>th</sup> August 2024. I issued directions on its disposal on the 27<sup>th</sup> September 2024. The application was to be heard concurrently with the application dated 9/08/24. The Respondents were to respond to the application within 5 days of service and the applicant was to respond further within 3 days of service Parties were to file written submissions starting with the applicant within 5 days and thereafter the Respondent within 5 days of service.
18. The above application is premised on the grounds on its face and the supporting affidavit of Julia Susan Stuart sworn on 25<sup>th</sup> September 2024 who is referred to as Proposed Interested Party. The application seeks the following orders;-
  1. spent
  2. That this court be pleased to stay any further proceedings in the matter pending hearing and determination of this application
  3. That the proposed Interested Party/Applicant herein be enjoined onto this suit as either an Interested Party or Respondent and be allowed to file Responses to the Applicants Originating Summons



4. That this Honorable court be pleased to review and or vary and or set aside the judgement delivered herein on 22<sup>nd</sup> July 2024 which allowed the Applicants suit filed by way of Originating Summons.
  5. That if necessary, the Applicants be directed and or ordered to amend their joint Originating Summons filed herein adding the proposed Interested Party or a Respondents in the matter to enable her file the aforementioned responses and/or Defence(s) for a fresh hearing of the suit, purely for purposes of determining the rights and interest of the proposed Interested Party/ Applicant.
19. The Applicant depones that she is the legal wife of Colin Stuart and attached a Certificate of Marriage. The main ground for this application is that the suit property is Matrimonial property. That the said Colin Stuart sold the same to the Plaintiffs without her knowledge or involvement as required under Section 12 of the Matrimonial Property Act Chapter 152 read together with Section 28(a) of the Land Registration Act. The property could not be sold without her consent. That in the absence of a spousal consent which is A mandatory statutory requirement it would be illegal to transfer the property to the Plaintiffs or even rectification of the register in their favor pursuant to the judgement of the court herein.

### **Submissions**

20. The Applicants submitted that the application is unopposed for want of a response thereto despite service of the same. That both the Plaintiffs and the respondents in the OS knew of the existence of a spouse as evidenced by clause 6.10 which set out the requirement for a spousal consent as mandatory requirement. That not even a judgement can substitute a mandatory or give life to a transfer for a sale that required a spousal consent.
21. On joinder reference is made to the provisions of Order 1 Rules 9 and 10 of the Civil Procedure Rules and that the judgement delivered becomes a decision in rem affecting the parties who did not participate. That the court is empowered at any stage of the proceedings to allow additional parties provided that they are necessary in the proceedings as the interested party is affected by the judgement. The court is also referred to the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1(1)(b) it is submitted that a judgement may be reviewed at the instance of an aggrieved person who is not a party to the proceedings even in the pendency of an appeal. That it is obvious that there can never be a common ground of appeal since the grievance is on spousal consent and which would be raised by a spouse who has not consented.
22. The court is invited to invoke its discretion under the provisions, Article 50 of the Constitution on the right to be heard and the inherent powers of the court under sections 1A, 1B , 3A of the Civil Procedure Act. That sections 12(1) of the Matrimonial property Act, 28(a) and 93 (3)(b) are all geared towards protection of the matrimonial property.
23. Firstly let me state that the fact that an application is not responded to cannot form the basis for the court to allow the same. The Court is still obligated to apply itself and render an informed decision in allowing it or otherwise.
24. I have pondered intently on the above application considering the circumstances of the case and I'm persuaded that I need not spend so much time on it for the following reasons;-
25. It has now emerged from the responses to the application dated 9<sup>th</sup> August 2024 that the suit property is no longer registered in the names of Colin Stuart but has been transferred to a third party one Stacy Aluoch Ojuang. I will add that following the filing of the application dated 9<sup>th</sup> August 2024, the



Applicants/Plaintiffs in the Originating Summons filed ELCLC E 057 of 2024 by way of Plaint against Colin Stuart and the said above 3<sup>rd</sup> Party and the County Land Registrar. Infact in my directions in respect of this application I made a disclosure of the said suit and left it to counsel's discretion to peruse the pleadings therein.

26. Be that as it may the suit property is nolonger in the name of Mr. Collin Stuart, the applicants spouse. The court fails to understand how the application can be sustained against a subject matter which is nolonger in the names of Colin Stuart the spouse who is alleged to have disposed of the matrimonial property without the consent of his spouse. For me evidently there is nothing to litigate further in as far as the present suit is concerned. The court has rendered a judgement which judgement cannot be enforced whichever way since the suit property is now registered under the said Stacy Ojuang. Infact to me it is imperative that the suit ELCLC E 057 of 2024 must be determined before Mrs Stuart can be able to have clarity on her next cause of action. The application is clearly a non starter.
27. For the foregoing reasons the application dated 25<sup>th</sup> September 2024 is hereby struck out. There shall be no orders as to costs.

Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 31<sup>ST</sup> DAY OF OCTOBER 2024**

.....

**A.E DENA**

**JUDGE**

Ms. Mwangi holding brief for Mr. Nzavi for the Plaintiff/Respondent

Mr. Kenga for the Respondent/Applicant

Ms. Kyengo for proposed Interested Party

Asmaa Maftah-Court Assistant

