



**Kibiti v Kithira (Environmental and Land Originating Summons
E003 of 2023) [2024] KEELC 7233 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023
CK NZILI, J
OCTOBER 30, 2024**

BETWEEN

SILAS KIBITI APPLICANT

AND

SARAH KITHIRA RESPONDENT

RULING

1. By an application dated 28.8.2024, which is anchored on Sections 1A,1B, 3A, 65 & 95 of the [Civil Procedure Act](#) and Order 42 of the [Civil Procedure Rules](#), the applicant is seeking to have the firm of Meenye & Kirima Company Advocates come on record him; stay of execution of the judgment dated 15.5.2024 and for leave to file an appeal out of time.
2. The grounds are that the respondent was found entitled to 1 acre of LR No Nyaki/Munithu/327 (the suit parcel); there was a disagreement with the former counsels on record; the applicant is still desirous of filing the appeal; he has sought leave at the Court of Appeal at Nyeri to file the notice and memorandum of appeal out of time; he stands to suffer substantial and irreparable harm; the delay is not intentional; the court has discretion to issue the orders sought and that the respondent shall not be prejudiced.
3. In the supporting affidavit sworn on 29.8.2024 by Silas Kibiti, the applicant avers that he was not able to pay the instructions fee on time due to financial constraints; he had paid Kshs 6,100/= as the instructions fee, but the former advocate failed to file the appeal as per the annexed the M-Pesa statement as SK "1"; the appeal has a high chances of success going by the annexed copies of the draft notice and memorandum of appeal as SK "2 & 3". The applicant also avers that the respondent has begun the execution process to his detriment; his right to a fair hearing shall be violated.



4. The respondent opposes the application by a notice of preliminary objection dated 9.9.2024. She avers that the application offends Order 9 Rule 9 of the [Civil Procedure Rules](#) since there is no evidence of service of the application on the outgoing counsels or consent.
5. The application is equally opposed since it is contrary to Rule 17 (1) of the [High Court \(Organization and Administration\) General Rules, 2016](#), for the recess was gazetted to run from 1st August – 15th September 2024, and the application was filed on 29.8.2024 during the recess without seeking leave for the hearing during the recess. Additionally, the respondent filed grounds of opposition dated 9.9.2024 that the application is frivolous and an abuse of the court process; there is no appeal, and thus, the court has no jurisdiction.
6. Through written submissions dated 9.9.2024, the respondent submits on both the preliminary objection and the grounds of opposition. On Order 9 Rule 9 of the [Civil Procedure Rules](#), the respondent submits that the notice of change of advocates was not served on the outgoing advocates. Reliance was placed on [James Ndonyu Njogu v Muriuki Macharia](#) (2020) eKLR and [S.K Tarwadi v Veronicah Muehlmann](#) (2019) eKLR.
7. Regarding Rule 17 (1) of the [High Court Organization and Administration\) General Rules](#): the respondent submits that the applicant did not seek leave to bring the instant application.
8. Further, on the grounds of opposition, the respondent submits that under Rule 4 of the [Court of Appeal Rules 2022](#), the applicant ought to have applied for leave to file the appeal out of time at the Court of Appeal, and therefore, this court lacks jurisdiction to determine the instant application. Again, respondent submits that there is no appeal pending at the Court of Appeal, and thus, Order 42 Rule 6 cannot be invoked.
9. From the court record, it appears that on 27.9.2024, the applicant filed a notice of intention to act in person. This, in essence, means the prayer for the firm of Meenye & Kirima Advocates to come on record is stands untenable.
10. Regarding jurisdiction, the respondent avers that this court lacks jurisdiction to entertain the prayer to extend the time to file the appeal. Jurisdiction is everything and without it a court must down its tools. The notice of appeal is dated 27.5.2024 and lodged on 28.5.2024. The applicant has also alleged that he has applied to file the appeal out of time at the Court of Appeal. Details of that application have not been disclosed or as to whether the same has been granted. It is also questionable why the applicant is litigating piecemeal and simultaneously before this court and at the Court of Appeal. The moment the appellate court is seized of the matter, this court becomes functus officio. There is already a notice of appeal lodged by the applicant's former lawyers and endorsed by the Deputy Registrar of this court on 28.5.2024. The prayer lacks merit.
11. As to seeking leave under Rule 17 (1) of the High Court Organization and Administration) General Rules, the orders issued on 30.8.2024 were clear that the application did not comply with the High Court Vacation Rules. It was, therefore, not certified urgent. The oversight, however, occasioned no prejudice on the respondent for having not sought leave.
12. Regarding stay pending appeal is at the discretion of the court and is to be exercised judiciously and not whimsically. The applicant has to meet the requisite principles for the grant of an order of stay, by demonstrating substantial loss, providing security for the due realization of the decree should the appeal fail, filing the application without delay, and lastly, establishing if it is in the interest of justice to grant the orders sought. See in [RWW v EKW](#) (2019) eKLR, [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, [Seventh Day Adventist Ltd v Muslim Mosque Committee & 2 others](#)



(Civil Appeal No 138 of 2021 (2022) KECA 100 (KLR) 11th February (2022) (Ruling) and *Butt v Rent Restriction Tribunal* (1982) KLR 417,

13. From the affidavit in support of the application, there is no cogent or tangible evidence of what the status of the substratum of the appeal is, who is in occupation, what likely loss is and if the appeal stands being rendered nugatory. Sufficient cause, as per Order 42 Rule 6(1) of the *Civil Procedure Rules*, is what the applicant has to show that in absence of a stay, he will inherit a barren result, should his intended appeal succeed. The record of this matter indicates that what is pending is taxation of costs before the Deputy Registrar. The applicant has not given sufficient reasons, such as whether the execution process is underway and the likely state of affairs injurious to him, to warrant the orders sought herein, to curtail the respondent from enjoying the fruits of her judgment, yet she has the undoubted right to do so.
14. The application is, therefore, dismissed for want of merits.
15. Costs to the respondent.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 30TH DAY OF OCTOBER, 2024.

In presence of

C.A Kananu

Mwendwa for the plaintiff

Ms. Murugi for defendant

HON. C K NZILI

JUDGE

