



Nyauma - Attorney General & another v Mutere (Suing on Behalf of Ephalindah Mutere Pursuant to Power of Attorney Registered on 9/4/2021) (Environment and Land Miscellaneous Application E005 of 2024) [2024] KEELC 7075 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7075 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2024
DO OHUNGO, J
OCTOBER 24, 2024

BETWEEN

STAFFORD NYAUMA - THE ATTORNEY GENERAL 1ST APPLICANT

THE REGIONAL COMMISSIONER WESTERN REGION 2ND APPLICANT

AND

GILLAN MUTERE RESPONDENT

SUING ON BEHALF OF EPHALINAH MUTERE PURSUANT TO POWER OF ATTORNEY REGISTERED ON 9/4/2021

RULING

1. By Notice of Motion dated 22nd February 2024, the Applicants seek the following orders:
 1. That this application be Certified Urgent and service of the same be dispensed with in the first instance.
 2. That this Honourable Court be pleased to issue an order of stay of the Proceedings and execution of the orders issued in in the Ruling delivered on 8th February, 2024 in MC L & E Case No. E264 of 2023 by Hon. J. R. Ndururi, SPM pending the lodging, hearing and determination of the intended appeal against the said decision.
 3. That this Honourable Court be pleased to grant leave to the Applicants to lodge their intended Appeal.
 4. That the Honourable Court be pleased to issue any other and/or further order that it deems fit in the circumstances of the case.
 5. That the costs of this application be provided for.



2. The application is brought inter alia under Article 50 (2) of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3A and 75 of the *Civil Procedure Act* and Order 43 rule 1 (1) of the Civil Procedure Rules. It is supported by affidavits sworn by Stafford Nyauma and Samson Macharia, the First and Second Applicants, respectively.
3. The application is premised on the following grounds:
 - a. The Applicants have an arguable appeal with high chances of success.
 - b. The right of the Applicants to file an Appeal is not direct as they must first seek the leave of this court before they file the same.
 - c. A letter requesting for certified copies of the Ruling, Order as well as typed proceedings in MC L & E Case No. E264 of 2023 has already been served at the Court Registry for appropriate action.
 - d. The Appeal will be rendered nugatory if stay of proceedings and execution of the impugned decision is not granted as sought.
 - e. The application has been brought without undue delay.
4. Mr Nyauma deposed in his Supporting Affidavit that he is an Advocate practising as such in the Attorney General's Chambers and that on 8th February 2024 the Subordinate Court (Hon. J. R. Ndururi, SPM) delivered a ruling in MC L & E Case No. E264 of 2023 - Gillan Mutere v Attorney General where it found that the Respondents in the said matter knowingly and willingly refused to obey lawful orders issued by the Subordinate Court. That the Subordinate Court further cited the said Respondents for contempt of Court and ordered that they appear before the Subordinate Court in person to show cause why they should not suffer punishment for the contempt.
5. Mr Nyauma further deposed that in reaching the said decision, the Subordinate Court neither considered evidence which had been availed nor the Applicants' case and that the demand that they appear before the Subordinate Court to show cause why they should not suffer punishment for contempt is unjust and against the rules of natural justice. He added that they were dissatisfied with the ruling and had applied for certified copies of the ruling, order and proceedings with a view to lodging an appeal. That unless stay of proceedings and execution of the order is granted pending hearing and determination of the intended appeal, they would suffer substantial loss.
6. On his part, Mr Macharia deposed that he is the Second Applicant and went ahead to reiterate the matters deposed to by the First Applicant.
7. The Respondent opposed the application through Grounds of Opposition dated 8th March 2024 wherein he took the position that the application is defective since no appeal had been filed against the impugned ruling and that the application does not meet the threshold for granting stay of execution pending appeal.
8. The application was canvassed through written submissions. The applicants filed submissions dated 26th March 2024 in which they relied on Order 42 rule 6 of the Civil Procedure Rules as well as the cases of Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR, James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR and Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR and argued that stay of execution should be granted since they had demonstrated that they would suffer substantial loss if the order was not made. They further argued that there was no unreasonable delay since the application was filed on 22nd February 2024 which was barely fourteen days after the ruling.



9. On the question of leave to appeal against the ruling, the Applicants relied on Section 75 of the *Civil Procedure Act* and Order 43 rule 1 of the Civil Procedure Rules and argued that leave to appeal is required in the circumstances. They relied on the case of *Directline Insurance Co. Ltd v Onyango (Civil Appeal E345 of 2022)* [2022] KEHC 15614 (KLR) (Civ) (24 November 2022) (Ruling) and urged this Court to allow the application with costs.
10. In reply, Respondent filed submissions dated 6th May 2024 wherein they cited Section 79G of the *Civil Procedure Act* and Order 42 rule 6 of the Civil Procedure Rules and argued that the Applicants were not entitled to any stay of execution pending appeal since they had not filed any appeal against the ruling of the Subordinate Court. He also referred to Section 75 (1) (g) of the *Civil Procedure Act* and Order 43 rule 1 (u) of the Civil Procedure Rules and argued that to the extent that the ruling sought to be appealed against was made under Order 40 rule 3 of the Civil Procedure Rules, an appeal lay as of right, and no leave is required. That in any event, if leave to appeal was required, Order 43 rules 2 and 3 of the Civil Procedure Rules requires that such an application be made before the Subordinate Court. He relied on the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR and urged this Court to dismiss the application.
11. I have considered the application, the affidavits, grounds of opposition and the submissions. The issues that arise for determination are whether leave to appeal was required and whether stay of execution pending appeal should issue.
12. The question of whether an appeal lies as of right or only by leave is a straightforward one. All that is needed to answer it in the context of a particular order is to view the order against the provisions of Section 75 of the *Civil Procedure Act* and Order 43 rule 1 of the Civil Procedure Rules. No leave is required if the order was made under any of the instances listed under Section 75 (1) (a) to (h) of the *Civil Procedure Act* and Order 43 rule 1 (1) (a) to (aa) of the Civil Procedure Rules. It is that simple.
13. A perusal of the first paragraph of the ruling delivered by the Subordinate Court on 8th February 2024 shows that it was in respect of an application which was brought under Order 40 rule 3 of the Civil Procedure Rules. Pursuant to Order 43 rule 1 (1) (u) of the Civil Procedure Rules, no leave is required to appeal against such an order. Further, even if leave was necessary, which is not the case, Order 43 rule 1 (3) makes it clear that an application for leave to appeal “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.”
14. In view of the foregoing, no leave to appeal was required in respect of the ruling delivered by the Subordinate Court on 8th February 2024. The ruling was made in proceedings that were before the Subordinate Court pursuant to the jurisdiction granted it by Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates’ Courts Act*, 2015. An appeal against the order was to be filed in this Court within 30 days of delivery of the ruling, as is stipulated by Section 16A (1) of the *Environment and Land Court Act*, 2011. Instead of filing the present application on 22nd February 2024, the Applicants should have filed an appeal since they were still within time. As matters stand now, they may have to seek extension of time, if they still aspire to exercise the right of appeal.
15. The last issue for determination is whether stay of execution pending appeal should issue. This issue, too, finds ready answer in the law. Jurisdiction to grant stay of execution pending appeal is codified within the four walls of Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which provides as follows:

6.



- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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. [Emphasis added]

16. The Applicants are yet to file any appeal. Ultimately, they may or may not, file any appeal. Stay of execution cannot be granted pending hearing and determination of a non-existent appeal. Such an open ended stay would be fertile ground for abuse of the court process. I find no merit in the prayer for stay of execution pending appeal.

17. I find no merit in Notice of Motion dated 22nd February 2024. I dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF OCTOBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Simiyu for the Applicants

Mr Mondia holding brief for Ms Odeck for the Respondent

Court Assistant: M Nguyayi

