



**Digi-Tel Communications System Limited v Ngumbao & 5 others (Environment and Land Appeal E039 of 2024) [2024] KEELC 13491 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13491 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E039 OF 2024  
FM NJOROGE, J  
NOVEMBER 27, 2024**

**BETWEEN**

**DIGI-TEL COMMUNICATIONS SYSTEM LIMITED ..... APPELLANT**

**AND**

**KAFEDHA JAMES NGUMBAO ..... 1<sup>ST</sup> RESPONDENT**

**ALEX FURAH KAINGU ..... 2<sup>ND</sup> RESPONDENT**

**ANNA WAIRUMU MWANGI ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**JULIUS SHIKOLI RUSIMBA ..... 5<sup>TH</sup> RESPONDENT**

**ABDALLA NZAI MWALIMU ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The notice of motion application dated 26/8/2024 has been filed by the Appellant. It seeks the following orders: -
  - a. ....Spent;
  - b. ....Spent;
  - c. That this honourable court be further pleased to issue an order of stay of execution of the ruling delivered on 20<sup>th</sup> August 2024 together with any other subsequent orders emanating out of the said ruling pending the hearing and determination of the application;
  - d. That upon granting the prayers above, this honourable court be further pleased to set aside, vary and vacate the ruling delivered on 20<sup>th</sup> August 2024 pending the hearing and final determination of the appeal herein.



- e. That the honourable court do make any such order or further orders as it may deem fair and just in the interest of justice;
  - f. That costs of the application be costs in the cause.
2. The application which was brought under Section 1A, 3A and 63 (e) of the *Civil Procedure Act* and Order 10 rule 9, Order 22 rule 22 and Order 51 rule 1 of the Civil Procedure Rules was premised on the grounds set out on the face of the motion, supporting affidavit sworn by Jonathan Paul Savage on the even date and also in a supplementary affidavit sworn on 20/10/2024 by the same deponent.
  3. The Appellant intends to appeal a ruling delivered on 20/8/2024 by Hon. James Mwaniki, (CM) in Malindi CM ELC OS No. E136 OF 2023. According to the deponent, the said court dismissed the Appellant's application dated 5/6/2024 wherein they had sought the following:
    - a. Stay of execution and/or arrest of the intended execution of judgment and all consequential orders;
    - b. leave to enter appearance be allowed to file further documents and be granted an opportunity to be heard on merit;
    - c. The setting aside varying or vacating of the judgment in the matter;
    - d. The setting down of the matter for hearing to enable both parties be accorded fair trial.
  4. The grounds upon which the application is made are that the 5<sup>th</sup> respondent never filed any response to the suit while the applicant herein filed a replying affidavit; that the matter proceeded without the participation of all the defendants in the suit; judgment was delivered on 8/5/2024; the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had instructed the firm of Katsoleh & Co Advocates to represent them and paid the required legal fees; the Appellant is apprehensive that if execution is not stayed, the Respondents would proceed to execute the orders given which will adversely affect them and render the appeal nugatory; that the said advocate never attended court for hearing or filed the requisite documents in support of the defendants' case notwithstanding that the same had been supplied to him; that upon enquiry the advocate kept telling the defendants that he was awaiting service of hearing or mention notices; that there is no proof of service of hearing notices on him in the lower court file; that the 3<sup>rd</sup> defendant got to know that the matter had been concluded when his employee was served with a copy of the judgment and decree; that unless the orders sought are granted the appellant will have been condemned unheard;
  5. The 1<sup>st</sup> Respondent filed a replying affidavit he swore on 16/10/2024, on behalf of himself and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He opposed the application stating that the application is an abuse of the court process since the grounds cited in the present application are similar to those raised in the application before the Chief Magistrate's court. He added that the present firm Messrs Minyazi & Associates is not properly on record since judgment was long delivered. On the last issue I summarily disagree since this is an appeal in a court different from that that dismissed the application, thus a different proceeding, and a different set of instructions must have been given to the present law firm. The present firm is therefore properly on record.
  6. The application was canvassed by way of written submissions which I have carefully considered.
  7. I have considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. In the present case, the only live prayer in the motion is prayer 4 which is seeking to set aside the impugned ruling pending the hearing and final determination of the appeal. Prayer 3 which sought to stay the said ruling is spent, because it



was sought only pending the hearing and determination of the instant application. Evidently, prayer 4 is to no avail, since in granting the same, would be akin to determining the present appeal prematurely.

8. The Applicant's motion may be replete with drafting blunders, but a court of law ought to aim at doing substantive justice. Having said that, the court will, invoking its inherent power under Section 3A of the *Civil Procedure Act*, deem prayer 3 of the motion as one for stay of the ruling dated 20/8/2024 pending appeal, and this court accordingly amends that prayer to that effect. However, though this court is aware of the drafting risks inherent in hastily drafted applications under certificate of urgency, it admonishes counsel to take time in future to pore over each and every word in their applications, and possibly employ a second pair of eyes for proof reading to avert such embarrassing situations.
9. It must not be lost that the subject of the present appeal is the ruling and not the judgment of the Chief Magistrate's court. However, it can be deciphered that perchance the present appeal against the ruling of the trial magistrate succeeds, that decision would affect the judgment since one of the prayers in the appeal is that the ruling and order of the trial magistrate be set aside and the appellant be granted an opportunity to be heard.
10. Article 50 of *the Constitution* provides for right to a fair and impartial hearing for any person having a dispute that can be resolved by application of the law. Being granted a hearing ensures natural justice is done. When a litigant claims in a setting aside application that he has been shut out of the temple of justice for the reason that service or proper service was not effected upon him or his counsel, it behoves the court to exercise abundant caution in ascertaining the veracity of such claim lest it end up condemning him a second time. In the case of *Ann Jane Bowskill Versus Sidy Jofwe & 7 Others Malindi ELC Civil Suit No. 89 Of 2018* this court stated as follows:
  - “ 12. In setting aside applications and especially those based on non-service, the court needs exercise maximum caution to prevent the injustice that may occur of declining a setting aside application and hence barring a litigant in the event it eventually turned out that the claims of non-service were, after all, correct. The court must carefully assess the evidence supplied by the parties claiming non-service and weigh it against the assertions of the party alleging service, and determine which of the opposing positions is likely to lead to justice in the case. And under the Civil Procedure Rules, even where service has been effected but the court is persuaded on the basis of the material presented in a setting aside application that such service was insufficient and is likely to engender an injustice, it may exercise its discretion and set aside the judgment in the case. All this approach is intended to jealously guard a citizen's constitutional right to a fair hearing as envisaged in Article 50 of *the Constitution*.”
11. In that case this court considering the very wide discretion in setting aside applications as held in *Sammy Maina Versus Stephen Muriuki 1984 eKLR* set aside the judgment and allowed the case to be reheard on its merits.
12. I find this case to be no different from *Ann Jane Bowskill (supra)*. There is need to investigate the issue of service that paved the way for the hearing in the lower court. This court is not seized of much material at the present moment as it has not perused the lower court file record. It will do so on appeal. However, in the end, the fact that the present application seeks a stay of the execution of the ruling delivered on 20/8/2024 matters.



13. The Court of Appeal in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others (Civil Appeal (Application) E383 of 2021) [2021] KECA 363 (KLR)* stated as follows: -

“We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1<sup>st</sup> respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed.”

14. That application before the lower court sought setting aside of judgment and leave to perform other duties attendant to preparing a matter for hearing on its merits. The ruling emanating therefrom never commanded any action. It gave a negative order dismissing the application wholly, such that the situation remained just as it had been prior to its filing.
15. The lower court in its ruling of 20/8/2024, dismissed the Applicant’s motion seeking to stay execution and set aside the judgment of the lower court delivered on 8/5/2024. The dismissal order is in the nature of a negative order and is incapable of execution. For that reason, the application dated 26/8/2024 lacks merit and it is hereby dismissed with costs. The appeal shall be mentioned on 30/1/2025 for further directions.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

