



REPUBLIC OF KENYA



KENYA LAW
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**Masake v Nyangwara (Environment & Land Case E003 of 2022)
[2024] KEELC 14153 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E003 OF 2022
EM WASHE, J
DECEMBER 20, 2024**

BETWEEN

SIMION MASAKE PLAINTIFF

AND

HELLEN MORAA NYANGWARA DEFENDANT

RULING

1. The Defendant (hereinafter referred to as “the Applicant”) filed a Notice of Motion dated 08.12.2023 (hereinafter referred to as “the present Application”) against the Plaintiff (hereinafter referred to as “the Respondent”) seeking the following Orders; -
 - a. That the Honourable Court be pleased to grant the applicant temporary stay of execution of judgement delivered on 29.02.2023 pending the hearing inter-partes of the application and thereafter pending the hearing and determination of Kisumu Court of Appeal Case No. E162 of 2023 Between Simion Masake-versus- Hellen Moraa Nyangwara.
 - b. That the costs of this Application be in the cause.
2. The grounds upon which the above prayers are premised are as provided below; -
 - i. This Court pronounced its judgement on the 29.03.2023 in favour of the Respondent against the Applicant.
 - ii. The Applicant being aggrieved by the judgement pronounced on the 29.03.2023 proceeded to file an Appeal before the Court of Appeal known as Kisumu Court of Appeal Case No. E162 of 2023 which is still pending determination therein.
 - iii. Consequently, this Court should grant a stay of execution of the Judgement pronounced on the 29.03.2023 pending the hearing and determination of the said proceedings known as Kisumu Court of Appeal Case No. E162 of 2023.



- iv. The Applicant stated that she is an elderly woman who resides on the disputed land known as LR.No.Transmara/Nkararo/341 and therefore the implementation of the Judgement pronounced on 29.03.2023 would cause her irreparable harm and injury as she would become a destitute.
3. The present Application was duly served on the Respondent who opposed the same by filing a Replying Affidavit sworn on 17.01.2024.
4. The Respondent opposed the present Application on the following grounds; -
 - i. First and foremost, the Respondent pleaded that the present application was overtaken by events and was in fact obsolete.
 - ii. The Respondent averred that the Notice of Appeal filed by the Applicant before the Court of Appeal was in fact irregular and contrary to the Court of Appeal Rules hence could not be deemed to be a lawful Notice of Appeal or Memorandum of Appeal.
 - iii. According to the Respondent, the Memorandum of Appeal filed by the Applicant before the Court of Appeal was assigned number Kisumu Court of Appeal No. E075 of 2023 and not the alleged number known as Kisumu Court of Appeal No. 162 of 2023.
 - iv. The Respondent's view therefore was that the proceedings known as Kisumu Court of Appeal No. 162 of 2023 which is the basis upon which the Applicant is seeking a stay of execution is none existent.
 - v. Further to the above, the Respondent pleaded that the Applicant had not satisfied the conditions provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and is not entitled to the remedy of a stay of execution as sought for in the present application.
 - vi. Lastly, the Respondent stated that the present Application had been brought after an inordinate delay which cannot be explained.
 - vii. In conclusion, the Respondent sought this Court to dismiss the present Application with costs.
5. Upon service of the Replying Affidavit by the Respondent, the Court directed that the present Application be canvassed by way of written submissions.
6. The Applicant duly filed her written submissions on 13.02.2024 while the Respondent filed his submissions on 09.07.2024.
7. The issue in the present Application is rather straight forward as it deals with whether or not the Applicant should be granted an Order of Stay of execution against the Judgement pronounced on 29.03.2023 or not.
8. To begin with, the Applicant needs to demonstrate that she has filed an Appeal before the Appellate Court to create a basis upon which the present Application can be anchored.
9. The Applicant has submitted that she has a valid Appeal before the Court of Appeal known as Kisumu Court of Appeal No. 162 of 2023 which was properly filed and now pending determination.
10. On the other hand, the Respondent submitted that the Applicant herein filed only one Memorandum of Appeal which was assigned Kisumu Court of Appeal Civil Appeal No.E075 of 2023.



11. Unfortunately, the Memorandum of Appeal assigned Kisumu Court of Appeal No. E.075 of 2023 was filed out of time and therefore irregularly hence incompetent before the law.
12. The Respondent pleaded and submitted that there was Memorandum of Appeal assigned the alleged number Kisumu Court of Appeal No. 162 of 2023 as alleged enable this Court entertain the present Application before it.
13. Based on these two conflicting submissions, the Court is faced with an issue to ascertain whether or not the Applicant has an Appeal or not and which is the correct Appeal file before the Court of Appeal.
14. To assist resolve this issue, the Court was presented with a Ruling from the Court of Appeal in Kisumu Court of Appeal Civil Application No. 162 of 2023 pronounced on the 07.06.2023 which this Court took judicial notice of the same on 03.10.2023.
15. A perusal of the Ruling pronounced on the 07.06.2023 in the proceedings known as Kisumu Court of Appeal Civil Application No. 162 of 2023, it is clear that the Applicant herein had lodged a Notice of Appeal dated 30.03.2023 and thereafter Memorandum of Appeal dated 29.06.2023 against the Judgement and Decree of this Court pronounced on the 29.03.2023.
16. The Applicant realising that the either the Notice of Appeal or the Memorandum of Appeal had been filed out of time, proceeded to file an Application dated 29.06.2023 known as Kisumu Court of Appeal Civil Application No. E.075 of 2023 within which she sought an order to have the Appeal filed out of time be deemed to be properly filed as well as an Order of Stay of Execution against the Judgement and Decree of this Court issued on the 29.03.2023.
17. The directions of a three-judge bench in the proceedings known as Kisumu Court of Appeal Civil Application No. E.075 of 2023 were that the Applicant's prayers contained in her application dated 29.06.2023 known as Kisumu Court of Appeal Civil Appeal No.E.075 of 2023 could not be considered simultaneously and the Applicant was therefore supposed to file a separate Application first seeking an Order that the Notice of Appeal dated 30.03.2023 and the Memorandum of Appeal dated 29.06.2023 were duly filed within time or with leave of the Court before the second limb of a Stay of Execution of the judgement and Decree of this court pronounced on the 29.03.2023 would be dealt with.
18. It is on these directions that the Applicant herein filed the second Application known as Kisumu Court of Appeal Civil Application No. 162 of 2023 through her application dated 29.09.2023.
19. The Applicant's second Application dated 29.09.2023 is what was determined on the 07.06.2024 with an Order that the Notice of Appeal dated 30.03.2024 is deemed to be properly on record with leave of the Court.
20. This being the case, this Court is satisfied that there exists an Appeal before the Court of Appeal which is pending hearing and determination as submitted by the Applicant herein.
21. Having resolved this particular issue, the second issue for determination is whether or not this Court should grant the Orders sought in the present Application.
22. The provisions of Order 46 Rule 6 (1) of the Civil Procedure Rules, 2010 provide as follows; -

“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.”

23. The Court’s interpretation of Order 46 Rule 6 (1) of the Civil Procedure Rules, 2010 is that an aggrieved party is ordinarily required to make the first application for Stay of Execution before the Court which has pronounced the disputed Ruling, Judgement and/or Decree.
24. In the event the aggrieved party is again dissatisfied with the outcome of the Application seeking for a Stay of Execution from the Court that pronounced the Judgement being challenged, then another application for Stay of Execution can be filed before the Appellate Court.
25. Clearly therefore, the provisions of Order 46 Rule 6 (1) of the Civil Procedure Rules, 2010 provide a systematic manner in which the two instances an Aggrieved party to a Ruling, Judgement and Decree an apply for an Order of Stay of Execution.
26. The first instance of making an Application for Stay of Execution is from the Court which its Ruling, Judgement and/or Decree is being appealed against and the second instance is in the Appellant Court.
27. This Court’s view is that the practice of filing an Application for Stay in the Appellate Court at the first instance and then after it is declined one files a similar application in the Sub-ordinate Court from which the Appeal lies is erroneous and not proper.
28. Once an aggrieved party files an Application for Stay in an Appellate Court and the same is declined for whatever reason, such an Aggrieved Party should not file a similar application before the Lower Court whose Ruling, Judgement and/or Decree is being appealed against as it amounts an indirect review of the Appellate Court’s decision.
29. The only available remedy for an aggrieved party that files an application for Stay of Execution in an Appellate Court and such orders are denied is to seek for a review from the same Court and justify why the Appellate Court should now grant him/her the Orders of Stay of Execution pending Appeal.
30. In this file, the Court pronounced its Judgement on the 29.03.2023 in favour of the Respondent who was the Plaintiff against the Applicant who was the Respondent.
31. The Applicant upon receipt of this Judgement pronounced on 29.03.2023 decided to Appeal against the same before the Court of Appeal.
32. Consequently, the Applicant filed a Notice of Appeal dated 30.03.2023 before this Court and thereafter proceeded to the Court of Appeal and filed an application dated 29.06.2023 known as Kisumu Court of Appeal Civil Application No. E075 of 2023 inter-alia seeking for Orders that the Notice of Appeal dated 30.03.2023 be deemed properly filed and secondly an Order of Stay of Execution pending Appeal as well as Injunctive Orders.
33. The Application dated 29.06.2023 known as Kisumu Court of Appeal Civil Application No. E.075 of 2023 was heard by a three Judge Bench and its finding was that the prayers contained in the said Application could not be granted unless and/or until the issue of the validity relating to the Notice of Appeal was resolved.
34. In essence therefore, the Application dated 29.06.2023 was denied including the Orders of Stay of Execution of the Judgement pronounced on 29.03.2023 and the Injunctive Orders therein.



35. Looking at the above scenario, it is clear that the Applicant herein elected to file his Application for Stay of Execution directly to the Appellate Court but unfortunately the same was denied due to the uncertainty of the Notice of Appeal dated 30.03.2023.
36. The Applicant having now regularised the Notice of Appeal dated 30.03.2024 through the Ruling pronounced on 07.06.2024 in the proceedings known as Kisumu Court of Appeal Civil Application No. 162 of 2023, the next step was for her to again file this Application before the Court of Appeal so that now it can be heard afresh and the appropriate orders issued.
37. In fact, the Learned Judge of Appeal in her Ruling pronounced on 07.06.2024 in the proceedings known as Kisumu Court of Appeal Civil Application No. 162 of 2023 pointed out that both the Notice of Appeal and the Record of Appeal to be properly on record.
38. The implication of the above finding is that the Court of Appeal sitting in Kisumu is now seized of the Applicant's Appeal over the Judgement and Decree of this Court issued on the 29.03.2023 and this Court is now functus of ficio hence does not have the jurisdiction to entertain any further applications unless otherwise ordered.
39. In other words, the Applicant herein should file and prosecute all further Applications before the Court of Appeal henceforth.

Conclusion

40. In conclusion, this Court makes the following Orders in regards to the Notice of Motion dated 08.12.2023; -
 - A. This court is functus of ficio and does not have jurisdiction to entertain & determine the application dated 08.12.2023.
 - B. The application dated 08.12.2023 is therefore denied with no orders as to costs.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 20TH of DECEMBER 2024.

EMMANUEL.M. WASHE

JUDGE

In The Presence of :

Court Assistant: Emmanuel

Advocate For The Plaintiff: Mr. Aminga H/b For Ochwangi

Advocate For The Defendants: Ms. Nekoye H/b For Mr. Mwariri

