



**Kioko v Kithuku & another (Environment and Land Appeal
E012 of 2020) [2023] KEELC 540 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 540 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E012 OF 2020
CA OCHIENG, J
FEBRUARY 9, 2023**

BETWEEN

REUBEN MULWA KIOKO APPELLANT

AND

BENSON KITHUKU 1ST RESPONDENT

MAVOKO LAND DEVELOPMENT CO. LTD 2ND RESPONDENT

RULING

1. What is before court for determination is the 1st and 2nd respondents' notice of objection to the appeal dated the November 24, 2020 which is premised on the following grounds:
 1. That the appellant's appeal was filed fourteen (14) days out of time to appeal without the court's leave.
 2. That the appellant's appeal is defective and incompetent and without any orders of appeal.
 3. That the appellant's appeal is defective and incompetent and without any orders of appeal.
 4. That the appellant failed to service notice to appeal.It is proposed to the honourable court to order
 - a. The dismissal of the appeal with costs.
2. The instant notice of objection was canvassed by way of written submissions.

Analysis and Determination

3. Upon consideration of the instant notice of objection including the rivalling submissions, the only issue for determination is whether the entire appeal should be dismissed with costs.



4. The 1st and 2nd respondents in their submissions insist that the appeal was filed out of time as the order to dismiss the suit was made on October 5, 2020, yet the memorandum of appeal is dated the November 18, 2020. Further, that the appellant has not provided reasons as to why the thirty (30) days limit was violated. They contend that the appeal is defective, incompetent and without any order or decree for appeal. Further, the appeal is on point of law but no leave under order 43 of the Civil Procedure Rules was obtained to file it. To buttress their averments, they relied on the following decisions: Serephen Nyasani Menge v Rispah Onsase (2018) eKLR and Kenya Ports Authority v Maur Abdalla Bwanamaka (2018) eKLR.
5. The appellant in his submissions provided a background of the lower court suit and insisted that he was not a party to ELC Case No 366 of 2009 and therefore the mere mention of his name is not only misplaced but causing a lot of injustice to him. He contends that the suit properties which were subject to ELC No 366 of 2009 are LR No 25062 from Velji Jadwa, Nanubhai Velji Varsani and Bhimji Varsani; and LR No 11895/27 and not Athi River/Athi River 9/61 which was a subject matter at Mavoko Law Court in ELC No 12 of 2020. He insists that the doctrine of *res judicata* was not only abused but misapplied to determine his suit in the lower court. He contends that he has sued Mavoko Development Co Limited to be restrained from dealing with Plots 41 and 42 (Kasina Mlolongo) within LR No 11895/35 and not Athi River/Athi River Block 9/61. He reiterates that the notice of objection should have been subjected to a full hearing. He admitted filing the memorandum of appeal on November 18, 2020 but proceeded to explain that the court proceeded on a short break before the ruling was certified. He further insists that the appeal lies as of right as it is between the parties. To buttress his averments, he relied on the following decisions: Ruth Njeri Zeyble v Eberhard Zevble & another (2010) eKLR and Charles Oncharo Ogoti v Safaricom Limited & another (2020) eKLR.
6. The respondents have sought for dismissal of this appeal on grounds that it was filed out of time without leave. The appellant admits that the ruling including order in which he is appealing from was delivered on October 5, 2020 while he filed the memorandum of appeal on November 18, 2020. He however explains that the delay was due to the short break the court took after delivery of its ruling. He further insists that he did not require leave to file the appeal since it was a matter dealing with parties to a suit.
7. Section 79 G of the Civil Procedure Act provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
8. In this instance, the impugned ruling was delivered on October 5, 2020 while the memorandum of appeal was filed on November 18, 2020, which was two weeks late. The appellant claims the court took a short break but has not produced the certificate of delay confirming it is the court that took long to issue a certified copy of the ruling. Even from the face of the ruling, it is evident the same was delivered in the presence of the respondents’ counsel and absence of plaintiff’s (appellant’s) counsel. Further, I note there is no court order or decree that is sought to be appealed against within the record



of appeal. For the avoidance of doubt, I wish to reproduce an excerpt from the impugned ruling being appealed against:

In respect to the instant preliminary objection, I have considered the judgement in Machakos CMCC No 532A of 2014, Reuben Mulwa kioko v Mavoko Development Co Ltd and it is clear to me that the same was between the plaintiff herein and the 2nd defendant. It is evident from the said judgement that the plaintiff's claim against the 2nd defendant was over two plots being plot No 41 and 42 (Kasina Mlolongo) located within LR No 11895/35 originally known as LR No 11895/27. That claim was dismissed by the court *vide* the said judgement dated June 24, 2019. It has been submitted before me that the same land litigated on in the said case is the same one the plaintiff now claims to be his land in this suit and that in Mavoko Land Development Co Ltd v Kasina Housing Scheme Society & 4 others (2019) eKLR, the Environment and Land Court finally determined that LR No 11895/27 was fake, null and void... In the circumstances, I come to the conclusion that the 2nd defendant has proved that the dispute herein is *res judicata* thus the requirements of section 7 of the [Civil Procedure Act](#) have been satisfied. The upshot of the above analysis is that I find merit in the preliminary objection dated July 28, 2020 and as a legal consequence thereof, the entire suit stands dismissed with costs to the defendants.”

9. From this excerpt alone, it is clear the suit was dismissed on the basis that it was *res judicata* and this is the fulcrum of the instant appeal. From a reading of order 43 of the [Civil Procedure Rules](#), it is mandatory that the appellant should have sought for leave to lodge an appeal against an order on *res judicata* which he did not.
10. In the foregoing, I find merit in the instant notice of objection to the appeal and will proceed to dismiss the appeal and award costs to the respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF FEBRUARY, 2023.

CHRISTINE OCHIENG

JUDGE

