



**Nchoe v Naingisa (Miscellaneous Application E001 of 2024)
[2024] KEELC 13619 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13619 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
MISCELLANEOUS APPLICATION E001 OF 2024
CG MBOGO, J
DECEMBER 5, 2024**

BETWEEN

EVANS LEPAPA NCHOE APPLICANT

AND

KAITET OLE NAINGISA RESPONDENT

RULING

1. Before this court for determination is the substantive notice of motion dated 2nd April, 2024 filed by the applicant and it is expressed to be brought pursuant to Sections 1A, 1B, 3A and 79 G of the Civil Procedure Rules, and Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That the applicant be granted leave to file an appeal out of time against the aforesaid judgment and consequential orders of Hon. G.N Wakahiu dated and delivered on 13th April, 2022.
 4. That this honourable court do make such other and further orders as it may deem fit and necessary and expedient in the interest of justice.
 5. That costs of this application be provided for.
2. The application is premised on the grounds inter alia that judgment was delivered on 13th April, 2022, in favour of the respondent as against the applicant. The application is further supported by the affidavit of the applicant sworn on even date. The applicant deposed that his advocate then on record had informed him that judgment was delivered without notice. That being dissatisfied with the judgment, he sought the legal services of Ms. Nchoe, advocate who filed the necessary pleadings in the matter and obtained orders staying the decree dated 9th June, 2022. He deposed that the matter was further mentioned before the court severally and he failed to show up. He deposed that the



matter was mentioned on 13th October, 2022 when the respondent informed him that he had filed a response. He deposed that his counsel on record then had informed him that there was need to respond to the contentious issues raised by the respondent in the replying affidavit that required filing a supplementary affidavit.

3. The applicant deposed that he filed the application dated 31st October, 2022 and that when the matter came up in court on 15th November, 2022 the respondent failed to show up. He also deposed that when the matter came up in court on 25th November, 2022 the respondent sought leave to file his response and that in a surprising turn of events, the respondent filed the notice of preliminary objection on 31st January, 2023 which he felt the need to seek the services of a different advocate. He deposed that the court allowed the respondent's preliminary objection and dismissed his application to arrest the ruling.
4. The applicant deposed that the mistake of his counsel should not be visited upon him, and that unless the application for stay is heard urgently, the respondent threatens to levy execution which will render the intended appeal nugatory. Further, he deposed that no prejudice will be occasioned on the respondent if the orders sought are granted.
5. The application was opposed vide the replying affidavit of the respondent sworn on 28th August, 2024. The respondent deposed that the application is incompetent as the advocate who has filed the same lacks locus to institute the proceedings pursuant to Order 9 Rule 9 of the *Civil Procedure Rules*. He deposed that the applicant was represented by the firm of kiptoo K. & Company who prosecuted the matter until judgment was delivered on 13th April, 2022. He deposed that thereafter, the applicant filed Misc. Appl. No. E005 of 2022 through the firm of Kudate-Nchoe & Company Advocates. Further he also deposed that on 14th March, 2023 the applicant filed an application to arrest the ruling as well as seeking the firm of Tanyasis Lemein & Co. Advocates to come on record for the applicant. The respondent deposed that the ruling was delivered on 16th March, 2023 where the court upheld his preliminary objection and vacated the stay orders granted on 8th June, 2022.
6. The respondent deposed that the applicant filed Misc. Appl. No. E002 of 2023 which has been dismissed for want of prosecution on 16th May, 2024. He went on to depose that the court is functus officio and lacks jurisdiction to purport to entertain a matter especially where the applicant was granted stay which was later vacated by the court. He deposed that there is no appeal before the court for consideration under Order 42 Rule 6 of the *Civil Procedure Rules*. He also deposed that the decree arising from the judgment has been perfected, as it has already been issued to him, and that there is nothing to be stayed by the court.
7. The respondent further deposed that judgment was delivered on 13th April, 2022 and that on 27th April, 2023 he extracted the decree and served it upon the District Land Registrar who issued him with a title deed. For this reason, the respondent deposed that the application has been overtaken by events. Further, he deposed that the applicant has not demonstrated the legal basis for grant of stay pending appeal, and that as such, the application is an afterthought and an abuse of the judicial process. He deposed that he will suffer prejudice if an extension of the appeal is granted as he is being denied the fruits of his judgment. He also deposed that no good reasons have been advanced explaining the delay in filing of the appeal, and that there is no appeal on record. The respondent urged this court to consider the factors observed in *Edith Gichungu Koine versus Stephen Njagi Thoithi* [2014] eKLR.
8. The applicant filed his supplementary affidavit in response thereto sworn on 14th November, 2024. While reiterating the contents of his supporting affidavit, the applicant deposed that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* have been met as a consent was recorded and duly filed in the chief Magistrates court on 17th October, 2023. He deposed that the same was duly admitted by the court and an order of the entry of the consent granted by the chief magistrate.



9. The applicant further deposed that he instructed the firm of Tanyasis Lemein to file an application, and that he was never aware that the same was filed and dismissed for want of prosecution. He deposed that no notice to show cause was served upon him to appear to explain why the applicant should not be dismissed, and that the prayers sought in Narok ELC Misc Appl. E002 of 2023 were not determined on merit. He also deposed that the application sought by M/s Kudate Nchoe & Company Advocates did not seek leave to appeal out of time and that the application was dismissed as the provisions of Order 9 Rule 9 had not been met. As such, the issues and prayers sought in the instant application are live and ripe for determination before this court.
10. The application was canvassed by way of written submissions. The applicant filed his written submissions dated 14th November, 2024 where he raised two issues for determination as follows: -
 - i. Whether an order of stay of execution should be granted pending the hearing and determination of the appeal.
 - ii. Whether leave should be granted to the applicant to appeal out of time.
11. On the first issue, the applicant submitted that in the absence of an order of stay of execution, he stands to suffer substantial loss as the respondent will deal with the suit property in a manner adverse to his rights. He relied on the cases of *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331, *Butt v Rent Restriction Tribunal* [1979] EA, and *James Thomas Andafu v Joseph Makokha Akbulunya* [2018] eKLR.
12. While relying on the case of *Peter Nakupang Lowar v Nautu Lowar* [2022] KEELC 1473 (KLR), the applicant further submitted that the application has been brought without unreasonable delay. Further, he urged this court to exercise discretion so that he does not suffer undue burden to fulfill the conditions.
13. The applicant further submitted that this court should exercise discretion and grant him leave to appeal out of time as deposed in his supporting affidavit. To buttress on this submission, he relied on the cases of *HAM v SOS* [2021] eKLR, *Ngugi v Thogo* (Civil Application 372 of 2018) [2021] KECA 88 (KLR) (22 October 2021) (Ruling) and *Oduol v Adinda & another* [2022] KEELC 15219 (KLR).
14. The respondent did not file his written submissions. Be that as it may, I have considered the application, the replies thereof and the written submissions filed by the applicant. In my view, the issue for determination is whether the applicant is entitled to the orders sought.
15. The applicant filed the instant application seeking stay of execution of the decree and judgment delivered on 13th April, 2022. In support of his application, the application enumerated the history of the application since judgment was delivered including the previous applications filed. In addressing the issues raised by the applicant, and assuming that this application had been filed immediately the judgment of the trial court in MC ELC No. 24 of 2018, was delivered, the applicant ought to have followed the procedure laid out in law.
16. In his supplementary affidavit, the applicant deposed that the issues and prayers sought in Narok ELC Misc. Application No. E002 of 2023 were not determined on merit. This has necessitated this court to call for this file and establish the status of that application.
17. I have perused the record in ELC Misc. No. E002 of 2023. On 16th May 2024, the application dated 24th May, 2023 was dismissed with costs for want of prosecution. With the application dismissed, the applicant should have sought for reinstatement of the same. Instead, the applicant instructed a different



advocate this time round to file a similar application. I find this un-procedural and abuse of court process.

18. The notice of motion dated 2nd April, 2024 is thus not properly before this court and the same is hereby struck out with costs to the respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL this 5TH day of DECEMBER, 2024.

HON. MBOGO C.G.

JUDGE

05/12/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

