



REPUBLIC OF KENYA



**Matindi & another v Gachiku & another (Miscellaneous Civil Appeal
208 of 2023) [2024] KEHC 9456 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL APPEAL 208 OF 2023**

**A MSHILA, J
JULY 26, 2024**

BETWEEN

BONIFACE WAINAINA MATINDI 1ST APPLICANT

NDUNGI MATINDI 2ND APPLICANT

AND

MARGARET GACHIKU 1ST RESPONDENT

THE LAND REGISTRAR KIAMBU 2ND RESPONDENT

RULING

1. Before court is a Notice of Motion dated 12th October, 2023 and brought under Order 51 Rule 1, Order 42 Rule 5 of the *Civil Procedure Rules*, Section 3A and Section 79G of the *Civil Procedure Act*; Article 159(2)(d) of the *Constitution* of Kenya 2010 and the Inherent jurisdiction of the Court; The Applicant sought for the following orders:
 - i. That the Memorandum of Appeal annexed be deemed as duly filed and served;
 - ii. That the Ruling made by the learned trial magistrate be reviewed varied and set aside.
 - iii. The costs be provided for the appeal be dismissed for being filed without leave of court and/or out of time.
2. The application is premised on the grounds on the face of the application and the Supporting Affidavit of Boniface Maina Matindi made on the 12/10/2023; the Ruling was delivered on the 13/09/2023 in favour of the Respondents; the Applicant made an informed decision to proceed to lodge an appeal and on 12/20/2023 filed the draft Memorandum of Appeal together with an application seeking leave to file the appeal out of time.



3. The 1st Respondent filed Grounds of Opposition and raised a Preliminary Objection stating that the Application dated 12/10/2023 was a starter, bad in law, misconceived, incompetent and incurably defective and as such an abuse of the court process and precious judicial time.
4. The application was canvassed by way the Applicant filing written submissions. The Respondent relied on the Preliminary Objection and the Grounds of Opposition.

Applicant's Submissions

5. The Applicant submits that the grounds raised in the 1st Respondent's Preliminary Objection are based on technicalities notwithstanding the existence of a prima facie case. The court was urged to uphold the overriding objective for substantive justice as opposed to technicalities. In any case, it was submitted that no prejudice would be suffered by the Respondents and that the appeal has high chances of success. Reliance was placed in the case of *Raila Odinga Vs Independent Electoral And Boundaries Commission & 4 Others* (2013) eKLR. Further, it was submitted that the facts deposed in the supporting affidavit are not contested and are drawn from the trial court's judgment and record. Any prejudice that would be suffered by the 1st Respondent would be compensated by way of damages. Reliance was placed in the case of *Regina Waitihira Mwangi Gitau Vs Boniface Nthenge* (2015) eKLR. The contents of the supporting affidavit were said to be matters in the court record as such cannot be scandalous or oppressive as such the court should not strike out the memorandum of appeal as the same would be a draconian exercise. The court was urged to dismiss the Preliminary Objection with costs.

1st Respondent's Submissions.

6. The 1st Respondent submits that the drawer of the supporting affidavit commissioned the said affidavit rendering it defective. Reliance was placed in the case of *Caltex Oil Kenya Ltd Vs New Stadium Service Station Ltd & Another* (2002) eKLR. The contravention of the Oaths and Statutory Declaration Act was said not to be a mere irregularity. The memorandum of appeal was accused of not being concisely set out. The application was said to be an omnibus application incapable of being determined. Reliance was placed in the case of *Pyaralal Mband Bheru Rajput Vs Barclays Bank & Others* Civil Case No. 38 of 2004. Lastly, the court was urged to dismiss the application herein for being capricious.

Issues For Determination

7. Having considered the Applicant's application, the Replying Affidavit by the Respondent and the submissions, the only issue framed for determination is whether to grant leave to the Applicants to lodge their appeal out of time under the provisions of Section 79G of the *Civil Procedure Act*.

Analysis

8. Order 43 (2) of the *Civil Procedure Rules* 2010 provides:
 - “(2) An Appeal shall lie with leave of the Court from any other order made under these Rules”.
 - “(3) An application for leave to appeal under Section 75 of the Act 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”.



9. In the instant case, the impugned judgment was delivered on 13th September, 2023 and on 12th October, 2023 the Applicants filed the Memorandum of Appeal together with an application seeking leave to file the instant appeal out of time.
10. However, the 1st Respondent herein is of the opinion that since the Applicant did not specifically request for leave to file the appeal out of time, the application should be struck out for being incompetent.
11. The Applicants herein sought among other orders that the court deems the intended appeal as being properly filed as their application was informed by the practice directions previously issued by this court.
12. Section 3A *Civil Procedure Act* provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
13. Further Section 1A & 1B of the *Civil Procedure Act* provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.
14. In the interest of justice, failure to specifically pray for leave to file the appeal out of time by the Applicant in the application but instead seeking that the court deems the appeal as being properly filed, will not deter this court from doing substantive justice in this matter.
15. In any case, Article 159(2)(d) states that;-

“Justice shall be administered without undue regard to procedural technicalities.”
16. Further, as provided in Section 3A of the *Civil Procedure Act*, the court has inherent powers to give orders which are necessary to meet the ends of justice.
17. Be that as it may, the impugned Ruling was delivered on 13/09/2023 and on 12/10/2023 the Applicant filed the Memorandum of Appeal together with the convoluted application for review and at the same time seeking leave to file the instant appeal out of time was indeed filed about fifteen (15) days outside the stipulated timelines; The explanation given by the Applicant in respect to the period of delay was that he needed to make an informed decision before embarking on instructing his advocate to proceed to appeal.
18. Having considered all the circumstances in this application, this court is satisfied with the reasons and explanation given by the Respondent as to why he failed to file the intended appeal within the stipulated time; and this court is satisfied that the delay of about fifteen (15) days was not inordinate.
19. Lastly, a cursory perusal of the Memorandum of Appeal establishes that the main ground of appeal is with respect to whether or not the land is matrimonial property; This court is satisfied that on this ground the Applicants have an appeal that is arguable.

Findings And Determination

20. For those reasons this court makes the following findings and determination;
 - i. The Preliminary Objection is overruled.



- ii. The Application dated 12/10/2023 is hereby allowed. The Memorandum of Appeal be and is hereby deemed to be as duly filed upon payment of the requisite court fees. The Record of Appeal be filed and served within 45 days hereof.
- iii. The Applicants shall bear the costs of this application assessed at Kshs.5000/- payable to the Respondents before the next mention date
- iv. In default of (ii) and (iii) the Appeal shall stand dismissed.
- v. Mention on 25/09/2024 before the Deputy Registrar for compliance.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 26TH DAY OF JULY, 2024

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Gakunju - For Applicants

Kinuthia - For 1st Respondent

N/A - For 2nd Respondent

