



Kaburungo (Suing as the Administrator of the Estate of Dedan Kageni Kaburungo) v Karatu & 2 others (Environment & Land Case 282 of 2016) [2023] KEELC 18465 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 18465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 282 OF 2016
LC KOMINGOI, J
MARCH 16, 2023**

BETWEEN

JANE NJERI KABURUNGO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DEDAN KAGENI KABURUNGO) PLAINTIFF

AND

ROSE WANJIRU KARATU 1ST DEFENDANT

GULF ENERGY LIMITED 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

RULING

1. This is the Notice of Motion dated May 11, 2022 brought under Article 159(2)(d) of the [Constitution](#) of Kenya; Section 1A, 3A and 95 of the [Civil Procedure Act](#); Order 9 Rule 9 and 10, Order 50 Rule 4 and 6 [Civil Procedure Rules](#) and all other enabling provisions of the law..
2. It seeks orders:-
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to extend time and allow the applicant to file and serve her Notice of Appeal out of time, upon such conditions as are just.
 4. That the costs of this application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs (a) and (k).



4. The Application is supported by the affidavit of Jane Njeri Karungo the Plaintiff/Applicant herein. The same is undated.
5. The Application is opposed. There is a replying affidavit sworn by Paul Limoh, Chief Executive Officer of the 2nd Defendant/Respondent sworn on May 24, 2022.
6. On July 15, 2022, the court with the consent of the parties directed that the Application be canvassed by way of written submissions.

The Plaintiff's/Applicant's submissions

7. They are dated July 25, 2022. They raise one issue for determination; Whether the Plaintiff/Applicant has adequately demonstrated reasons to warrant the enlargement and/or extension of time to file and serve the notice of appeal. She has put forward the case of *Kiu & Another vs Khaemba & 3 Others* KECA 318 KLR.
8. It is submitted that the delay of almost five months from the date of delivery of the judgment and filing of the instant application was as a result of the former advocate's mistake. She has put the case of *CFC Stanbic Limited vs John Maina Gitbaiga & Another* [2013] eKLR.
9. It is further submitted that failure to file the Notice of Appeal on time was as a result of the former advocate's failure to execute her instructions. She relies on the case of *Visbra Stone Suppliers Company Limited vs RSR Stone [2006] Limited* [2020] eKLR where a delay of 1 year, 2 months and 7 days was found to be excusable.
10. It is also submitted that the intended appeal is arguable. She has put forward the case of *Athuman Nusura Juma vs Afwa Mohammed Ramadhan* [2016] eKLR.
11. It is not in dispute that the 2nd Defendant/Respondent is in current possession and/or occupation of the suit property. It stands to suffer no prejudice. On the other hand, the Applicant's constitutional right to appeal stands to be inhibited by technicalities should this honourable court dismiss the instant application. She has relied on the Kiu case (*supra*) and *Kenya Power & Lighting Company vs Benzene Holdings Limited t/a Wycoco Paints* [2016] eKLR she prays that the application be allowed.

The 2nd Defendant's/Respondent's submissions

12. They are dated July 20, 2022. They raise one issue; whether the Application has any merit and therefore whether the orders sought should be granted. It has relied on Rule 75 and 82 of the Court of Appeal Rules.
13. The judgment sought to be challenged was delivered on November 25, 2021. The notice of appeal ought to have been filed within fourteen (14) days.
14. It is submitted that even though this court has wide and unfettered discretion on whether to extend time for filing an Appeal or not, the said discretion should be exercised judiciously and upon reason rather than arbitrarily and capriciously on whim and/or sentiment, and should balance between protecting a party's opportunity to fully agitate its dispute and the need to ensure timely resolution of the disputes.
15. The principles that guide the court in the exercise of its discretion to extend time in such cases were clearly set out in the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others* [2016] eKLR. The Plaintiff has failed to explain to this court why it took five months to follow up on the matter to ensure that the Appeal was indeed filed by the former advocates.



16. The Plaintiffs attempts to explain the delay by blaming the previous advocates is not persuasive. She has not demonstrated due diligence on her part. It has put forward the case of *Rajesh Rughani vs Fifty Investments Limited & Another* [2016] eKLR.
17. The grounds advanced do not meet the threshold as the said application is a mere afterthought meant to delay the conclusion of the matter and to frustrate the payment of costs whose bill has been filed in court. It has put forward the cases of *Nginyanga Kavole vs Mailu Gideon* [2019] eKLR; *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR.
18. There has been unexplained inordinate, inexcusable delay in seeking the court's intervention to regularize the intended appellate process and therefore the plaintiff is undeserving of the orders sought.
19. The Plaintiff should not hide behind Article 159(2)(d) of the *Constitution* as litigation must come to an end. The 2nd Defendant stands to suffer great prejudice if the orders sought are granted as they would have the effect of prolonging the litigation which has spanned over a period of six (6) years.
20. It prays that the application be dismissed with costs to the 2nd Defendant.
21. I have considered the Notice of Motion, the affidavit in support and the annexures. I have also considered the response thereto, the written submissions and the authorities cited. The issue for determination is whether this application is merited.
22. It is the Plaintiff's/Applicant's case that she instructed her former advocate to appeal but he misadvised her that the court had directed that the appeal be lodged in forty five (45) days. She annexed an email dated December 1, 2021 and marked "JNK-3", in which she requests the former advocate to initiate and complete the appeal. It is her case that in April 2022 she inquired from the former advocate the status of the appeal. It is at this point that she found out that no appeal had been lodged.
23. I find that the Plaintiff/Applicant has demonstrated that she did instruct the former advocate to lodge an appeal. In the case of *Stanley Kaiyongi Mwenda vs Cyprian Kubai*, E.O Okubasu JA stated as follows:-

".....As it has been said on numerous occasions in an application of this nature this court is being asked to exercise its unfettered discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in his favour. If the explanation given is acceptable, the court will then exercise its discretion in favour of the applicant.

And in *Leo Sila Matiso vs Rose Hellen Wangari Mwangi* Civil Application No NAI 255 of 1997 (unreported) this court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly, the reason for delay, thirdly, (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted."



In the present application the applicant has explained why there was a delay in filing Notice of Appeal. The applicant who had been acting in person did not know what he was required to do and so by the time he filed the Notice of Appeal he was three days out of time.”

24. I find that the Plaintiff/Applicant has given a reasonable explanation of the delay in filing the Notice of Appeal.
25. I agree with the Plaintiff's/Applicant's counsel that the 2nd Defendant/Respondent is in possession and or occupation of the suit property. It will suffer no prejudice if the Plaintiff /Applicant is allowed to go on appeal.
26. In conclusion, I find merit in this application and I grant the following orders:-
 - a. That the time for filing notice of appeal is hereby extended on condition that the same be filed within twenty one (21) days from the date of this ruling.
 - b. That the 2nd Defendant/Respondent shall have costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF MARCH 2023.

L. KOMINGOI

JUDGE

