



Mwabaya & another v Chombe (Environment and Land Appeal 2 of 2023) [2023] KEELC 17219 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 2 OF 2023**

**EK MAKORI, J
APRIL 26, 2023**

BETWEEN

NYEVU KATANA MWABAYA 1ST APPELLANT

KOI KAFADZA MBITHA 2ND APPELLANT

AND

PATRICK SAFARI MUMBA CHOMBE RESPONDENT

RULING

1. This ruling is in respect of the respondent’s notice of motion dated February 6, 2023 seeking the following orders:
 - a. That the appeal be struck out for being filed out of time without leave of the court.
 - b. That the costs of this application be provided for.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit deposed by Patrick Safari Mumba Chome the respondent herein stating that the judgment in Kilifi ELC No. E004 of 2021 was delivered on November 1, 2022 and a decree was issued on the even date. He stated that on the 16th of December 2022, the Appellants through their advocates were served with the bill of costs. After that, the appellants filed an appeal which has run out of time without good and sufficient cause for the filing the same out of time and the same is frivolous and should be dismissed. The respondent has relied on the following authorities: - *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others* [2014] eKLR, *Harun Ogoro Nyamboki v Peter Mujungu Gathuru* [2019] eKLR and *DPP v Michael Sistu Mwaura Kamau & 4 others* [2019] eKLR, which authorities opine that where the law provides timelines within which to do a certain thing, if that time lapses, one needs to first seek for the extension of time before he can proceed to do that which the law requires.



3. In response, the 2nd appellant Koi Kafadza Mbitha filed a replying affidavit stating that he is yet to lodge his appeal on account that he has not been supplied with typed and certified copies of proceedings from the lower court and that the prayers sought in the application are ambiguous as what is on record is a Memorandum of Appeal as leave will only be sought upon receiving the certified copies of proceedings. Besides, the Christmas period ought to be reckoned as enunciated in the case of *Keziah Stella Pyman & 2 others v Paul Mwololo Mutevu & 8 others* [2013] eKLR. Further, that time starts running from the date of issuance of a decree, in this case, two decrees were issued one dated November 17, 2022 and March 3, 2023. If the court reckons that scenario it will reach a finding that the appeal was filed timeously.

Analysis and Determination

4. I have considered the application and the submissions by the parties as well as the authorities relied upon. The issue before me for determination is whether the application is meritorious.
5. The law governing the filing of appeals from the subordinate court to the High Court is governed by section 79 G of the *Civil Procedure Act* (the Act) which 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.”

6. In this case, it is not disputed that the judgment subject matter of this appeal was delivered on November 1, 2022 and that the appellants filed their Memorandum of Appeal on January 11, 2023. The 2nd appellant in his replying affidavit stated that the delay in lodging the appeal was occasioned by the lower court not issuing copies of certified proceedings in time. There was no evidence for this assertion.
7. The present application is for striking out an appeal out of time without leave and not seeking an extension of time. There is no attempt that has been made to admit the appeal out of time. The appellants only cited no appeal on record for not having been supplied with certified copies of proceedings from the lower court. Moreover, the Christmas vacation ought not to be factored in the computation of time. Because there is a Memorandum of Appeal on record, it is clear that the appellants intended to appeal. Nonetheless, I am of the considered view that they did not conform to the conditions of appealing out of time as stated in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others* [2014] eKLR:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. this, the court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this court’s Registry. This is irregular as that document is unknown in law and the same should



be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this court extending time), is expunged from the court's Record."

8. Decree in this matter was issued on 1st day of November 2022. 30 days within which to file an appeal obviously lapsed on or about December 1, 2023. The memorandum of Appeal was filed in this court on January 11, 2023 well past the time allowed to file an appeal, The Appellant ought to have sought leave first to file the appeal out of time before filing the Memorandum of Appeal and not the other way round.
9. Application dated February 6, 2023 is hereby allowed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI

THIS 26TH DAY OF APRIL, 2023.

E.K. MAKORI

JUDGE

