



**Ikiugu v Ikiara (Environment and Land Appeal 4 of 2022)
[2023] KEELC 17678 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 4 OF 2022**

AK BOR, J

APRIL 25, 2023

BETWEEN

JOHN MUTWIRI IKIUGU APPELLANT

AND

LAWRENCE MWONGERA IKIARA RESPONDENT

RULING

1. This court heard the appeal and delivered its judgment on 5/12/2022 in the presence of the advocate for the Respondent only. The Appellant brought the application dated 6/2/2023 seeking leave to appeal out of time and stay of execution of the decree dated 15/3/2022 issued by the Learned Magistrate. The application indicates that it is brought under Sections 1 A, 1B, 3A, 3B and 63 (e) of the Civil Procedure Rules and Order 42 Rule Order 9 and Order 51 Rule 1 of the Civil Procedure Rules; Section 153 of the Evidence Act and Article 159 (2) of the Constitution.
2. The application was made on the ground that this court's judgment was read in the absence of the Appellant and that the Appellant's advocate was aware that the judgment was to be delivered on 22/11/2022 but he was later informed that it had been put off to 24/1/2023. The application was supported by the Appellant's affidavit in which he deponed that his advocate informed him that the advocate who held his brief on 22/11/2022 confirmed that the judgment was not ready and had been deferred to 24/1/2023. That it was only on 24/1/2023 when his advocate physically attended court that he discovered that the judgment had been delivered on 5/12/2022. He averred that since his advocate knew the judgment was to be delivered on 24/1/2023, he did not bother to check the file until 24/1/2023 when they learned that the judgment was read on 5/12/2022. He applied for certified copies of the proceedings and the judgment. He explained that he was not aware that his advocate mistook 24/11/2022 with 24/1/2023 and added that they served a judgment notice for 24/1/2023 on the Respondent. He gave his advocate's email address as xxxx.com and maintained that they were never served by the court. He averred that he was dissatisfied with the decision of this court and had



prepared a notice of appeal. He attached copies of the typed proceedings showing that the judgment was to have been delivered on 24/11/2022.

3. The Respondent opposed the application through the replying affidavit filed in court on 20/2/2023. He averred that it had taken the Appellant 63 days from the date judgment was delivered until 8/2/2023 when he brought this application, and urged that the Appellant was guilty of inordinate delay. He argued that this court could not grant the orders sought because it lacked jurisdiction. He added that the mistake of the Appellant's advocate of failing to attend court when the judgment was delivered was not a reason for him to be granted leave to appeal out of time or to be granted stay of execution. He maintained that the Appellant and his advocate should bear the blame for being careless and not following up the court registry if they were in doubt. He contended that the Appellant was hell-bent on preventing him from enjoying the fruits of his judgment.
4. He argued that the Appellant had not complied with Order 42 Rule 6 of the *Civil Procedure Rules*. He stated that the proceedings which the Appellant attached to his application proved that the court system was very efficient and effective because the certified proceedings were typed and issued to him promptly. He pointed out that the Notice of Appeal was not filed within the stipulated time and urged that this application ought to have been made under Rules 4 and 5 of the Court of Appeal Rules.
5. The Appellant swore the further supporting affidavit filed on 7/3/2023 where he deponed that it was within the court's discretion to grant leave to appeal out of time. He urged that he reasonably believed that the judgment was to be delivered on 24/1/2023 and not 24/11/2022. He explained that he was only late by one day because Sundays were excluded in computing time as well as the period running from 21st December to 13th January. He maintained that he filed the application immediately he realised there was a judgment. He stated that he erroneously served a judgment notice on the Respondent on 23/11/2023 (sic) indicating that the judgment would be delivered on 24/1/2023 but the Respondent maliciously failed to inform him that he had served the wrong date. He maintained that the notice of judgment was not served on him.
6. The Respondent filed a further replying affidavit on 1/3/2023 in which he deponed that before delivering the judgment on 5/12/2022, the court placed the file aside when it noted the absence of the Appellant and requested the Respondent's counsel Mr. Jefferson Okemwa to write a short email to the Appellant's advocate to inform him that the judgment was to be delivered. He annexed a copy of the email which his advocate sent to the Appellant's advocates email address, xxxx.com on 5/12/2022 at 9:28 a.m. informing him that his attendance was required in court for the delivery of the judgment. He averred that the Appellant was guilty of material non-disclosure and that he had approached the court with unclean hands.
7. The court directed parties to file submissions which it considered. The Appellant submitted that based on the computation of time under Order 50 of the *Civil Procedure Rules*, he had not taken long from the time judgment was delivered. He maintained that he had explained that he was not aware of the date the court was to deliver its judgment. He argued that the orders he seeks would not prejudice the Respondent and that this court had the discretion to grant leave to appeal against its judgment.
8. The Respondent submitted that in deciding whether or not to grant leave to appeal out of time, the court must bear in mind the following principles: that being an equitable remedy, it is only available to a deserving party at the discretion of the court and is to be determined on a case by case basis. The other factors are whether there is a reasonable reason for the delay and if the delay has been explained to the satisfaction of the court; whether the Respondent will suffer prejudice if the extension of time is granted; and whether the application was brought without delay.



9. The Respondent submitted that the Appellant was guilty of inordinate delay in filing his notice of appeal. He urged that the explanation regarding the advocate taking down the wrong date could not be entertained because the court served parties when they both failed to show up. He added that no evidence was placed before the court to prove that the Appellant's advocate diarised a different date. In any event, the Appellant advocate could have called the court registry if he was in doubt. The Respondent reiterated the fact that Mr. Okemwa Advocate wrote to the Appellant's advocate an email on 5/12/2022 informing him that the judgment was to be delivered that day.
10. The Respondent relied on Section 66 of the [Civil Procedure Act](#) on the aspect of an appeal lying from the decree of the High Court to the Court of Appeal and argued that this application should have been filed in the Court of Appeal.
11. Regarding stay of execution, the Respondent relied on Order 42 of the [Civil Procedure Rules](#) and contended that the Appellant had not demonstrated what loss he stood to suffer if stay were not granted. He surmised that the Appellant was hell-bent on preventing him from enjoying the fruits of his judgment and was not keen on bringing the litigation to an end. He argued that the Appellant did not deserve to be granted leave to appeal out of time because he had not demonstrated sufficient cause for failing to file his appeal on time and had failed to comply with Order 42 Rule 6 of the [Civil Procedure Rules](#).
12. The issues for determination in this application are whether this court should extend the time for the Appellant to lodge an appeal against its judgment delivered on 5/12/2022 and if the Appellant should be granted stay of execution.
13. This matter first came up for the delivery of judgment on 22/11/2022. Mr. Mwangi Kariuki held brief for Mr. Mutunga Murithi for the Appellant. There was no evidence that the Respondent had been served yet he was not represented on 24/10/2022 when the court gave the judgment date. The court indicated that it would deliver the judgment on 24/11/2022 and the Respondent was to be served. None of the parties appeared on 24/11/2022. The court directed that the judgment would be delivered on 5/12/2022 and the parties were to be served by the court. When the matter came on 5/12/2022, only the Respondent was represented. The court was satisfied that both parties were served and it went ahead to deliver the judgment.
14. Section 66 of the [Civil Procedure Act](#), which the Respondent quoted, provides that subject to the provisions prescribed as to furnishing of security, an appeal shall lie from the decree and orders of the High Court to the Court of Appeal except where it is otherwise expressly provided in the Act. That section does not apply to this matter which emanated from the Magistrate's Court. The applicable provision would be Section 79 D, which stipulates that no second appeal from a decree passed in appeal by the High Court shall lie except on the grounds mentioned in Section 72. The grounds set out in Section 72 are that the decision is contrary to law or some usage having the force of law; the decision failed to determine some material issue of law or usage having the force of law; or where a substantial error or defect in the procedure provided by the Act or any other law in force may possibly have produced error or defect in the decision of the case upon the merits. The Appellant has not indicated which of these grounds it wishes to base his appeal on.
15. The Appellant's advocate's email address given in the supporting affidavit, xxxx.com is the same email address which Mr. Jefferson Okemwa Advocate sent an email to on 5/12/2022 at 9.28 am notifying the Appellant's advocate of the delivery of the judgment. The court sent the judgment notice by email to both the Respondent's advocate and the Appellant's advocates email address: xxxx.com on 28/11/2022 at 4.30 pm. The Appellant did not controvert the fact that an email was sent to his advocate on 5/12/2022 before the court delivered the judgment. It is doubtful that the Appellant's



advocate learned of the delivery of the judgment on 24/1/2023 as the Appellant would have the court believe.

16. The letter which the Appellant's advocate wrote to the Deputy Registrar seeking a certified typed judgment and proceedings is dated 20/1/2023, which contradicts the Appellant's averment at paragraph 8 of the supporting affidavit where he stated that they were not aware of the judgment until 24/1/2023. The instant application was filed on 8/2/2023, which is two weeks after the date the Appellant claims to have become aware of the delivery of the judgment.
17. The Appellant's advocate learned from the emails sent by the court and the Respondent's advocate that the judgment was to be delivered on 5/12/2022. There was inordinate delay in filing the application for extension of time.
18. The Appellant contended that he was only late by one day in lodging his intended appeal. Under Rule 75 of the *Court of Appeal Rules*, a person who desires to appeal to the Court of Appeal is required to give written notice to the Registrar of the superior court within 14 days of the date of the decision against which it is desired to appeal. The Appellant was required to have lodged a notice of appeal by December 19, 2022.
19. The Appellant has not explained the delay in lodging the appeal within time to the satisfaction of the court.
20. The Appellant failed to demonstrate that substantial loss may result to him unless the order for stay was made. He has not offered security for the due performance of such decree as may ultimately be binding on him.
21. The court declines to grant the orders sought in the application dated February 6, 2023. The Respondent is awarded the costs of that application.

DELIVERED VIRTUALLY THIS 25TH DAY OF APRIL 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Mutunga Murithi for the Appellant

Mr. Jefferson Okemwa for the Respondent

