



**Wambua v Syengo & 3 others (Environment and Land Appeal
33 of 2021) [2023] KEELC 17002 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17002 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 33 OF 2021**

**LG KIMANI, J
APRIL 18, 2023**

BETWEEN

GREGORY SEMBEI WAMBUA PLAINTIFF

AND

GEORGE MUEMA SYENGO 1ST DEFENDANT

ANJELINE MWENDE NJERU 2ND DEFENDANT

EQUITY BANK LIMITED 3RD DEFENDANT

DISTRICT LAND REGISTRAR, KITUI 4TH DEFENDANT

RULING

1. The plaintiff filed an Application dated 9th of December 2022 seeking the following orders:
 1. Spent
 2. Spent.
 3. That the court be pleased to extend the time within which to file and serve the Plaintiff/Applicants Notice of Intention of Appeal against the Judgment of this Honourable Court delivered on 8-11-2022.
 4. That the costs of this application be in the cause.
2. The application is founded on the ground that when the judgment was delivered by the Court on 8th November 2022, the Applicant was not informed of the judgment by his former advocates and he only became aware of it on 2nd December 2022 when he went to inquire at the former advocates' office, by which time the 14 days allowed for filing the Notice of Appeal had lapsed. He contends that his right to fair hearing may be infringed in the event that he is not granted leave to appeal the judgment out of time.



3. The applicant contends that he as an arguable appeal with a high chance of success and that the Respondents will not suffer any prejudice if the application is allowed. He states that he instructed a new Advocate M/S Sila and Company Advocates to represent him and pursue the appeal in place of his former advocates, M/S Kyalo Muia & Company Advocates.

1st and 2nd Respondents' Response

4. The 1st and 2nd Respondents filed grounds of opposition dated 8th February 2023 stating that the application is bad in law, incompetent and does not meet the threshold for grant of the prayers sought for the reasons of unreasonable delay and that it offends the provisions of Section 7 of the [Appellate Jurisdiction Act](#) (CAP 9) and Rule 75(2) of the Court of Appeal Rules, 2010. They further state that the law requires an Applicant to file an appeal first and then seek leave of the court to have the same admitted out of the statutory period.

3rd Respondents' Response

5. The 3rd Respondent filed grounds of opposition dated 18th January 2023 faulting the application for not citing Order 50 rule 6 of the Civil Procedure Rules, 2010. They stated that the intended Notice of Appeal is frivolous, vexatious, and incompetent as it offends provisions of Order 75(2) of the Court of Appeal Rules, 2010 having been filed outside of the 14 days statutory time and no record of appeal has been filed in accordance with Rule 82 of the Court of Appeal Rules, 2010.
6. They further state that the applicant has not demonstrated good and sufficient cause for the delay and he has not met the factors for grant of extension of time as espoused on the case of *First American Bank of Kenya Ltd-Gulab P. Shah 7 2 others* Nairobi Milimani HCCC No. 2225 of 2000 (2002)1EA. Further that shifting blame to the applicant's former advocates as a ground for the delay lacks any legal backing owing to the legal dictum restated in *Hamam Singh & others vs Mistri* (1971) EA 122.

The Applicants' submissions

7. The Applicant submitted that his application is brought under Section 7 of the Appellate Jurisdiction Act, Article 159 of the [Constitution](#) of Kenya, Section IA, IB and 3A of the [Civil Procedure](#) At and quoted Order 50(4) of the [Civil Procedure Rules](#) on enlargement of time. He submitted that failure to quote this provision in the application is not fatal and he relied on the provision of Order 51 Rule 10(1).
8. On whether this court has jurisdiction to hear the appeal, the Applicant quoted from Section 7 of the [Appellate Jurisdiction Act](#) and relied on the cases: *Kenya Airport Authority vs Timothy Nduvi Mutungi* (2014) eKLR, *Edward Njane Ng'anga & Another vs Damaris Wanjiku Kamau & Another* (2016) eKLR and *Loise Chemutai Ngurule & Another vs Winfred Leshwari Kimugen & others* (2015) eKLR.
9. The Applicant highlighted that the delay was not inordinate and that the Respondents have not demonstrated what prejudice they will suffer if the leave sought should be granted and they relied on the cases of: *Nicholas Kiptoo Koris arap Salat vs IEBC & 7 others* (2014) eKLR and *Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another* (2018) eKLR.
10. Counsel submitted that the period for lodging the record of appeal which has also lapsed should be extended based on exercise of the court's inherent jurisdiction, the oxygen rule and the ruling by Githinji JA in *Kenya Airports Authority v Timothy Nduvi Mutungi* (2014) eKLR.



1st and 2nd Respondents' written submissions

11. Counsel for the 1st and 2nd Respondents reiterated the grounds of opposition filed and submitted that the application has been made after unreasonable delay which has not been explained and that the application is incompetent lacks merit and is misconceived on law for offending the relevant provisions of the law.
12. They also pointed out that the Applicant did not invoke Sections 13(7) and 19(2) of the Environment and *Land Act* as well as Order 50 rule 6 of the Civil Procedure Rules. The 1st and 2nd Respondents urged the court to dismiss the application with costs.

3rd Respondent's submissions

13. Counsel for the 3rd Respondent reiterated the contents of the grounds of opposition and the case law cited therein and submitted that the application is filed under an inapplicable provision of the Court of Appeal Rules 2010 while it ought to have been premised on Order 50 (6) of the Civil Procedure Rules, 2010.
14. It is the 3rd Respondent's submission that the reasons given for delay are inexcusable and unsatisfactory since the Applicant was present in court on 7th July 2022 when the court set the matter for filing submissions and that it was his duty to follow up on the judgment date. Further, that it took him another seven days after finding out about the judgment to instruct his advocates to file the instant application. The 3rd Respondent relied on the cases of: *Multiple Hauliers v Enock Bilindi Musundi & 2 others* (2021) eKLR, *Hamam Singh & others vs Mistri* (1971) EA 122 and *Ngunjiri v Mbugua & Another* (2021) KECA 22(KLR) (23rd September 2021).
15. The 3rd Respondent submitted that the appeal is not arguable for the reason that no draft Memorandum of Appeal has been annexed to the application. They further submitted that it was their legitimate expectation that litigation had to ultimately come to an end, the Applicant having failed to file a Notice of Appeal within the expected statutory timelines. That by allowing extension of time, the 3rd Defendant stands to suffer prejudice by being forced to respond to an appeal filed by an indolent applicant. The 3rd Respondent further submits that the applicant failed to seek extension of time to file the record of appeal and is bound by his pleadings.

Analysis and Determination

16. The Applicant seeks extension of time for filing Notice of Appeal. Judgment in this case was delivered on 8th November 2022 where the Plaintiff/Applicant's suit was dismissed. The Applicant states that he was not informed of the judgment by his former advocates and only became aware of it on 2nd December 2022 when he went to inquire at the former advocates' office, by which time the 14 days to file the Notice of Appeal had lapsed.
17. Rules 77(1) and(2) of the Court of Appeal Rules (2022) states that:
 - “(1) A person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
 - (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”



18. The Respondents have contended that the Applicant has brought his application under the wrong provision of the law that is Section 7 of the *Appellate Jurisdiction Act* CAP 9. They state that the section confers jurisdiction to the Court of Appeal only and does not apply to this Court. The said provision states that:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

19. Contrary to the Respondent’s submissions, the court is of the view that Section 7 of the *Appellate Jurisdiction Act* applies to the circumstances of this case for the reason that appeals from this Court lie to the Court of Appeal and the requirement of filing notice of appeal is provided for under the above quoted Rule 77 of the Court of Appeal Rules. This was confirmed by Munyao J. in the case of *Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung’em & 2 Others* (2015) eKLR held as follows:

“It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of *the Constitution* of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.”

20. The Respondent contends that the Applicant should have instead brought the application pursuant to Order 50 (6) of the Civil Procedure Rules, 2010. The Court does not agree with this contention for the reason that the said provision states that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:”

21. It is noted that filing of Notice of Appeal is a requirement under Rule 77(1) and (2) of the Court of Appeal Rules (2022) and not under the Civil Procedure Rules. In the court’s view extension of time under Order 50 of the Civil Procedure Rules does not apply in the circumstances in this case. In any event even if the wrong provision of the law is quoted, Order 51 Rule 10 of the Civil Procedure Rules clearly provides that failure to quote the provision under which an application is made is not fatal to the application. Sub rule 2 provides that;

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”



22. Is the Applicant is entitled to the extension of time as sought? Shah JA in the case of *Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another* [2000] eKLR quoted himself as follows:

“I said in the case of Gabriel Kigi and others vs Kimotho Mwaura & another Civil Application No Nai 197 of 1997 (unreported):

“But I must revert to section 7 of the Act. That section in my view gives discretionary powers to the High Court to allow extension of time to file a notice of appeal when there is as yet nothing before this Court.”

23. In an application for extension of time, the court ought to take into account several factors as observed by Odek, J.A in *Edith Gichugu Koine vs. Stephen Njagi Thoitbi* [2014] eKLR, as,

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

24. In *Charles Karanja Kiiru v Charles Gitbinji Muigwa* [2017] eKLR the Court of Appeal held that:

“There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.”

25. The period of delay between the judgment delivered on 8-11-2022 and filing this Application on 9th December 2022 is 31 days. The applicant submits that the delay was not inordinate since he only found out about the judgment on 2-12-2022. The court notes that the Applicants counsel was present in court when judgment was delivered but the applicant states that his counsel did not inform him until he went to visit their offices. The Court has considered that the ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. No reason was advanced to convince the court that the intended appeal herein is an afterthought or frivolous. The court held in the case of: *Stecol Corporation Limited v Susan Awuor Mudemba* [2021] eKLR that:

“Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.”

26. The Court has also considered the overriding objective of the court to facilitate the just, expeditious, proportionate and affordable resolution of disputes and the inherent power of the Court to make such orders as may be necessary for the ends of justice as established by Sections 1A and 3A of the *Civil*



Procedure Act. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 laid down the parameters as follows:

“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 the 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.”

27. In the court’s opinion, the delay in this case cannot be said to have been unreasonable, the reason for delay is also a plausible one. However, it is noted that a draft of the memorandum of appeal intended to be filed has not been annexed and we are not certain what the grounds of appeal are. In the courts view the Applicant has a right of appeal and it is in the interests of justice that he be given an opportunity to pursue the intended appeal notwithstanding that he did not attach the draft memorandum of appeal.

28. The 3rd Respondent has contended that the Applicant should have followed up on his judgment and that his reason for the delay is inexcusable. In a similar case, *Githinji, JA* while finding a delay of 4 ½ months due to the mistake of a Counsel pardonable in the case of *Kenya Airport Authority & another v Timothy Nduvi Mutungi* [2014] eKLR held that:

“The mere fact that the 2nd applicant’s former advocates appeared in the High Court on six occasions after the judgment was delivered is not indicative of the fact that he had communicated the decision of the High Court to the 2nd applicant..... The mistake of a counsel is pardonable in the interest of justice.”

29. The applicant in submissions sought an order of extension of time to file a record of appeal for the reason that the said time has also lapsed. Rule 84 of the Court of Appeal Rules(2022) requires that:

“Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—

- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;

30. The application before this court is for extension of time for filing a Notice of Appeal. The applicant did not seek extension of time for filing the record of appeal. The applicant is bound by his pleadings and he cannot by way of submissions make a prayer for a substantive order that he did not seek in his application without making an application for amendment of the application. Further, the provision of Section 7 of the Appellate Jurisdiction Act, suggests that the the Court is only empowered to extend time for doing certain specific acts which are; giving notice of intention to appeal from a judgment of the Court, making an application for leave to appeal or for a certificate that the case is fit for appeal. There is no mention of extension of time for filing a record of appeal.

31. In any event it is the court’s view that the provision of Rule 84 of the Court of Appeal Rules (2022) is self-explanatory as to the time allowed for the filing of a record of appeal to the Court of Appeal. The Court therefore declines to make the order for extension of time for filing a record of appeal as submitted by the applicant.

32. The final orders of the court are that the application dated 9th of December 2022 is hereby allowed in the following terms;



- A. The time within which the Plaintiff/Applicant is to file and serve a Notice of Intention to Appeal against the Judgment of this Honorable Court delivered on 8-11-2022 is hereby extended by a period of seven (7) days from the date of this ruling.
- B. Costs of this application are awarded to the Respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF APRIL 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Ruling read in open court and virtually in the presence of:

C/A Musyoki

Sila for the Applicant

M/s Onono holding brief for Orego for 3rd defendant

N/A for 1st and 2nd defendants

