



**Gatheca & another (Sued in their capacity as Chairman and Treasurer of
Miri-ini Mixed Organic Farmers (CBO)) v Mwaura & 61 others (Civil Appeal
E210 of 2023) [2023] KEHC 27004 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E210 OF 2023
FN MUCHEMI, J
DECEMBER 19, 2023**

BETWEEN

**FRANCIS GICIA GATHECA 1ST APPLICANT
LYDIA WANJIKU GATHECA 2ND APPLICANT
SUED IN THEIR CAPACITY AS CHAIRMAN AND TREASURER OF MIRI-INI
MIXED ORGANIC FARMERS (CBO)**

AND

**NDORO MWAURA 1ST RESPONDENT
ISAAC KABIU MUTUNDU 2ND RESPONDENT
JAMES MWANGI KIGATHI & 59 OTHERS 3RD RESPONDENT**

RULING

Brief facts

1. The application dated 20th January 2023 seeks for orders for leave to file an appeal out of time against ruling in Gatundu Civil Case No. E080 of 2022 delivered on 1st November 2022. The applicants also seek for orders of stay of proceedings in respect to Gatundu Civil Case No. E080 of 2020 *Ndoro Mwaura & 61 Others vs Francis Gicia Gatheca & Another* pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 17th February 2023.

Applicants' Case

3. The applicants avers that they filed an application dated 30/5/2022 in Gatundu Civil Case No. E080 of 2020 and the court delivered its ruling on 1/11/2022 dismissing the said application. Being aggrieved



with the decision of the court, the applicants sought to lodge an appeal. It is the applicants' case that time within which to file an appeal has expired. The 2nd applicant contends that the failure to file the appeal within the stipulated time was not intentional but was occasioned by the delay to obtain a copy of the ruling.

4. The applicants aver that the appeal is arguable, meritorious and has high chances of success. The applicants urge the court to stay the proceedings in Gatundu Civil Case No. E080 of 2020 which is scheduled for hearing on 28/3/2023. The applicants are apprehensive that if stay of the proceedings in the lower court is not granted, it shall render the appeal nugatory. The applicants state that the respondents will not be prejudiced if the orders sought are granted.

The Respondents' Case

5. The respondents oppose the application on the premise that it is frivolous, vexatious and a total abuse of the court process. The respondents further contend that the applicants have not provided a copy of the impugned ruling dated 1/11/2022 nor have they given cogent reasons for not availing the same before the court. Further, the applicants have not annexed a draft Memorandum of Appeal to their application which is indicative of the frivolous nature of their application. The respondents argue that the applicants ought to have first obtained a certified copy of the impugned ruling and then file the instant application.
6. The respondents contend that the application is an afterthought aimed at denying them their right to enjoy the fruits of their judgment. Moreover, the respondents state that they stand to suffer prejudice and will therefore be disenfranchised if the same is allowed.
7. The applicants filed a Further Affidavit dated 6th March 2023 annexing a copy of the order from the ruling dated 1/11/2022 and the draft Memorandum of Appeal and aver that the intended appeal is arguable with high chances of success.

The Applicants' Submissions

8. The applicants rely on Order 42 Rule 6(1) of the Civil Procedure Rules and the case of Kenya Wildlife Service vs James Mutembei (2019) eKLR and argue that they have filed their application for stay of proceedings expeditiously. The applicants further argue that they have been intent on preferring an appeal and they have been following up for a typed copy of ruling to enable them file an appeal but the same has taken longer than anticipated which has surpassed the stipulated time within which to file an appeal.
9. The applicants further rely on Section 79G of the Civil Procedure Act and the case of Belinda Murai & Others vs Amos Wainaina [1978] KLR 278 and urge the court to exercise its discretion in their favour and enlarge time within which to file the appeal. The applicants further submit that the delay in filing the appeal was as a result of the registry in producing a copy of the typed proceedings and thus should not be visited on them.
10. The applicants further rely on the case of Niazsons (K) Ltd vs China Road & Bridge Corporation (Kenya) [2001] eKLR and submit that if the orders sought are not granted, the intended appeal shall be rendered nugatory. The applicants further submit that that their intended appeal is arguable and meritorious with a high chance of success. To support their contentions, the applicants rely on the cases of Stanley Kangethe Kinyanjui vs Tony Ketter & Others [2013] eKLR; Century Oil Trading Company Limited vs Kenya Shell Limited [2008] eKLR and Belinda Murai & Others vs Amos Wainaina [1978] KLR 278.



11. The applicants rely on the case of *Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others* (2013) eKLR and submit that they are deserving of costs of the application as costs follow the event.

The Respondents' Submissions

12. The respondents submit that although the applicants contend that they had not been supplied with a copy of the ruling from the trial court, they have not attached any evidence to show that they applied for a certified copy of the ruling.
13. The respondents further submit that the ruling of the trial court was delivered on 1/11/2022 yet they filed their application on 24/1/2023 which is about one month after the statutory duration to file their appeal. Moreover, the respondents submit that the applicant failed to seek for stay of execution following the delivery of the ruling and is now seeking stay of proceedings in a bid to delay and deny them justice.
14. The respondents rely on Section 79G of the *Civil Procedure Act* and the cases of *Omar Shurie vs Marian Rasbe Yafar* (Civil Application No. 107 of 2020) and *Susan Ogutu Oloo & 2 Others vs Doris Odindo Omolo* [2019] eKLR; Miscellaneous Application No. 5 of 2018 *Serephen Nyasani Menge vs Risper Onsase* (2018) eKLR; Civil Appeal No. 142 of 2013 *Dilpack Kenya Limited vs William Muthama Kitonyi* (2018) eKLR and Miscellaneous Case No. E009 of 2021 *Monata Matiko Chonchorio vs John Marwa Chabaro* (2021) eKLR and submit that the applicants have exercised unreasonable delay on account of being unable to obtain a certified copy of the ruling from the trial court. The respondents further submit that the applicants did not have a copy of the impugned ruling nor did they demonstrate any extra efforts to obtain the same when the application came up for hearing on 16th March 2023. As such, the respondents submit that the instant application is an abuse of the court process and ought to be dismissed.
15. The respondents rely on Section 27 of the *Civil Procedure Act* and the case of Environment & Land Case No. 23 of 2021 *Peter Njuguna Gitau vs Daniel Kiprono Kiptum & 3 Others* (2022) eKLR and pray that they are awarded with costs.

Issues for determination

16. The two main issues for determination herein are:-
 - a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;
 - b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

17. Section 79G of the *Civil Procedure Act* states:-

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 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.

18. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
19. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
20. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

21. The applicants blamed the magistrate’s court registry for the delay in supplying the proceedings which included the impugned ruling. The said ruling was delivered on 1st November 2022 and this application was filed on 24th January 2023. The law provides for 30 days for an aggrieved party to file an appeal. Taking the prescribed period into consideration, this application was filed one month and 24 days after the expiry of the statutory time granted for filing this kind of appeal. The applicant is obligated to explain the delay. No evidence of request for proceedings or a reminder thereof were annexed to this application to mitigate delay. As such this court holds the view that delay was not explained.



22. The applicant later filed a further affidavit on 06/03/2023 and annexed the order of the court for the impugned ruling. The order issued by the honourable Magistrate Hon. R. N. Nganga reads:

It is hereby ordered: -

1. That the application as filed by the Defendants/Applicants be and is hereby dismissed and deem the suit as filed by the Plaintiffs/Respondents as properly filed before court.
2. That the matter be fixed for pre-trial directions within 30 days from the date of this ruling.
3. That no orders as to costs

On reading the said order, one would not tell what the ruling was all about, what the reasoning was on the issues before the court. This being the position, this court is not in a position to assess whether this appeal is arguable or whether it has any chances of success. In an application seeking for orders to appeal out of time, the court must consider several issues as was held in the case of Nicholas Kiptor (supra) which cannot be done without looking at the ruling complained of.

23. Having found that the applicants did not attach the impugned ruling; and that they are guilty of inordinate delay in filing this application, I find that it would be a futile exercise to delve into the issue whether the applicant has complied with the conditions set out under Order 42 Rule 6` of the Civil Procedure Rules.
24. I find no merit in this application and I dismiss it with costs to the respondents.
25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF
DECEMBER 2023.**

**F. MUCHEMI
JUDGE**

