



**Muthama & another v Wambua & 2 others (Environment and Land Miscellaneous Application 29 of 2020) [2023] KEELC 17825 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17825 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 29 OF 2020  
A NYUKURI, J  
MAY 17, 2023**

**BETWEEN**

**JEFFERSON MWENDWA MUTHAMA ..... 1<sup>ST</sup> APPLICANT**

**JOYCE MUTINDI MUTHAMA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPHAT KYOLOLO WAMBUA ..... 1<sup>ST</sup> RESPONDENT**

**MIKE MULUNGA MUTUA ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR GENERAL, NATIONAL ENVIRONMENTAL MANAGEMENT  
AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. By a Notice of Motion dated July 21, 2020, the Applicants sought the following orders;
  1. Leave be granted to the Applicants to appeal out of time against the judgment and decree made and delivered on June 3, 2020 by the National Environmental Tribunal at Nairobi in Appeal No NET 173 of 2016 Josphat Kyololo Wambua & Anor Vs Director General National Environment Management Authority, Jefferson Mwendwa Muthama & Anor and to admit the Appeal out of time.
  2. Upon grant of (2) above there, the draft Memorandum of Appeal be deemed to be properly filed upon payment of the requisite court fees.
  3. The costs of this application be in the cause.
2. The application is premised on the grounds on the face of it as well as the supporting affidavit sworn on July 21, 2020 by Jefferson Mwendwa Muthama the 1<sup>st</sup> Applicant. The Applicant's case is that the



Applicants are dissatisfied with the judgment of the National Environment Tribunal (NET) in NET 173 of 2016 delivered on June 6, 2020 and wishes to appeal against the same. That the delay in filing the appeal was due to the lockdown barring travel into Nairobi as the Applicants do not reside in Nairobi. They also stated that the judgment was delivered in the absence of the parties and that the file was not available even at the time of requesting for typed proceedings.

3. It was the Applicant's position that their appeal raised arguable grounds and they ought to be given a chance to appeal the judgment of NET.
4. The application was opposed. Josephat Kyololo Wambua the 1<sup>st</sup> Respondent herein filed a replying affidavit sworn on February 8, 2021 in opposition to the application. It was the Respondents' case that the advocate who filed the application has no locus as he was not on record before the tribunal. He further deponed that the reasons for the delay are unsatisfactory as counsel for the Applicants operates in Nairobi and that the decision of NET was emailed to the parties on June 18, 2020. He also stated that the Applicant's only served the application herein on September 1, 2020. According to the Respondent, the Applicants had approached the court with unclean hands as they had failed to stop the construction when the appeal was filed at NET.
5. The Respondent also stated that the Applicant had filed Machakos ELC No 206 of 2017 to stop NET from hearing the matter on grounds of jurisdiction but that the said petition was abandoned. He held the view that the intended appeal lacked merit.
6. The application was disposed by way of written submissions. On record are the Applicants' submissions dated February 1, 2022 and the Respondents' submissions dated May 24, 2022.

### **Applicants' Submissions**

7. Counsel for the Applicants submitted that the former advocates consented to change of advocates and the consent was filed with submissions. Counsel further submitted that if the Applicants are not allowed to appeal, they stand to suffer substantial loss while no prejudice will be suffered by the Respondent if orders sought are granted.
8. It was submitted for the Applicant that Section 130 (1) of EMCA allowed an aggrieved party who is dissatisfied with the decision of NET to appeal to this court in 30 days. Counsel referred to Rule 75 of the Court of Appeal Rules and Section 79 G of the *Civil Procedure Act* and argued that where there is good and sufficient cause, leave to appeal out of time may be granted. Reliance was placed on the case of *Fahim Yasin Twba v Timany Issa Abdalla & 2 Others [2015] eKLR*, to argue that this court has unfettered discretion to extend time.

### **Respondents' Submissions**

9. Counsel for the Respondent submitted that the Applicants' counsel was not properly on record on account of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* that require leave for counsel to come on record after entry of judgment.
10. In addition, counsel contended that the delay on the part of the Applicant was inexcusable as counsel for the Applicants is based in Nairobi while NET is also based in Nairobi. It was the position taken by the Respondents that the Applicants were indolent having served the application herein on September 1, 2020.
11. While arguing that the orders sought are discretionary, counsel for the Respondent contended that by filing ELC Petition No 206 of 2017 and proceeding to construct when NET ordered the Applicants to stop, they had approached the court with unclean hands.



## Analysis and Determination

12. I have carefully considered the application, the affidavit in support, replying affidavit and submissions. In my view, the following two issues arise for determination;
  - a. Whether the application herein is properly on record.
  - b. Whether the Applicants have met the threshold for grant of leave to file appeal out of time.
13. Order 9 Rule 9 of the Civil Procedure Rules provides that when there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, then such change of advocate or intention to appear in person shall not have effect without an order of the court either through an application or by consent of the previous and incoming advocate, or party acting in person, as the case may be.
14. My understanding of the import of Order 9 Rule 9 of the Civil Procedure Rules is that the rule applies in a suit where there is judgment and not in any subsequent suit. As there is no judgment in this matter, that provision does not apply and therefore the firm of Moses Odawa & Company Advocates appearing for the Applicant herein did not need leave of court to file the instant application.
15. On the question of extension of time, Section 79 G of the *Civil Procedure Act* provides for jurisdiction to extend time for filing appeal where there is a good and sufficient cause. That provision states as follows;

'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 appeal 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.'
16. Section 130 of EMCA provides that anyone who is aggrieved by a decision of NET ought to file an appeal thereto in this court within 30 days.
17. The power to extend time is discretionary and not a right of any party. A party who wishes the court to extend time in their favour must explain the delay to the satisfaction of the court. In addition, the court ought to consider the prejudice that may be suffered by the other party if time is extended.
18. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR*, the Court of Appeal in discussing the factors to be considered in an application for extension of time, stated as follows;

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.
19. In the instant application, the decision of NET was delivered on June 3, 2020. As Section 130 of EMCA requires an appeal against the decision of NET to this court to be filed in 30 days it means that the Applicants ought to have filed their appeal on or before July 3, 2020. The application herein was filed on July 24, 2020, which is 21 days after the required time. The explanation given by the Applicants is that there was a lockdown then and extra county movements were not allowed and that they were not able to travel to Nairobi. Although the Respondent argued that the Applicants' counsel operates in Nairobi, my view is that the case belongs to a litigant and not his advocates, and therefore the



Applicants could still not be able to attend to their counsel due to the lock down which lockdown has not been disputed by the Respondents. In any case, the Respondents stated that the ruling was emailed to parties on June 18, 2020. It is common knowledge that from March 2020, there was disruption of operations of many service providers due to Covid-19 pandemic. The explanation given by the Applicants in my view, is a sufficient explanation as to what caused the delay. The Applicants' delay was a 21 day delay. As the pandemic affected the country for a substantial part of the year 2020, I do not consider a delay of 21 days as being unreasonable in the circumstances of this case. In the premises, I am satisfied that there was good and sufficient cause for the delay and which has been explained to the satisfaction of the court.

20. The upshot is that the Notice of Motion dated July 21, 2020 is hereby allowed on the following terms;
- a. Leave be and is hereby granted to the Applicants to file appeal out of time against the judgment of the National Environment Tribunal delivered on June 3, 2020 in NET Appeal No 173 of 2016 *Josphat Kyololo Wambua & Another v Director General National Environment Management Authority, Jefferson Mwendwa Muthama & Another*.
  - b. The Applicant to file and serve the appeal against the judgment of NET in NET Appeal No 173 of 2016 within twenty one (21) days from the date of this ruling.
  - c. Pursuant to the proviso to Order 50 Rule 6, the Applicant shall bear the costs of the application herein.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17<sup>TH</sup> DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

No appearance for the Applicants

No appearance for the Respondents

Ms Josephine – Court Assistant

