



**Nyabwari v County Government of Kisii (Miscellaneous Application  
11 of 2022) [2023] KEELC 17396 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17396 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
MISCELLANEOUS APPLICATION 11 OF 2022**

**M SILA, J**

**MAY 11, 2023**

**BETWEEN**

**PERIS MORAA NYABWARI ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF KISII ..... DEFENDANT**

**RULING**

(Application to file appeal out of time; supporting affidavit sworn by counsel who deposed that they were not aware of the delivery of judgment; reply indicating that judgment was emailed to counsel; no supplementary affidavit to refute this; court not persuaded that good and sufficient cause as required by section 79G, *Civil Procedure Act*, has been demonstrated; application dismissed with costs)

1. What is before me is an application dated 6 October 2022 seeking orders for leave to file an appeal out of time against the judgment delivered on 10 August 2022 in the suit Kisii Chief Magistrates' Civil Suit/ ELC No 109 of 2019. The main ground upon which the application is based is that the applicant was not aware of the delivery of the judgment and the same was delivered in her absence. In the supporting affidavit, sworn by Nyaenya Moraa Lydia, who is counsel in the firm appearing for the applicant, it is averred that judgment had been scheduled for delivery on 20 July 2022 but was not delivered as the trial Magistrate was on leave. It is deposed that on inquiry, counsel for the applicant was informed that the judgment would be delivered on notice, but they never got the notice. It is said that the applicant's law firm only came to find out the position on 20 September 2022 when their office clerk went to check on the position of the matter. It is deposed that the applicant is aggrieved by the judgment as there was no award made for damages for trespass and exemplary damages which were pleaded. She now wishes to appeal but the 30-day period prescribed to file an appeal has lapsed.
2. The application is opposed by the replying affidavit of Mokaya John Momanyi, Principal Legal Counsel in the office of the respondent. He deposes that judgment was rendered on 10 August 2022



which judgment was sent to the parties' emails at 12.24pm and he has annexed a copy of the email printout. He has deposed that the judgment was delivered on a day that was taken in court in presence of all parties. He deposes that the allegation that the applicant only came to learn of the judgment on 20 September 2022 is unfounded as the judgment was sent to the emails of counsel promptly upon delivery. He contends that the delay is inordinate as the application is being filed 60 days later. He is of opinion that no sufficient cause has been shown as required by section 79G of the Civil Procedure Act and the power to extend time to file an appeal cannot be enjoyed by indolent parties who blatantly ignore court procedures. He has added that the respondent has already forwarded the judgment to its Finance Department for settlement and it will suffer great prejudice if the application is allowed.

3. The application was canvassed through written submissions and I have taken into account the submissions filed by both counsel for the applicant and respondent before arriving at my disposition.
4. . The application is founded upon the provisions of section 79G of the Civil Procedure Act, cap 21, Laws of Kenya, which provides as follows :-

79G. Time for filing appeals from subordinate courts

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.

5. It will be noted from the above that an appeal from the subordinate court to the High Court needs to be filed within 30 days of the date of the decree excluding the period taken for the preparation and delivery to the appellant of the copy of the decree or order. The court however has discretion to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal out of time. The threshold therefore upon which such an application needs to be gauged is demonstration of "good and sufficient cause" for not filing the appeal out of time.
6. In our case, the application is grounded on the claim that the judgment was delivered without the applicant's counsel being notified. The supporting affidavit, which is sworn by counsel, deposes that the case was scheduled for delivery of judgment on 20 July 2022 but was not delivered on this date because the trial Magistrate was on annual leave. It is said that on inquiry, they were informed that judgment would be delivered on notice. The affidavit does not say where the query was directed and who gave the information that judgment would be delivered on notice. It is further deposed that the law firm of M/s Bosire Gichana & Company Advocates, who are on record for the applicant, were never served with the notice of delivery of judgment and "that the firm only came to know about the judgment on 20 September 2022 when the office clerk was sent to find out the position of the pending judgment from the court assistant of the said court."
7. This of course is refuted by the respondent who contends that the judgment was emailed to counsel upon delivery on 10 August 2022 and the forwarding email is attached. I have seen the forwarding email and I can see that indeed the email from court was copied to the email of the law firm of M/s Bosire Gichana & Company Advocates, for it is the same email used in filing this application. There is no supplementary affidavit filed to contest that the email delivering the judgment was not so sent to the law firm of M/s Bosire Gichana & Company Advocates and nothing has been filed to contend that what Mr Mokaya deposed is not true. There is serious doubt as to the deposition of Ms Nyaenya in support of this application. The evidence is stark that the judgment was indeed delivered to the emails



of counsel for the parties. I do not think that the court ought to exercise its discretion based on reasons that are doubtful in their genuineness.

8. Apart from the above, you would also expect that an application such as this be supported by the affidavit of the applicant herself even if a second affidavit would be filed by counsel. It is the party that wishes to lodge a suit or an appeal who is expected to assert that he/she indeed wishes to file the suit or the appeal. There is no such affidavit filed in this instance.
9. I don't think it should be expected that such applications would be granted as a matter of course. As the law states, good and sufficient cause needs to be disclosed, and I am afraid that such has not been disclosed in this instance.
10. Given the foregoing I proceed to dismiss this application with costs to the respondent.

DATED AND DELIVERED AT KISII THIS 11 DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

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