



Muinde & 6 others v Matei & another (Environment and Land Miscellaneous Application E046 of 2022) [2023] KEELC 18391 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E046 OF 2022
CA OCHIENG, J
JUNE 29, 2023**

BETWEEN

**ISAAC MUINDE 1ST APPLICANT
MUANGE MUTISYA 2ND APPLICANT
DAUDI MUTISYA 3RD APPLICANT
KYALO MUTISYA 4TH APPLICANT
MUTUNGA MUTISYA 5TH APPLICANT
PETER MUTISYA 6TH APPLICANT
ZAKAYO MUTISYA 7TH APPLICANT**

AND

**MUTISYA MULUMBA MATEI 1ST RESPONDENT
LAND REGISTRAR, MACHAKOS LANDS OFFICE 2ND RESPONDENT**

RULING

1. What is before the court for determination is a notice of motion application dated the October 13, 2022 where the applicants sought for the following orders:
 1. Spent.
 2. That there be a stay of execution of the ruling dated August 4, 2022 pending the hearing and determination of this application.
 3. That this honourable court be pleased to extend time and grant leave to the applicants to lodge a memorandum of appeal against the ruling of Honourable Bartoo Senior Resident Magistrate on August 4, 2022 in ELC No E017 of 2022 - Machakos.



4. That costs of this application be provided for.
2. The application is supported by the affidavit of Isaac Muinde, the 1st applicant herein who deposes that they instituted Appeal No E032 of 2022 however the same was withdrawn with no orders as to costs on October 13, 2022. He states that no prejudice will be occasioned on the respondents as the instant appeal has high chances of success. He contends that this application has been brought without unreasonable delay and it is in the interest of justice that it is allowed.
3. The 1st Respondent opposed the instant application by filing a replying affidavit where he deposes that the said application is frivolous, incompetent and an abuse of the court process and should be dismissed with costs. He contends that he is in the process of disposing parts of the subject property and the sole reason he lifted the caution was to pave way for subdivision. He insists the prayer for stay of execution is therefore overtaken by events. He claims that the memorandum of appeal does not raise any arguable grounds and the applicants have not tendered any evidence as to why there has been a delay in filing the appeal despite being granted leave on September 1, 2022 to do so. He reiterates that the application lacks merit and should be dismissed with costs.
4. The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant notice of motion application including the respective affidavits as well as the rivalling submissions, the following are the issues for determination: Whether time should be enlarged and the applicants granted leave to lodge a memorandum of appeal against the ruling of Honourable Bartoo, Senior Resident Magistrate, dated the August 4, 2022 in Machakos CM ELC E017 of 2022. Whether there should be stay of execution pending appeal.
6. The applicants in their submissions reiterated their averments as per the supporting affidavit and explained that the delay in filing the appeal was inadvertent and excusable as it was caused by human error. Further, that the application has been brought in good faith. To support their averments, they relied on the following decisions: *Stecol Corporation Limited v Susan Awuor Mudemb* (2021) eKLR and *Vishva Stone Suppliers Limited v RSR Stone (2006) Limited* (2020) eKLR.
7. The 1st respondent in his submissions insists that the applicants never sought for stay of execution of the ruling delivered on August 4, 2022 in court. Further, that the applicants failed to file the memorandum of appeal within thirty (30) days as directed. He contends that the applicants have not demonstrated substantial loss that they stand to suffer. He claims that the instant application is not merited and this court cannot validate an appeal filed out of time. He reiterates that he will be prejudiced if the orders sought are granted. Further, that the applicants cause of action has no basis. To buttress his averments, he relied on the following decisions: *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR; *Charles Karanja Kiiru v Charles Githinji Muigwa* (2017) eKLR and *Teresisa Kwamboka Mauti (suing as the Administratrix of the estate of David Mauti Nyarango (deceased) & Another v Ezekiel Nyarango Mauti & 5 others* (2022) eKLR.
8. The legal provisions governing enlargement of time to lodge a memorandum of appeal is contained in section 79G of the *Civil Procedure Act* which provides that:

"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.”

9. Further, Section 95 of the *Civil Procedure Act* stipulates thus:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

10. While order 50 rule 6 of the *Civil Procedure Rules* 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: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

11. In this instance, the applicants seek enlargement of time to file the memorandum of appeal. They explain that they inadvertently failed to file it in the previous application due to human error. It emerged that the previous application seeking leave to appeal out of time was withdrawn with no order as to costs as the applicants failed to annex the draft memorandum of appeal. The applicants contended that they have an arguable appeal. The 1st respondent insisted that the applicants were abusing the court process and do not have an arguable appeal. Further, that they did not demonstrate any beneficial interest in the suit land which is not ancestral land, nor any prejudice they stand to suffer. He insisted that he has already commenced to subdivide the suit property. In the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR, the learned judge stated that:

“Our case law has developed a number of factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd* [2003] KLR. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.....

Of course, all the applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict.



The applicants have easily met that standard. i believe that the applicant has discharged this burden.”

12. While in the case of *[Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others](#)* [2015]eKLR, the Court of Appeal stated that:

It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

See also the following decisions: *[Vishva Stone Suppliers Company Limited V RSR Stone \(2006\) Limited](#)* (2020) eKLR.

13. In the current scenario, the lower court lifted a caution the applicants had registered on the suit land Machakos/Kitanga/269 which is owned by their father. The applicants claimed their father was elderly and was being manipulated by the interested party to transfer the land in her sole name yet there were other bona fide purchasers who paid for their portions of land whose interest they sought to protect. On perusal of the impugned ruling and draft memorandum of appeal, i note the applicants raise triable issues in the said draft memorandum of appeal. from the explanations by the applicants, it is my considered view that the said explanations on the delay in filing the draft memorandum of appeal are plausible. Even though the 1st respondent vehemently opposed the instant application, i am of the view that he will not suffer any prejudice if the orders sought are granted.
14. On the issue of stay of execution, since the applicants only sought one pending the outcome of this application and are yet to lodge an appeal, i am unable to issue the orders as sought.
15. Based on my analysis above while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that the reasons advanced by the applicants are plausible and will exercise my discretion to enlarge time to enable them file the memorandum of appeal.
16. It is against the foregoing that I find the applicant’s notice of motion dated October 13, 2022 partially merited and will allow it in the following terms:
1. The applicants be and are hereby directed to file and serve the memorandum of appeal within fourteen (14) days from the date hereof failure of which the orders granted herein stand vacated.
 2. Costs of this application will be in the cause.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JUNE,
2023

CHRISTINE OCHIENG

JUDGE

