



**Chesiyna v Chesiyna & another (Environment and Land Appeal
E074 of 2021) [2023] KEELC 19103 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E074 OF 2021**

JG KEMEI, J

JULY 25, 2023

BETWEEN

AMELIA JEPTOO CHESIYNA APPELLANT

AND

CHRISTINE TARGOK CHESIYNA 1ST RESPONDENT

AMANDA JEBURET CHESIYNA 2ND RESPONDENT

*(Being an appeal against the Ruling and Orders of the Chief Magistrate Court,
Kikuyu by Hon. G. Onsarigo, SRM in ELC No. 14 of 2020 delivered on the 21/9/2021)*

RULING

1. On April 20, 2022 the Applicant was directed to file and serve the Record of Appeal within sixty days (June 20, 2022) in default the appeal would stand dismissed.
2. It would appear that the Applicant failed to comply with the orders of the Court set out in paragraph 1 above. So much so that the Record of Appeal was filed on July 5, 2022, being outside the 60 days deadline.
3. The non-compliance cited above provoked the filing of the Notice of Motion dated July 5, 2022 seeking orders to set aside the dismissal orders granted on April 25, 2022 and secondly extension of time to file the Record of Appeal out of time and thirdly the Record of Appeal filed on July 5, 2022 to be deemed duly and properly filed.
4. The application is supported by the affidavit of Boniface Njiru an Advocate of the High Court of Kenya and Counsel for the Applicant.
5. The deponent states that the Record of Appeal was not filed as ordered by the Court because the proceedings from the lower Court file were not ready (availed). Secondly, that he was bereaved to the



June 17, 2022 having lost his mother and therefore unable to act for the Appellants; thirdly that the error / mistake should not be visited upon his client.

6. That the Respondents are harassing the Applicant's tenants in the suit premises and further that they want to execute the orders in the trial Court before the Appeal is heard and determined. That he has placed the Record of Appeal on record but without the proceedings from the lower Court.
7. The application is opposed by the Replying Affidavit sworn by Christine T Chesiyana sworn by the 1st Respondent on July 26, 2022. She termed the application an abuse of the process of the Court, not filed in good faith, an afterthought and a misuse of judicial process. The Applicant is enjoying protection from the Court hence the desire to delay the suit. That the Applicant's Advocate became bereaved 53 days after the orders of the Court and therefore had sufficient time to file the Record of Appeal. This application was served upon the Respondents fourteen (14) days after filing hence inordinately. The Record of Appeal does not comply with Order 42 rule 13(4) and Order 50 rule 6 & 7 of the *Civil Procedure Rules*. The Applicant has omitted the proceedings of the lower Court in the Record of Appeal and no explanation has been tendered for the same. That the Applicant is using the Court process to harass, intimidate, threaten, provoke and or interfere with the Respondent by blocking entry into the suit property, purporting to lease the property and deliberately misleading this Court. The Court was urged to disallow the application.
8. In a Further Affidavit sworn on July 18, 2022 the Applicant deponed that he applied for typed proceedings September 27, 2021 which proceedings and certified copy of the Ruling have not been availed. She annexed a letter dated the September 27, 2021 addressed to the Deputy Registrar – Kikuyu Law Courts requesting for the proceedings in the trial Court file. Handwritten proceedings were also enclosed therewith.
9. In her written submissions, the Applicant submitted that she was unable to file the Record of Appeal within 60 days as directed by the Court because the typed proceedings were not availed/not ready and secondly the advocate for the Applicant was bereaved on the June 17, 2022 having lost his mother who was buried on the July 2, 2022.
10. On whether the Court has discretion to extend time for the Applicant to file the Record of Appeal, the Applicant relied on the case of *Leo Sila Mutiso Vs Hellen Wangari Mwangi* HCC No 255 of 1997 (unreported) where the Court held that the decision to grant or not to grant extension of time is discretionary and in so exercising discretion the Court considers such factors as the length of the delay, the reason for the delay and the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent.
11. Similarly, the Court was referred to the cases of *Nicholas Kiptoo Korir Arap Salat Vs IEBC & 7 Others* (2014) eKLR; *CFC Stanbic Limited Vs John Maina Gitthaiga & Anor* (2013) eKLR; *Kamlesh Mansukhlal Damki Patni Vs. Director of Public Prosecution & 3 Others* (2015) eKLR to buttress the position.
12. Further the Court was urged to be guided by the provisions of Article 159 of the *Constitution* and Section 3A of the *Civil Procedure Act* and the principles of natural justice and allow the application. That the Applicant has given sufficient reason to allow the Court exercise discretion in her favour.
13. Relying on the case of *Tana & Athi Rivers Development Authority Vs Jeremiah Kimigbo Mwakio & 3 Others* (2015) eKLR, the Applicant urged the Court not to visit the mistake of Counsel on her.

Analysis and Determination

14. The key issue for determination is whether the application is merited.



15. Being aggrieved by the decision of the Hon Court in Kikuyu, the Applicant sought for orders for stay of execution inter alia. On April 25, 2022 the Court granted the application allowing the Applicant to file the appeal out of time but within 60 days which ended on the June 24, 2022.
16. The Applicant did not comply triggering this application. There are three reasons given by the Applicant for non-compliance with the orders of the Court; the typed proceedings were not obtained on time; the Applicant's Counsel was bereaved; the mistake of Counsel should not be visited on the Applicant.
17. With respect to the typed proceedings I have sighted a request by the Applicants Counsel dated the September 27, 2021 wherein the Applicant sought for the typed proceedings from the Deputy Registrar. It has not been explained why no steps have been taken to procure the typed proceedings given that they were sought a period of over one year ago. I have perused the file and save for handwritten proceedings placed on record by the Applicant the Record of Appeal remains incomplete. The record therefore does not comply with Order 42 rule 13(4) which require the Applicant to include pleadings in the Record of Appeal. Even if the Court was to consider the application, the Record of Appeal would still be incomplete.
18. The other reason proffered by the Applicant is that her Counsel was bereaved and therefore unable to comply with the orders of the Court. The deadline for compliance was the June 24, 2022. Counsel for the Applicant has stated in his affidavit that he was bereaved from the June 17, 2022, a mere 7 days before the deadline given by the Court to file the Record of Appeal. It has not been explained why the Applicant did not comply within the 53 days of the 60 day deadline. In as much as the Court sympathises with the bereavement of the Counsel for the Applicant, it is trite that it is the sufficiency of the explanation that opens the flow of discretion in favour of the Applicant. In this scenario the Court finds that saving the bereavement, the Applicant has not explained the delay and or failure to comply with the Court orders.
19. It is so common for litigants wishing to persuade the Court to grant orders to cite the phrase "mistake of Counsel should not be visited on a litigant." This Court in other matters has held that a litigant is enjoined by the provisions of Section 1A (3) of the *Civil Procedure Act* to further the overriding objectives in the administration of justice to inter alia comply with the directions and orders of the Court. In this case the Applicant's non-compliance has not been explained satisfactorily.
20. In the end I find that the application has no merit. It is dismissed with costs to the Respondents.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF JULY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Muriuki HB Njiru for Appellant

Mukoya for 1st and 2nd Respondents

Court Assistants – Phylis & Lilian

