



REPUBLIC OF KENYA



Mwangi alias Lydia Njeri Ndichu v Kibui & another (Environment and Land Appeal 102 of 2022) [2023] KEELC 18863 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 102 OF 2022**

JG KEMEI, J

JULY 13, 2023

BETWEEN

LYDIAH NJERI MWANGI ALIAS LYDIA NJERI NDICHU APPELLANT

AND

CECILIA WANJIRU KIBUI 1ST RESPONDENT

FLORENCE NYAMBURA MWANGI 2ND RESPONDENT

RULING

1. The Notice of Motion dated November 17, 2022 is brought under Section 79G, 78, 1A, 1B and 3A of the [Civil Procedure Act](#), the [Environment and Land Court Act](#) and Order 50 of the [Civil Procedure Rules](#).
2. In the main, the Applicant seeks two orders; preservative orders with respect to the suit land, Ruiru Kiu Block 2/4610 from any alienation, transferring, charging, disposal or whatsoever dealings pending the hearing and determination of the appeal. Secondly, orders to file an appeal out of time.
3. The Motion is supported by the reasons annexed thereto and the Supporting Affidavit of Lydiah Njeri Mwangi alias Lydiah Njeri Ndichu.
4. The Applicant depones that she is dissatisfied with the decision of the Hon Chief Magistrate delivered on June 8, 2021 in CMCC No 260 of 2015 between Lydiah Njeri Mwangi alias Lydiah Njeri Ndichu Vs Cecilia Wanjiru Kibui & Florence Nyambura Mwangi. That the suit in the trial Court was dismissed without any notification of the hearing date. That she is the lawful owner of the suit property and that she has a strong arguable appeal that discloses triable issues as to the ownership of the suit property. That the right in the suit property has been illegally and fraudulently dispossessed. Inter alia that subsequent applications made by her Advocate to remedy the dismissal orders were done behind her back and without her authority and signature. It is her case that actions of her Advocate were intended to cover up the errors and blunders in the prosecution of her suit.



5. That her previous Advocate gave reassurances that everything was fine until she visited the registry and discovered that her suit had been dismissed. She averred that she was indisposed and hospitalised with Covid related illnesses. That granting the orders will not occasion any hardship or prejudice to the Respondents. In addition, the Applicant pleads with the Court not to visit upon her the errors and blunders of her erstwhile Advocate. Similarly, that the right to be heard is a fundamental right that ought not be casually taken away from a litigant. In the interest of justice she urged the Court to allow her application.
6. The application is opposed by the Replying Affidavit of the 2nd Respondent sworn on December 1, 2022. In opposing the application, the 2nd Respondent contended that the signatures of the Applicant in the Verifying Affidavit attached to the Plaint, the Supporting Affidavit sworn on July 14, 2021, the Affidavit of December 23, 2021 and the Affidavit of November 17, 2022 in support of the current Motion are different and far contrasting. That this raises doubt as to whether the Applicant exists or whether this is a panthom appeal. That the situation is further supported by the Applicant's own insinuation that the application was filed without her authority and signature. In the event that the Applicant / litigant is non-existence, the Court was urged to dismiss the application.
7. With respect to the prayer of conservatory orders, 2nd Respondent states that she has no intention to dispose the property and therefore the grounds for seeking preservatory orders are misdirected. On the prayer to appeal out of time, the Respondent contends that the Applicant ought to file a proper or supplementary Record of Appeal containing all the essential and material pleadings as contained in the trial file, failure to which the application should be dismissed.
8. It is the 2nd Respondent's position that the Applicant has not produced sufficient reasons to justify filing the appeal out of time given that her case was filed way back in 2017. Inter alia, the Applicant failed to produce evidence or nature of illness or evidence of hospitalisation or that she was immobilized so much so that her ability to prosecute her case was curtailed. The Respondent maintains that the Applicant is an indolent litigant with no place in our justice system which demands that litigation must come to an end.
9. Further the 2nd Respondent contends that the Applicant's suit at the trial Court was dismissed on June 8, 2021 for want of prosecution following an unchallenged application by the 2nd Respondent. The application seeking dismissal of the suit for want of prosecution was served upon the Applicant's Advocate M/s Kirubi Mwangi Ben & Co Advocates on March 22, 2021 for hearing on June 8, 2021. The said Motion was acknowledged by the Applicant's Advocates. That the Applicant bore the responsibility to prosecute her case and she cannot lay blame on the door steps of the said Advocates.
10. In a Further Supplementary Affidavit sworn on December 15, 2022 the Applicant stated that conservatory orders are necessary to preserve the subject matter from interference by the 2nd Respondent given that she had previously charged the property to secure a bank loan from Equity Bank. In addition, that she has been unwell since 2017 todate and has enclosed weekly doctor's appointments in support. That when she was disposed she had entrusted the matter in Court to her husband and daughter with instructions to monitor the progress with her lawyers and report to her. She insists that service for the application for dismissal of the suit was premised on a suspect Affidavit of service and the mode of service was non-compliant with procedural law. That her lawyer and the lawyer's clerk gave her false reassurances that her case was proceeding on the right track.
11. The 1st Respondent filed an Affidavit sworn December 13, 2022 where she has by and large reiterated the Affidavit evidence of the 2nd Respondent where she supported the case of the Applicant and



maintained that the suit land belongs to the Applicant. She also reiterated the Affidavit evidence of the Applicant.

The written submissions

12. I have read and considered the written submissions of the parties filed by Nyende & Co Advocates for the Applicant and MD Mwaura Advocates for the 2nd Respondent respectively. The Court is grateful to the said Counsel for their highlights.

Analysis and determination

13. There are two issues for determination; whether the Applicant is entitled to leave to file the appeal out of time and secondly whether the Court should issue preservative orders over the suit land.

14. As to whether the Applicant should be allowed to file an appeal out of time, the Court is guided by the legal framework set out in para 79B of the [Civil Procedure Act](#) which states as follows;

' An 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.'

15. It is pertinently clear that leave to file an appeal out of time is a discretionary remedy. The parameters in which Courts are to exercise discretion was given in the case of *Shah Vs Mbogo [1967] EA 116 and 123B* where the Court had this to say –

' The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.'

16. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in [Thuita Mwangi Vs Kenya Airways Ltd \[2003\] eKLR](#). They include the following: The period of delay; the reason for the delay; the arguability of the appeal; the degree of prejudice which could be suffered by the if Respondent the extension is granted; the importance of compliance with time limits to the particular litigation or issue; and the effect if any on the administration of justice or public interest if any is involved.

17. In this case the suit was dismissed on the June 8, 2021 for want of prosecution. The Applicant claims that she was not served with the motion and the hearing notice. However her then advocate on record failed to attend the online hearing arising from mis-diarisation of the matter in their office. The Applicant pleaded with the Court not to visit the errors and mistakes of advocate on her. The other reason advanced was that she has been unwell since 2017 todate and she has annexed unchallenged doctor's appointments showing that she has been unwell.

18. The Court has no reason to disbelief her. The Court is satisfied that the Applicant has given sufficient reasons to allow the flow of discretion in her favour. The delay of about 16 months in the view is excusable and not inordinate in the circumstances of this case.



19. Further the 2nd Respondent alluded that she is in possession of the property and in addition there were no instances of prejudice or hardship that would be visited to the Respondent if the orders to file an appeal out of time are granted.
20. With respect to the conservatory orders, my reading of the 2nd Respondent's Affidavit is that she is not opposed to the said orders given that she appreciates that as long as the suit is pending she must observe the principles of *pente lite*. In the interest of justice and to preserve the substratum of the suit land, I grant status quo orders which are that the 2nd Respondent is in possession of the suit land and that no dealings should be registered on the title pending the hearing and determination of the appeal.
21. In the end the application is granted on terms;
 - a. The Applicant is granted leave to file appeal out of time. The Applicant to file and serve a comprehensive Record of Appeal within the next 60 days from the date hereof in default the orders shall lapse automatically.
 - b. Status quo be and is hereby ordered that no dealings on the title pending the hearing and determination of the appeal.
 - c. The Applicant to pay costs of the application in favour of the 2nd Respondent.
 - d. Thereafter the Applicant to list the appeal for directions before the Court in an expeditious manner.
22. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF JULY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Nyende for Appellant

1st and 2nd Respondents – Absent – present when Ruling date was taken.

Court Assistant – Phyllis

