



**Mwatu v Ngumbao & another (Environment and Land Appeal
E006 of 2023) [2023] KEELC 20738 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E006 OF 2023
SM KIBUNJA, J
OCTOBER 18, 2023**

BETWEEN

KAVATA MULI MWATU APPELLANT

AND

KHAMIS NGUMBAO 1ST RESPONDENT

AGNES MWANGI 2ND RESPONDENT

*(Appeal against the judgement of Hon. M. Nabibya PM delivered in CM ELC No. 15 of 2018
Kavata Muli Mwatu v Khamis Ngumbao and Agnes Mwangi delivered on 27th October 2022)*

RULING

[NOTICE OF MOTION DATED 2ND FEBRUARY 2023 AND NOTICE OF PRELIMINARY
OBJECTION DATED 20TH FEBRUARY 2023]

1. The appellant moved the court through the application dated February 2, 2023 that is brought under Section 75G of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#). The orders sought therein are:
 - a. That the appellant be granted leave to appeal out of time against the judgement delivered on October 27, 2022 by Hon. M Nabibya (Principal Magistrate).
 - b. That the Memorandum of Appeal annexed to the motion be deemed as duly filed and served.
 - c. That the costs of this application be provided for.
2. The application is premised on nine (9) grounds on its face and is supported by the affidavit of Simon P. M. Mutugi, Advocate for the appellant, sworn on the February 2, 2023 in which he inter alia deposed that after the judgement was delivered in CMELC 15 of 2018 on October 27, 2022 by Hon Nabibya,



his firm wrote to the court the letter dated October 31, 2022, and served upon the respondents counsel, requesting for certified copies of the said judgement and proceedings for the purpose of filing an appeal. He further deponed that his firm's clerk one Mr. Kilonzo failed to retrieve the said certified copies until January 2023 when the firm proceeded to file their memorandum of appeal on 26th January 2023. The advocate argued that the appellant is still interested in pursuing the appeal and urged court to extend the time for filing the appeal in the interest of justice.

3. The application is opposed by the 1st respondent through the six (6) grounds on the Notice of Preliminary Objection dated February 20, 2023 that:
 1. Judgement of the Principal Magistrate court in CMC-ELC No. 15 of 2018 was delivered on October 27, 2022.
 2. The application is fatally defective because it does not comply with Section 79G of the *Civil Procedure Act*.
 3. The appellant's appeal No. 6 of 2023 was filed on January 26, 2023 and served upon the respondent's advocate on January 27, 2023.
 4. The applicant's application dated February 2, 2023 and filed in court on the same day is brought under the wrong section/orders of the law.
 5. The appellant's memorandum of appeal dated January 25, 2023 was filed in court on January 26, 2023 without leave of the court,
 6. The application dated February 2, 2023 is an afterthought and lacks merit and the same should be dismissed with costs to the 1st respondent.
4. The matter was mentioned on the February 22, 2023 when counsel agreed to have the application and preliminary objection canvassed together through written submissions to be filed and exchanged within the given timelines. The learned counsel for the appellant and 1st respondent filed their submissions dated the May 9, 2023 and March 20, 2023 respectively which the court has considered.
5. The issues before the court for determinations are as follows:
 - a. Whether the Notice of Preliminary Objection dated February 20, 2023 raises pure points of law and is merited.
 - b. Whether the court ought to grant leave to the appellant to file the appeal out of time and whether the memorandum of appeal filed out of time should be declared as duly filed.
 - c. Who ought to bear the costs of the application and preliminary objection?
6. The court has after considering the grounds on the application, grounds of opposition, submissions by the learned counsel, superior courts decisions cited thereon come to the following determinations;
 - a. The notice of preliminary objection dated the February 20, 2023, and filed by the 1st respondent sets out six grounds. Ground number 1, and 3 merely restates the date the judgement was delivered and the date of filing and serving the appeal respectively. Though the two grounds are set out in the notice of preliminary objection, it is unclear how they can fit in the definition of the grounds capable of determining the application and or appeal herein. Grounds 2, 4, 5, and 6 are on complying with section 79G, whether or not application is brought under the wrong provisions of the law/order, whether the Memorandum of



Appeal was filed without leave, whether the application is an afterthought and without merit respectively are matters that need to be ascertained before the court can make determinations thereof. It is trite law that what constitutes a worthwhile Preliminary Objection, should meet the criteria set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Limited* (1969) EA. 696 is very clear. LAW J.A on page 700 where it was stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit.” Sir Charles Newbold P, on page 701 observed that “The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

The Preliminary objection raised by the 1st respondent is incapable of disposing the matter preliminarily, without the court having to consider and ascertain the facts from elsewhere. The points raised in the preliminary objection require the parties’ active participation for and against, before the court can ascertain them one way or the other. The said grounds do not raise pure points of law and in my view, they are more like grounds of opposition where facts can be raised as a response to the application. Therefore, the preliminary objection as raised by the 1st respondent do not meet the criteria set out in *Mukisa Biscuit* [supra] and fails in their entirety.

b. On the application dated 2nd February 2023, the counsel for the 1st respondent in their submissions dated 20th March 2023, submitted that the appellant’s memorandum of appeal was filed over 69 days after judgement, and without leave of court. Counsel made reference to Section 79G of the [Civil Procedure Act](#) and argued that an application to file an appeal out of time cannot be filed on appeal which has already been filed without leave of the court. Counsel for the appellant on the other hand, submitted that the delay in filing the appeal was not unreasonable and urged the court to allow the application in the interest of justice, so as to enable the appellant to argue his appeal which was said to be arguable on issues which this appellate court ought to pronounce itself on.

c. Section 79G of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya provides 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 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.”

The appellant has submitted that the judgement was delivered on October 27, 2022, and the law allowed him 30 days within which to file an appeal. His counsel did a letter dated October



31, 2022 to the trial court requesting for certified copies of the judgement and proceedings. The letter was received by the court on November 4, 2022. The counsel for the appellant, Mr Mutugi, deposed that he was only able to get the typed proceedings in January 2023, and blamed the delay in following up on the certified copies on his clerk, one Mr. Kilonzo. Counsel then filed a memorandum of appeal on January 26, 2023 without leave of court, and this application on February 2, 2023 seeking leave to file the appeal out of time. The Court of Appeal in *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR held,

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

The judgement sought to be challenged was delivered on October 27, 2022. The appellant ought to have filed a memorandum of appeal on or about November 26, 2022 to be within the 30 days window. The application herein was filed on February 2, 2023, which is about four months later.

- d. The claim by the appellant that he was unable to file the appeal on time because there was a delay in securing certified copies of proceedings and judgment is not reasonable at all, as a party can file a memorandum of appeal without obtaining the said documents first. All a party would require is opportunity to peruse the judgment and craft grounds of appeal which can be amended later when filing the Record of Appeal. Counsel for the appellant was represented when the judgement was delivered by the trial court on October 27, 2022, and therefore they ought to have perused the court file and ensured that a Memorandum of Appeal was filed within 30 days as required by the law. The appeal filed herein without leave and without having been contemporaneously with an application for leave to file it out of time or to deem the appeal as properly filed is improperly before the court. The Memorandum of Appeal dated the January 25, 2023 and filed on that same date is hereby struck out.
 - e. That as the Applicant has indicated interest to file an appeal by filing the application dated February 2, 2023, and there is nothing presented to show that the respondents will stand to suffer any prejudice if the appellant is granted leave to file the appeal out of time prayer [1] of the notice of motion is granted. The inconvenience suffered by the respondent of having to oppose this application can be remedied by an award of costs.
 - f. That as the applicant is sorely to blame for failure to file the appeal in time, then he will pay the respondents’ costs in this application notwithstanding the provision of section 27 of the *Civil Procedure Act*.
7. The court therefore finds and orders as follows on the notice of motion dated the February 2, 2023 and notice of preliminary objection dated the February 20, 2023:
- a. The 1st respondent’s preliminary objection do not raise pure points of law and is hereby rejected with no order as to costs.



- b. The Notice of Motion dated the February 2, 2023 be and is hereby allowed in terms of prayer (1).
- c. The Memorandum of Appeal herein dated and filed on the January 25, 2023 be and is hereby struck out with no order as to costs.
- d. The appellant shall file and serve his Memorandum of Appeal and the Record of Appeal strictly within thirty (30) days from the date hereof, and in default the leave granted shall lapse automatically.
- e. The costs of this application shall be met by the appellant.
- f. The matter be fixed for pretrial conference after thirty (30) days.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 18TH DAY OF OCTOBER 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPELLANT/APPLICANT : Mr Mutugi

RESPONDENTS : M/s Arika and Ngigi for 1st and 2nd Respondents respectively.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

