



**Wambua (Legal representative of the Estate of Mutwiwa Wambua) v
Mwololo & 2 others (Environment and Land Miscellaneous Application
10 of 2022) [2023] KEELC 20930 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 10 OF 2022
TW MURIGI, J
OCTOBER 18, 2023**

BETWEEN

**MINDO WAMBUA (LEGAL REPRESENTATIVE OF THE ESTATE OF
MUTWIWA WAMBUA) APPELLANT**

AND

SERAH MWOLOLO 1ST RESPONDENT

STEPHEN KYENGO WAMBUA 2ND RESPONDENT

MWOLOLO WAMBUA 3RD RESPONDENT

(Application to file an appeal out of time against the Judgment in Kilungu ELC No. 31 of 2018; Serah Mwololo & 3 others vs Mutwiwa Wambua delivered on 18th August, 2022.)

RULING

1. By a Notice of Motion dated October 31, 2022, brought under Section 79G and 95 of the [Civil Procedure Act](#) and Order 50 rule 5 of the [Civil Procedure Rules](#), the Applicant seeks for the following orders:-
 1. That leave be granted to the Applicant to file an appeal out of time with respect to Kilungu ELC No. 31 of 2018; Serah Mwololo & 3 others vs Mutwiwa Wambua.
 2. That the annexed Memorandum of Appeal be deemed as duly filed and served upon payment of the requisite fees.
 3. THAT the costs of this application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Mino Wambua sworn on even date.



The Applicant's Case

3. The Applicant averred that she is aggrieved by the judgment of the Subordinate Court delivered on 18th August, 2022 and wishes to appeal against the same.
4. She further averred that her Advocate received a copy of the judgment on 27/10/2022 after the time to lodge an appeal had run out. She argued that she has an arguable appeal with high chances of success. She contended that the Respondent will not suffer any prejudice if the orders sought are granted.

The 1st and 2nd Respondents Case

5. The 1st and 2nd Respondents opposed the application through their replying affidavit sworn on 28th May, 2022. The Respondents averred that the application is an abuse of the court process and as such it ought to be dismissed with costs. They argued that the Applicant has not explained the reason for the delay in paying and collecting the judgment from the lower court. They contended that they will be prejudiced if the orders sought are granted. The Respondents asserted that the Applicant has been indolent in prosecuting this application and had approached the court with unclean hands.
6. The application was canvassed by way of written submissions.
7. The Applicant filed his submissions on 17th of February, 2022 while the Respondents submissions were filed on 4th May, 2023 which I have duly considered.

Analysis and Determination

8. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant should be granted leave to file the Appeal out of time.
9. Section 79G of the *Civil Procedure Act* outlines the time within which an appeal ought to be filed to the High Court from a Subordinate Court. The law 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.
10. Section 95 of the *Civil Procedure Act* goes on to state as follows;

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.
11. It is not in dispute that the Judgment in Kilungu ELC Case No. 31 of 2018 was entered against the Applicant on 18th August, 2022. The said Judgment was not appealed within the statutory period.
12. Nonetheless, this Court has unfettered discretion under the proviso to Section 79G to admit an appeal which has been filed out of time provided that sufficient cause has been demonstrated.



13. The considerations to be made when deciding upon such an application were set out by the Court of Appeal in the case of *Edith Gichugu Koine Vs Stephen Njagi Thoithi* [2014] eKLR:-

“There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others –See *Fakir Mohamed Vs Joseph Mugambi & 2 Others*, Civil Application No. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

14. This was the same view expressed by the Court of Appeal earlier in the case of *Thuita Mwangi Vs Kenya Airways Ltd* [2003] eKLR where the Court held as follows: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

15. From the foregoing, it is clear that in an application to file an appeal out of time, an Applicant must explain:-
- i. The length of the delay.
 - ii. The reason for the delay.
 - iii. The chances of the appeal succeeding.
 - iv. The degree of prejudice to the Respondent if the application is granted.

The Length of the Delay

16. In the present matter, judgment was delivered on 18th August, 2022. The Appeal ought to have been filed before the expiry of thirty days which means as at 18th September, 2022.
17. The application herein is dated 31st October, 2022 which is slightly less than two months since the last date when the appeal should have been filed. The stated length of delay is not inordinate.

The Reasons for the Delay

18. The Applicant averred that the delay in filing the appeal was due to the inability to obtain the judgment and proceedings within the time required for filing the appeal. In his supporting affidavit the Applicant



annexed a letter dated 18/08/2022 requesting for a certified copy of the judgment (annexure MW2a) and the payment receipt thereof (MW2b). From the Applicant's supporting affidavit, I am satisfied that the Applicant has given a reasonable explanation for the delay in lodging the appeal on time.

Chances of the Appeal Succeeding

19. The Applicant has annexed a draft memorandum of appeal in his supporting affidavit to demonstrate his willingness and intention of appealing the impugned judgment.
20. In the case of *Samuel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi & Another* [2018] eKLR, the Court held as flows: -

“Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. 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.”

The Degree of prejudice likely to be suffered by the Respondent If The Order Sought Is Granted

21. On the prejudice that is likely to be suffered by the Respondent if an appeal is filed out of time, there has been no demonstration that it cannot be adequately compensated by costs. The Court in *George Kianda & Another Vs Judith Katumbi Kathenge & Another* (2018) eKLR aptly held as follows: -

“The Respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd Vs. Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.”

22. Going by the above considerations, it is clear that the Applicant has sufficiently demonstrated merit in the application for enlargement of time for filing an appeal.
23. The upshot of the foregoing is that the application dated October 31, 2022 is allowed in the following terms:-
 1. The Applicant is hereby granted leave to appeal out of time against the Judgment and decree issued on August 18, 2022 by Hon. E.M. Muiru (PM) in Kilungu ELC No. 31 of 2018.
 2. The Applicant is granted 14 days leave to file and serve the memorandum of appeal.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF OCTOBER, 2023.

In the presence of:-



Mr. Munyasya for the Respondent.

Ms Nzilani for the Applicant.

