



REPUBLIC OF KENYA



**Gathura v Ngethe & another (Environment & Land Case 229 of 2012)  
[2023] KEELC 21797 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21797 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 229 OF 2012  
A OMBWAYO, J  
NOVEMBER 23, 2023**

**BETWEEN**

**JAMES MWANGI GATHURA ..... PLAINTIFF**

**AND**

**ANNE WANJIKU NGETHE ..... 1<sup>ST</sup> DEFENDANT**

**DENNIS KARIUKI KINUTHIA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the defendants Notice of Motion application dated 25<sup>th</sup> October 2023 which is expressed to be brought under Order 50 rule 6 of the *Civil Procedure Rules*, Sections 3A, 66 and 95 of the *Civil Procedure Act* and Article 159(2) of the *Constitution* of Kenya.
2. The application seeks the following orders;
  - a. That this honourable court be pleased to extend and/or enlarge the time within which to file an appeal against the judgement of the Honourable A.O Ombwayo delivered on 22<sup>nd</sup> September 2023 in Nakuru ELC No. 229 of 2012.
  - b. That the proposed appellant be granted leave to appeal out of time against the whole judgement of Honourable A. O Ombwayo delivered on 22<sup>nd</sup> September 2023 in Nakuru ELC No. 229 of 2012.
  - c. That the Notice of Appeal annexed hereto be deemed as properly filed and served.
  - d. That costs of this application be provided for.
3. The grounds on the face of the application are that the proposed appellants were aggrieved by the judgement delivered in the present matter on 22<sup>nd</sup> September 2023. That they are now seeking for leave to appeal against the said decision. That the prescribed statutory period within which to file an



appeal had lapsed. That the delay in filing the appeal was not inordinate. That the proposed appeal is meritorious with a high probability of success and that the respondent would not be prejudiced in any way if the orders sought herein are granted.

4. The application is supported by the affidavit of Peter Chege counsel for the defendants sworn on October 25, 2023. He deposed that the plaintiff commenced the proceedings herein seeking to be declared to have acquired land parcel No's Kiambogo/Kiambogo Block 2/405, Kiambogo/Kiambogo Block 2/16733 and Kiambogo/Kiambogo Block 2/16734. That the court in its judgement held that the plaintiff had acquired interest in the said properties and directed that the defendants titles be cancelled and the same be registered in his name. That the defendants being dissatisfied with the said judgement are desirous to appeal on the same but the statutory period within which to appeal has already lapsed. That the failure to file the appeal within time was occasioned by his absence from the station due to some official matters that he had to attend to. That it was upon him coming back that he realised that the period within which to file the appeal had lapsed. That he promptly procured the said judgement in preparation for the memorandum of appeal. That the delay in filing the appeal was not inordinate but was rather excusable and that it is in the interest of justice that the court grants leave for the defendants to appeal out of time. That the court can also in the interest of justice deem as properly filed the Notice of Appeal dated 11<sup>th</sup> October 2023.
5. The plaintiff filed a replying affidavit sworn on 31<sup>st</sup> October, 2023 on 3<sup>rd</sup> November, 2023. He deposed that he has been advised by his advocates on record that once the court delivered its judgement on 22<sup>nd</sup> September, 2023 it became *functus officio*.
6. He also deposed that this court does not have the jurisdiction to extend time for filing an appeal to the court of appeal out of time. That it is the Court of Appeal that has the jurisdiction to grant the said orders under rule 4 of the [Court of Appeal Rules](#). That judgement was delivered in the presence of the parties and so the defendants had sufficient time to make a decision on preferring an appeal. That before the court extends time to file an appeal, the applicant must explain the reasons for the delay. That the defendants counsel attributed the delay to official matters which matters were not explained.
7. He deposed that the defendants have not applied for certified copies of proceedings as required under the provisions of Rule 82 of the [rules of the court of appeal](#) and therefore when the matter comes up for ruling on 23<sup>rd</sup> November 2023, the time for filing an appeal would have lapsed. He then sought that the court declines to allow the present application and direct that the defendants sign the transfer documents within seven days failure to which the documents be executed by the Deputy Registrar.
8. The Plaintiff also filed a notice of preliminary objection dated 1<sup>st</sup> November, 2023 on 3<sup>rd</sup> November 2023. The grounds on the face of the preliminary objection are as follows;
  1. That the jurisdiction to extend time within which to lodge an appeal out of time is the preserve of the court of appeal under rule 4 of the [rules of the court](#).
  2. That to the extent that this application invokes the jurisdiction which is reserved for the court of appeal, the court lacks jurisdiction and the application ought to be struck out with costs.

## Submissions

9. The plaintiff filed his submissions on 1<sup>st</sup> November 2023 while the defendants did not file any submissions.
10. The plaintiff relied on rules 2 and 4 of the court of appeal rules and submitted that the jurisdiction to extend time for filing a notice of appeal was the preserve of the court of appeal. It was the plaintiff's submissions that without prejudice to the foregoing, the defendants' application lacks merit as the



jurisdiction to extend time is discretionary. The plaintiff relied on the cases of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and submitted that the defendants have to explain the reason for the delay which was not done. The plaintiff then sought that the defendants' application be dismissed with costs.

### **Analysis And Determination**

11. After considering the application, the responses thereto and the submissions, the following issues arise for determination;
  - a. Whether the plaintiff's preliminary objection dated 1<sup>st</sup> November 2023 has merit.
  - b. Whether the court should grant the defendants leave to file an appeal out of time.
  - c. Who should bear the costs of the suit.

#### **a. Whether The Plaintiff's Preliminary Objection Dated 1st November 2023 Has Merit.**

12. In *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696. Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows on what constitutes a competent preliminary objection:

Law, J.A.:

So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Newbold, P.:

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 the 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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”

13. The Court of Appeal in the case of *Nitin Properties Ltd v. Singh Kalsi & another* [1995] eKLR further held as follows:

A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the 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.”

14. The Supreme Court in the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No. 10 of 2013 [2014] eKLR held thus:

a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”



15. The plaintiff's preliminary objection is premised on the grounds that this court does not have the jurisdiction to extend time to lodge an appeal out of time. The plaintiff argues that the jurisdiction to extend time to file an appeal is the preserve of the court of appeal.
16. The court in the case of *Loise Chemutai Ngurule & another v Wilfred Leshwari Kimung'en & 2 others* [2015] eKLR held as follows;
  11. It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of *Simon Towett Martim v Jotham Muiruri Kibaru*, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004)eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to the Court of Appeal to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.
  12. With respect I disagree with the above decision. Section 7 of the *Appellate Jurisdiction Act*, Cap 9, is drawn as follows :-
    - S. 7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:
      - to extend time Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.
  13. It will be seen from the above that section 7 is explicit, that the High Court (which now in light of the *Constitution* of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.
  14. Neither am I of the view that there is any conflict between the above provision and the provisions in the *Court of Appeal Rules*, rule 4 of the *Court of Appeal Rules* also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned.” (emphasis mine)
17. As was held in the above matter, this court has the jurisdiction to extend time for filing of a notice of appeal and therefore the plaintiff's preliminary objection dated 1<sup>st</sup> November 2023 lacks merit and is hereby dismissed.

**b. Whether the court should grant the defendants leave to file an appeal out of time.**

18. The defendants are seeking for leave to file their Notice of Appeal out of time on the ground that the delay to file the Notice of Appeal was occasioned by their counsel's absence from the station due to some official matters that he had travelled to attend to.
19. The plaintiff in response argues that the defendant's counsel has not disclosed the nature of the said official matters that he was addressing and so the orders sought should not be granted.



20. The court in *Clemensia Nyanchoka Kinaro v Joyce Nyansiaboka Onchomba* [2021] eKLR cited with approval the holding in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported) where it was held as follows;

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”.

The court further noted that:

The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the *Court of Appeal Rules* (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered...”

21. A perusal of the court record indicates that judgement was delivered on 22<sup>nd</sup> September 2023 in the presence of counsel for the plaintiff while Mr Chelangat held brief for Mr Chege for the defendants. It is clear that during the delivery of judgement in this matter, counsel for the defendants was represented in court.
22. The application under consideration was filed on 23<sup>rd</sup> October 2023 thirty days after judgement had been delivered and sixteen days after the expiry of the period for lodging the Notice of Appeal.
23. As aforementioned, the defendants are seeking for leave to file a notice of appeal out of time on the ground that their counsel was out of station due to some official matters that he had travelled to attend to. The plaintiff argues that the defendants’ application should not be granted since the nature of the said official business counsel for the defendants was engaged in was not disclosed.
24. I agree with the arguments of the plaintiff that counsel has not explained the nature of the alleged official business that he had to travel to attend to which led to the failure to file the Notice of Appeal within time. However, it is in the interest of justice and fairness that the defendants be allowed to file their Notice of Appeal out of time because the mistake of counsel should not be visited on the party. Moreover, the delay is not inordinate consequently, the defendants’ application dated 25<sup>th</sup> October 2023 is allowed. Costs of the application in the appeal.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY ON THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023**

**A.O.OMBWAYO**

**JUDGE**

