



**Kimani v Kamanja & another (Environment and Land Miscellaneous Application
26 of 2022) [2023] KEELC 22563 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 26 OF 2022
A KANIARU, J
NOVEMBER 20, 2023**

BETWEEN

VIRGINIA GICUKU KIMANI APPLICANT

AND

NDWIGA KAMANJA 1ST RESPONDENT

EPHATUS GICHOHI 2ND RESPONDENT

RULING

1. I am called upon to determine a motion on notice dated 23.09.2022 and filed on 5.10.2022. It is expressed to be brought under Section 79(g), 3A, 1A, 1B of the *Civil Procedure Act* and all enabling laws. The applicant – Virginia Gicuku Kimani – was the plaintiff in the lower court suit while the respondents – Ndwiga Kamanja and Ephatus Gichohi – were the 1st and 2nd Defendants respectively. It is essentially an application for leave to appeal out of time against the lower court’s judgement. The prayers sought are as follows:
 - a. That this Honourable court be pleased to grant the applicant leave to appeal out of time against the judgement of Hon. H. Nyakweba Senior Principal Magistrate delivered on 31st March 2022 in Embu ELC No. 113 of 2018.
 - b. That costs be in the cause.
2. The motion is premised on the grounds inter alia, that the judgment was delivered on 31.3.2022 against the applicant and her case was dismissed with costs to the respondents herein. That being aggrieved by the judgement, she applied for the typed judgement to enable her file the appeal, which judgment she received but, being sick and old, she was not able to instruct her advocate to file the appeal on time. She also said that there was lack of funds. She said that she has now instructed her advocate but time for filing the appeal has lapsed. She says that the delay in filing the appeal on time was not deliberate and she now seeks leave to file it out of time.



3. The application came with a supporting affidavit in which the applicant reiterated the averments in the motion and attached a copy of the disputed judgement as well as draft memorandum of appeal.
4. The motion was responded to vide replying affidavits dated 31.1.2023 and filed on 9.2.2023. They were drawn by the 1st and 2nd Respondents - Ndwiga Kamanja and Ephantus Gichohi. They deposed, *inter alia*, that the Applicant's application is vexatious, an afterthought and has been overtaken by events. They deposed further that the applicant should not be granted leave to appeal out of time since after the conclusion of the matter, she went to sleep instead of following the legal procedure of filing the appeal on time. She was said to be wasting the court's time. They averred that they have learnt from a reliable source that the said applicant is out to punish them because she has no interest in the matter. They urged that the applicant's application is bad in law; that the cause of action is malicious; and that it will cause them to suffer irreparable loss and damage. Further it will cause them and their families to remain landless. Ultimately, they urged the court to dismiss the application with costs.
5. The application was canvassed through written submissions. The applicant's submissions were filed on 22.5.2023, while the Respondents both filed their submissions on 3.4.2023.
6. I have considered the motion, the response made to it, and the rival submissions. The issue for determination is whether the court should allow the applicant to file an appeal out of time.
7. Section 79G of the [Civil Procedure Act](#) is the operative provision in answering the question whether the prayer to enlarge time to file an appeal is merited. Section 79G of the [Civil Procedure Act](#) provides that:

“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.”
8. Section 95 of the same [Act](#) also grants this court the power to enlarge the time to do a certain act prescribed or allowed by the same Act and provides thus:-

“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.”
9. From Section 79(G) above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time at the discretion of the court. Some of the factors that aid courts in exercising the discretion whether to extend time to file an appeal out of time were laid out in the case of [Edith Gichungu Koine vs Stephen Njagi Thoithi](#) [2014] eKLR as quoted in [Stecol Corporation Limited v Susan Awuor Mudemb](#) [2021] eKLR. It was stated thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.” Emphasis mine.
10. The judgment in this case was delivered on 31.3.2022 while the present application was filed on 5.10.2022, six (6) months from the 30 day period stipulated in the Act for bringing appeals. The



appellant has submitted that the delay was occasioned by her being old and sick and her inability to raise funds to instruct her advocate to file the appeal on time. It seems to me that the delay, though inordinate, has been sufficiently explained by the applicant and may be excusable in the circumstances.

11. But my reading of the lower court judgement exposes to me a crucial factor which outweighs the reasons given for the delay. The factor is this: The applicant herein filed the lower court case without the requisite grant to represent the estate of her deceased husband. The land in dispute was owned by her late husband. One of the prayers in her suit in the lower court was that the register of ownership at the land's office be cancelled with a view to having the title revert back to the names of her deceased husband.
12. The judgement captures well that the real beneficiaries of the estate of the applicants late husband were in the process of getting letters of Administration. This obviously suggest that no grant had been issued in respect of that estate. The judgement also captured well the applicants testimony before the trial court stating clearly that succession had not yet been done.
13. While making its decision the trial court made this crucial observation:

“The plaintiff brings this suit claiming L.R. Nos Gaturi/Githimu/4048 & 4046 from the defendants on behalf of Ileri Kamanja (deceased) but she has not obtained any Grant of Letter of Administration *Ad Litem*.”

Flowing from this observation another related observation was made as follows:

“... the first issue for determination is whether the plaintiff has the necessary “*Locus standi*” to sustain this action. The only answer is no. this finding alone is sufficient to determine this suit.”

14. It appears to me plain that the applicant herein had no grant giving her the requisite legal capacity, or *Locus standi* if you like, to file the suit in the lower court. I have looked at the draft memorandum of Appeal that came with the application now before me. There is a ground faulting the trial court, for finding that the applicant had no *Locus standi* to file the suit in that court.
15. At this stage, I think it is necessary for me to state what the court would expect of an application like the one before the court where the judgement sought to be appealed against is premised on points of law that are formidable and therefore difficult to surmount. In [*Trade Bank Ltd \(in Liquidation\) vs L.Z. Engineering Construction Company Ltd & others*](#): Civil Application No. 282 of 1998, Nairobi [1997] KLR 846 (CAK) the court was very clear that in an application for extension of time, pleadings and judgement must be placed before the judge to show that he is not extending time for the filing of a frivolous appeal to the prejudice of the respondents.
16. It is necessary to make available the pleadings, judgement and other documents necessary because as observed by the Supreme Court in [*Mwambora & 9 others vs Spire Properties \(K\) Limited & 50 others*](#): Petition (Application) 27 [E031] of 2022: KESC 12 (KLR) (Civ) (17th February) (Ruling), the extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. The party seeking extension has a burden of laying a basis to the satisfaction of the court.
17. The lower court was clear in its judgment that a suit relating to the estate of a deceased person was filed before it and heard without the party filing it – referring to the applicant herein – making available the requisite grant to demonstrate *Locus standi*. In my view, the court stated the legal position correctly. I think I need to elaborate: In [*Nathaniel O. Khisa vs Mary Khisa Nyanyi & 3 others*](#) [2013] eKLR, the



suit was struck out because the plaintiff had not obtained letters of administration. In *Troustik Union International and Ingrid Ursula Heinz vs Mrs Jane Mbeyu & Mrs Alice Mbeyu*: CA No. 145 of 1990, the Court of Appeal expressed itself as follows:

“The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception.”

18. In my view, the application before me need to have as an annexure any grant that the applicant may have had before she filed her case in the lower court. If that had been done, the court would be prima facie persuaded that the intended appeal is at least arguable. That however was not done and the court is not therefore persuaded that the appeal intended to be filed is not frivolous.
19. I hold the view therefore that the merits of the application before me have not been demonstrated and I dismiss the same with costs to the respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20TH DAY OF NOVEMBER, 2023.

A.K. KANIARU

JUDGE

In the presence of M/s Wamatu for M/s Muthoni Ndeke for Applicant and Respondents present in person.

Court assistant: Leadys

Interpretation: English/Kiswahili

