



REPUBLIC OF KENYA



**Mwani v Masha (Miscellaneous Application E007 of 2023)  
[2023] KEELC 21690 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21690 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS APPLICATION E007 OF 2023  
EK MAKORI, J  
NOVEMBER 16, 2023**

**BETWEEN**

**ALFRED KAZUNGU MWANI ..... APPELLANT**

**AND**

**CHRISPAS CHENGO MASHA ..... RESPONDENT**

**RULING**

1. Hon E.K Usui delivered a judgment in Malindi ELC Case No. 32 of 2018. It is dated 26<sup>th</sup> July 2022 compelling Plaintiff to hand over to Defendant all ownership documents which included the Deed Plan, Transfer, and Title Deed to facilitate the transfer of the suit property to Defendant's name. Costs of the suit and counterclaim decreed in favour of the Defendant in the primary suit.
2. Dissatisfied with the judgment, the Applicant (Plaintiff in the primary suit) has approached this court seeking that:-
  - i. The court grants leave to appeal out of time.
  - ii. The court stays execution of the lower court Judgment and decree emanating therefrom.
  - iii. Costs of the application be provided for.
3. There is a Supporting Affidavit deposited on 8<sup>th</sup> February, 2023.
4. The Respondent (Defendant in the primary suit), has opposed the application. There is a replying affidavit deposited by the Respondent dated 22<sup>nd</sup> May 2023.
5. The Applicant (Interested Appellant) aver that there was a delay in obtaining copies of the typed proceedings and judgment. The Respondent intends to commence execution hence stay is necessary.



6. The Respondent contended that the Applicant has not attached a letter to show that proceedings were requested and the delay was occasioned by the court. Besides, there is no certificate of delay attached. From 26<sup>th</sup> August 2022, the Applicant had all the time to get copies of the proceedings and judgment.
7. The issue for determination in this matter is whether this court should extend the time within which to appeal.
8. The principles applicable in cases of this nature are as laid in the case of *Mombasa County Government v Kenya Ferry Service & Another* [2019] eKLR where the court set out the seven underlying principles for enlargement of time to be granted within which to appeal as follows:

“Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]”

9. In this particular matter, the applicant has stated that there was a delay in obtaining proceedings. That is the central ground in seeking to have time extended within which to appeal. In the *County Government of Mombasa Case* (supra), the Court held that:

“Further, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court emphasized the need for the Applicant, in an application for extension of time, to satisfactorily declare and explain the



whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:

“ [24] a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.” [emphasis added]

[27] In the present case, we note there is no certificate of delay from the Deputy Registrar of the Court of Appeal. Further, we note that the Applicant has not annexed the typed proceedings and the decree to confirm that the same were obtained on 28<sup>th</sup> June 2018 and 5<sup>th</sup> July, 2018 respectively.”

10. That is the same scenario we have here the Applicant has attached nothing to support the delay in the procurement of proceedings, not even a letter requesting the same. No certificate of delay. I also do not see a Memorandum of Appeal annexed. What is attached is the judgment delivered by the Honourable Magistrate.

11. The Notice of Motion dated 8<sup>th</sup> February 2022 is undecorated, it lacks in merit and is hereby dismissed with costs to the Respondent.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**E. K. MAKORI**

**JUDGE**

In the absence of:

Parties- who were aware of the same. A copy of the ruling be electronically transmitted to them.

