



Oisebe v Kenya Women Finance Trust Bank & 3 others (Miscellaneous Application 5 of 2023) [2023] KEELC 22390 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
MISCELLANEOUS APPLICATION 5 OF 2023**

M SILA, J

DECEMBER 13, 2023

BETWEEN

OSOSI VINCENT OISEBE APPLICANT

AND

KENYA WOMEN FINANCE TRUST BANK 1ST RESPONDENT

CENTRAL BANK OF KENYA 2ND RESPONDENT

KERATI AUCTIONEERS 3RD RESPONDENT

NELSON OISEBE 4TH RESPONDENT

RULING

1. The application before me is that dated 14 February 2023 and filed on 15 February 2023. The applicant seeks an extension of time to file an appeal out of time from a ruling delivered on 13 December 2022 in the suit Kisii CMCC (ELC) No. 140 of 2021. That ruling allowed a preliminary objection raised by the 1st respondent which led to the dismissal of the suit of the applicant. I have limited material before me, but from what I can see, the 1st respondent had raised issue that the suit was res judicata, which was accepted by the court hence the ruling dismissing the suit of the applicant. In this application, the applicant avers that he was not in court when the ruling was delivered. He deposes that on 16 December 2022, he communicated with his advocate and a letter was written applying for the ruling and proceedings. He avers that the mistake in not filing appeal in time was occasioned by failure of communication by the Chief Magistrate's Clerk, through email to his advocate on the same date of delivery of the ruling, which mistake was inadvertent and he begs to be excused. He avers that his suit is a land matter, and he also questions what he refers to as exorbitant interest rates charged by the 1st defendant, and that it would be in the interest of justice if his application is allowed.
2. The 4th respondent filed a replying affidavit which supports the application. He avers that he and the applicant are the joint registered proprietors of the suit land which they gave as security to the 1st



respondent. He avers that they cleared the loan, and according to him, they have no balance. He deposes that the lower court file was being typed which led to the late filing of the appeal and the mistake should not be visited upon the applicant. He has also added that the applicant's advocate inadvertently forgot to inform him (applicant) when the matter was coming up for ruling. He also thinks that it will be just and fair if the application is allowed.

3. The application is opposed by the 1st respondent, who was 1st defendant in the suit before the trial Magistrate, and who raised the preliminary objection that culminated in the ruling that dismissed the suit. The replying affidavit is sworn by Christine Nyokabi Kamau, her Finance and Credit Administration Manager, Eastern Nyanza. She avers that the delay in filing the appeal is inordinate, and inexcusable, and is not satisfactorily explained. She deposes that the ruling date was given in the presence of counsel for the applicant and counsel for the 1st respondent, and the applicant cannot therefore place blame on the Court Assistant. She deposes that the ruling was read on 13 December 2022 in absence of the applicant despite him being aware of the date. She points out that the applicant applied for a copy of the ruling vide letter dated 16 December 2022 but has not availed evidence of payment for the ruling or indicated when he acquired a copy of it. She avers that the grounds of appeal have not been disclosed so that the court can assess its prospects of success. She adds that the applicant and the 4th respondent are brothers; that the 1st respondent advanced to the 4th respondent and his wife a loan of Kshs. 5 million and they charged the land parcels Wanjare/Bomorenda/2280 and 2598 as security. They defaulted and the 1st respondent moved to exercise her chargee's statutory power of sale, after which the 4th respondent instituted several suits in an effort to stop the sale, which suits were dismissed. It is averred that after the 4th respondent exhausted all avenues, it was his brother, the applicant, who now approached court through the suit Kisii CMCC ELC No. 140 of 2021 seeking the same remedies. She avers that the repayment period for the loan advanced lapsed and they are now indebted to the tune of Kshs. 3, 957,728.04/=. She avers that due to the multiplicity of suits the 1st respondent has been unable to realize the security which has affected her business.
4. The other parties did not file anything towards the application.
5. I invited counsel to file written submissions and I have seen on record the submissions of Mr. Gichaba, learned counsel for the applicant, and Ms. Muigai, learned counsel for the 1st respondent. I have considered them before arriving at my decision.
6. What is before me is an application to file an appeal out of time. This is covered by section 79G of the [Civil Procedure Act](#), Cap 21, which is drawn as follows:

79G. Time for filing appeals from subordinate courts

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.
7. From the above, it will be seen that one has 30 days to file an appeal to this court from a decision of the subordinate court. The ruling in our case was delivered on 13 December 2022. On the day of the ruling, counsel for the applicant was not present, and I have no reason to doubt that the date for the ruling was given in presence of his counsel as deposed by the 1st respondent. I have seen that counsel for the applicant wrote a letter on 16 December 2022 asking for a copy of the ruling for appeal purposes. In the grounds in support of this application, it is said that proceedings and ruling were issued on 2



February 2023 and I can indeed see this date stamped on the annexed proceedings and ruling. I think the applicant can benefit from the time taken to prepare the proceedings and ruling as provided in Section 79G.

8. The above aside, and if I was to strictly compute time without taking into consideration the time taken to avail the proceedings and ruling, under order 50 rule 4, the time between 21 December of the year and 13 January of the following year is omitted from computation of time. It would mean therefore, that in our case, the appeal ought to have been filed on or before 6 February 2023. The appeal was not filed within this period but instead this application was filed on 15 February 2023 about 9 days later.
9. Given that the proceedings appear to have been received on 2 February 2023 I don't think that the applicant was out of time in filing the appeal at the time that this application was filed, but certainly, at this moment, the time has now lapsed. If the time taken to provide proceedings and the ruling is ignored, this application was filed on 15 February 2023, 9 days after the time to appeal had lapsed which is not inordinate.
10. I am therefore persuaded to extend time to the applicant to file his appeal out of time. I direct that the Memorandum of Appeal and the record of appeal be filed and be served by 31 January 2024 at the latest.
11. The costs of this application will be costs in the appeal.
12. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 13 DAY OF DECEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

In the presence of:

Mr. Gichaba H.M for the applicant

Ms. Muigai for the 1st respondent

N/A for the 2nd – 4th respondents

