



Omundi v Omundi (Environment and Land Miscellaneous Application E010 of 2023) [2023] KEELC 22251 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22251 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2023**

M SILA, J

DECEMBER 7, 2023

BETWEEN

HENRY MARUBE OMUNDI PLAINTIFF

AND

JEREMIAH OMWENO OMUNDI DEFENDANT

RULING

(Application to file appeal out of time; applicant contending that he was late in filing the appeal because the judgment was not delivered on the day scheduled as he was allegedly informed that the trial court would not be sitting and that he waited for a new date for judgment which was never given; applicant stating that he later found that judgment was delivered after time to appeal had lapsed; record showing that the allegations of the applicant are untrue as the judgment was delivered on the day scheduled; court not persuaded to exercise its discretion to a party who is deliberately misleading the court; application dismissed)

1. The applicant was plaintiff in the suit Ogembo SPMCC ELC No. 027 of 2021. His suit was dismissed. Through an application dated 5 June 2023 and filed on 16 June 2023, he seeks leave to file appeal out of time. In his supporting affidavit, he contends that the judgment was slated for delivery on 15 February 2023, but the court did not sit on that day as the trial Magistrate was said to be away on official duties. He deposes that he personally attended court on 15 February 2023 with his counsel when they were informed that the trial court was not sitting because the trial magistrate was engaged elsewhere on official duties and as such new dates will be communicated on notice. He deposes that he has been waiting for notices to come from court for delivery of the judgment till around May 2023 when he discovered from the Ogembo Law Courts Civil Registry that judgment in the matter had been delivered. He avers that his advocate sought copies of proceedings and judgment. On receipt of the copy of judgment he discovered that the judgment was delivered on 15 February 2023 in open court on the very day when he was told that the magistrate was away from the station. He states that he



was not able to file his appeal within time as judgment was read in his absence and that of his counsel without notice. He is aggrieved by the judgment and he thus seeks an extension of time to file the appeal out of time.

2. The respondent has filed a replying affidavit to oppose the motion. He contends that the applicant is cheating this court and that his application is full of deliberate falsehoods meant to mislead this court. He asserts that it is false for the applicant to claim that judgment was not delivered on 15 February 2023. He has annexed the proceedings and pointed out that judgment was indeed delivered on that day and that the applicant is not being sincere by claiming that judgment was delivered on a different date. He contends that the applicant has come to court with unclean hands and he has demonstrated a high degree of hypocrisy and insincerity and ought not be granted the orders sought. He points out that the applicant has not provided the source of his information that the court did not sit on 15 February 2023 as claimed. He adds that there has been inordinate delay in filing this application and the applicant is indolent.
3. I gave leave to the applicant to file a supplementary affidavit but none was filed.
4. Both Mr. Begi, learned counsel for the applicant, and Mr. Ochwangi, learned counsel for the respondent, filed submissions towards the application which I have taken note of.
5. The time within which one has to file an appeal to this court is provided by Section 79G of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, which provides 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.
6. Though only the High Court is mentioned, the provision must apply to this court, which is a court of equal status with the High Court. Thus, one needs to file an appeal within 30 days of the decision, unless he demonstrates that he can benefit from exclusion of time certified for preparation and delivery of the decree or order. There is also discretion vested upon this court to extend the time for filing an appeal, if the applicant satisfies court that he had good and sufficient cause for not filing the appeal in time. In our case, there is no certificate from the subordinate court that there was time eaten up in preparation and delivery of the decree or order to the applicant. The applicant can only therefore be allowed to file his appeal out of time by showing that he has good and sufficient cause for having not filed his appeal within the prescribed time.
7. In his submissions, Mr. Begi, learned counsel for the applicant, reiterated his client's position that no judgment was delivered on the scheduled day for delivery, which was 15 February 2023. This allegation is of course contested by the respondent, who asserts that judgment was delivered on 15 February 2023 and he has referred me to the proceedings of the court. I have looked at the proceedings and indeed, they show that judgment was delivered on 15 February 2023 with the court making the entry that judgment was delivered in open court in absence of the parties who had notice. The court further made an entry for the file to be returned to the registry for perusal by the parties at their own convenience.
8. In his affidavit, the applicant has deposed that he was present in court on 15 February 2023 with his counsel and they were informed that the trial court was not sitting on that day because the trial



Magistrate was engaged elsewhere on official duties and that a new date for delivery of the judgment would be communicated on notice. I have a problem with this allegation. First, there is no affidavit from the applicant's advocate to confirm that he was indeed present in Ogembo court on the specified date and that the trial Magistrate was not sitting. Secondly, the applicant has not disclosed who informed him that the court would not sit. It is also common that when a court does not sit, written notice is published to notify the public. There is no notice attached by the applicant to show that the court informed the public that trial Magistrate would not be sitting on that day. There is in fact absolutely no material to contradict the court record which shows that judgment was indeed delivered as scheduled on 15 February 2023. Section 84 of the *Evidence Act*, Cap 80, Laws of Kenya, makes a presumption on the genuineness of a court record. It is drawn as follows :-

84. Records of evidence.

Whenever any document is produced before any court, purporting to be a record or memorandum of any evidence given in a judicial proceeding or before any officer authorized by law to take such evidence, and purporting to be signed by a judge or magistrate or any such officer as aforesaid, the court shall presume—

- (a) that the document is genuine;
- (b) that any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true; and
- (c) that such evidence was duly taken.

9. Whenever there is a presumption, the burden of proof is on the party alleging the contrary. In our case, the law presumes that the record of the court is correct and thus the applicant must provide evidence to demonstrate that the record does not reflect the true position of the matter. As I have stated before, no evidence was tabled by the applicant. This court must thus hold that judgment was indeed delivered on 15 February 2023 as scheduled and notified by court to the parties.
10. It is clear to me that the applicant has come to court with a bald faced lie that the court did not sit on 15 February 2023 when the court actually sat. He who comes to court seeking a discretion of the court must come to court with utmost sincerity and honesty, as one cannot come to equity with unclean hands. In fact, his conduct is despicable. He is insinuating that the record of the court is incorrect which is a very serious allegation upon a judicial officer. All this is false. I am unable to exercise my discretion in favour of the applicant given that he deliberately came to court with an attempt to mislead the court.
11. There is no merit in this application and it is hereby dismissed with costs to the respondent.
12. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 7 DAY OF DECEMBER 2023

JUSTICE MUNYAO SILA
JUDGE,

ENVIRONMENT AND LAND COURT AT KISII

In the presence of: -

Ms. Nyakweba holding brief for Mr. Ochwangi for the respondent

No Appearance on part of M/S Aboki Begi & Co. for the applicant



