



**Gaita & another v Rukwaro (Environment and Land Miscellaneous Application 8 of 2021) [2022] KEELC 2243 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2243 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 8 OF 2021**

**JO OLOLA, J**

**MAY 19, 2022**

**BETWEEN**

**JOSEPHINE WANGARI GAITA ..... 1<sup>ST</sup> APPLICANT**

**NYERI COUNTY REGISTRAR ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOEL NDIRITU RUKWARO ..... RESPONDENT**

**RULING**

1. By the Notice of Motion herein dated 28<sup>th</sup> June 2021, Josephine Wangari Gaita (the Applicant) prays for orders:
  2. That the Applicant be allowed leave to file (an) Appeal out of time and that accordingly the Memorandum of Appeal already filed and annexed hereto be deemed to have been filed within time and that time to file (the) record of Appeal be extended accordingly;
  3. That there be a stay of execution pending appeal;
  4. That this Honourable Court be pleased to grant the Applicant (leave) to call additional evidence which the Lower Court failed to take when the trial Magistrate refused to grant (an) adjournment for that purpose despite the application for adjournment having been (properly) made;
  5. That this Honourable Court be pleased to issue such further orders and directions as the Court may (deem) fit; and
  6. That the Costs of this application be provided for.
2. The application is supported by a brief affidavit sworn by the Applicant wherein she deposes in the relevant Paragraphs 2 to 9 as follows:



2. That when the hearing of this case was concluded we were informed the Judgment would be delivered on 13<sup>th</sup> May, 2021;
  3. That when we arrived in Court 13<sup>th</sup> of May 2021 the Court Clerk/Interpreter informed us that the Judgment would be delivered on email and therefore we could leave;
  4. That despite strenuous efforts in that direction, I did not access a copy of the Judgment until 18<sup>th</sup> June, 2021 when I instructed my Advocate to consider the possibility of filing an appeal herein;
  5. That duly advised by my Counsel to that effect I verily believe I have good grounds of appeal in this matter (a copy of the Memorandum of Appeal is annexed marked “JWG 1”);
  6. That this is a very sensitive land matter where although the accuracy of the land register is fully state guaranteed, my title is now liable to be cancelled;
  7. That the question now being raised can only be answered effectively by the Government and its relevant agencies;
  8. That it begs many questions that the very arm of Government that is responsible for investigating land frauds, when such is alleged, should be the very same one to advise the complainant to institute proceedings in Court to have the title issued to me by the same Government to be nullified despite the fact that the relevant Government agent has confirmed by sworn evidence adduced before Court that my title deed was validly issued in strict accordance with due process of law; and
  9. That surely in those circumstances it is incumbent upon this Honourable Court in the wider interest of Justice to grant me the rights to appeal herein and duly admit and hear my appeal on merit and in the meantime protect my title pending appeal.
3. Joel Nderitu Rukwaro (the Respondent) is opposed to the orders sought. In his Replying Affidavit sworn and filed herein on 23<sup>rd</sup> September, 2021 he avers at the relevant Paragraphs 3 to 8 thereof as follows:
3. That a typed copy of (the) Judgment in Nyeri Chief Magistrate ELC No. 50 of 2019 was emailed to the parties on 13<sup>th</sup> May, 2021 and the Appellant should have taken steps to appeal from that date;
  4. That no copies of proceedings, a copy of the Court’s Judgment that the Applicant intends to appeal against or even a copy of the letter written to the Court requesting for typed certified proceedings has been annexed by the Applicant to enable this Court exercise its Judicial discretion to extend time for filing an appeal out of time;
  5. That I am informed by my advocates on record which information I believe to be true that no application for stay of execution and/or proceedings was filed in Nyeri CM ELC No. 50 of 2019 making the present application for stay untenable;
  6. That there is no appeal that I am aware of and the Applicant has not indicated the steps she has undertaken to file the same to enable this Court grant the orders she is seeking;
  7. That in reply to Paragraphs 6, 7 and 8 the Applicant is only seeking this Court’s sympathy by adducing evidence through an affidavit while she is well aware that she gave evidence in the lower Court, was cross-examined on it and Judgment given in my favour; and



8. That I am advised that the Applicant’s application is premature, bad in law, an afterthought and an abuse of the process of this Court as it purports to seek prayers to file an appeal out of time and stay for an appeal which is yet to be filed.
4. I have carefully perused and considered the application and the response thereto. I have equally perused and considered the rival submissions as filed herein by the Learned Advocates for the parties.
5. The Applicant herein prays for leave of this Court to file an Intended Appeal out of time. In addition, she prays for a stay of execution pending the Intended Appeal as well as leave to call additional evidence which she says the lower Court failed to consider when her application for adjournment was disallowed.
6. In respect of an appeal from the subordinate Court to this Court, Section 79G of the Civil Procedure Act provides as follows:
- “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. As the Supreme Court of Kenya stated in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR:
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- “(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 for 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) Whether there is reasonable explanation for the delay. The delay should be explained to the satisfaction of the Court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7)
8. I have given due consideration of the record in light of the rival pleadings, submissions and the principles that guide the Court in the exercise of its jurisdiction to extend time under the provisor to Section 79G of the Civil Procedure Act. As can be discerned from the above – cited authority granting of leave to file an appeal out of time is a discretion which the Court ought to exercise in favour of an Applicant where the Applicant demonstrates good and sufficient cause why the Appeal was not filed in time.



9. In the matter before me, I was unable to discern any explanation reasonable or otherwise for the delay in filing this application. From a perusal of Paragraphs 2, 3 and 4 of the Supporting Affidavit, it is apparent that the Applicant was notified that the impugned Judgment would be delivered via email on 13<sup>th</sup> May, 2021. From the material placed before me, it is evident that the Judgment was indeed delivered and released to the parties via email on the said date.
10. The only attempt in the Applicant's brief affidavit to explain the delay can be found at Paragraph 4 of her Supporting Affidavit in which she avers as follows:
  - “4. That despite strenuous efforts in that direction, I did not access a copy of the Judgment until 18<sup>th</sup> June 2021 when I instructed my advocate to consider the possibility of filing an appeal herein.”
11. With respect, I think it was incumbent upon the Applicant to offer an elaborate explanation as to the difficulties she encountered in accessing the Judgment and the alleged strenuous efforts made to access the same. In the absence of the same the burden of explaining the delay was certainly not discharged.
12. While the Applicant had a chance to and indeed did file a Supplementary Affidavit herein on 14<sup>th</sup> October 2021, there was no evidence that she had either applied for or obtained copies of the lower Court's proceedings and Judgment for purposes of appeal.
13. In addition while the Applicant sought an order of stay of execution of the Judgment delivered on 13<sup>th</sup> May, 2021 a complete copy of the Judgment or orders granted were not availed to enable the Court determine any prejudice that the Applicant might suffer as a result thereof. Her Affidavit was silent on the reason for the request for stay and for leave to file additional evidence.
14. It follows that I did not find any merit in the Motion dated 28<sup>th</sup> June 2021. The same is dismissed with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 19<sup>TH</sup> DAY OF MAY, 2022.**

In the presence of:

Mr. A. J. Kariuki for the Applicant

Mr. Theuri Mwangi for the Respondent

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**

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