



**Kung'u v Gitau & another (Environment and Land Miscellaneous Application
E002 of 2022) [2021] KEELC 4735 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2021] KEELC 4735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2022
LA OMOLLO, J
MAY 12, 2022**

BETWEEN

HANNAH WANJIKU KUNG'U APPLICANT

AND

BENTON KUNG'U GITAU 1ST RESPONDENT

JANE WANJIRU WATHIGO 2ND RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated February 1, 2022. The said application did expressed to be brought under Order 42(6) and 51(1) of the [Civil Procedure Rules 2010](#) and sections 79G and 95 of the [Civil Procedure Act](#).
2. The application seeks the following Orders:
 1. That this Honorable Court be pleased to extend time and grant leave to the Applicant to lodge the memorandum of Appeal out of time against the judgement entered against them by the Hon. E. Nderitu (C.M) in Molo Chief Magistrate's Court (Environment and Land Court) Suit No. 89 of 2019 delivered on September 21, 2021.
 2. That costs of this application be provided for in the cause.
3. The application is based on the grounds on its face and supported by the affidavit sworn by one Collins Odundo counsel for the Applicant. It is sworn on February 1, 2022.

The Applicant's Contention

4. He contends that the Applicant instituted a suit on the 21st day of March, 2018 against the Respondents before the Environment and Land Court at Nakuru which suit was later transferred to the Chief Magistrate's Court at Molo.



5. He contends further that the case was heard and judgement delivered on September 21, 2021 against the Applicant.
6. It is his contention the Applicant had the intention to Appeal against the said judgement and instructed her advocates on record, at the time, to file a memorandum of Appeal but it was not done.
7. He also contends that the Applicant then decided to instruct her present advocates after the thirty days statutory period within which one ought to file a memorandum of Appeal had lapsed.
8. He contends further that he was instructed by the Applicant on November 15, 2021 and immediately sought to record a consent with the previous firm so as to properly come on record on behalf of the Applicant.
9. Counsel contends that after receiving instructions, he applied for copies of proceedings and judgement on December 15, 2022 and the same was not supplied until after the time to file an Appeal had expired.
10. He contends that the delay has not been occasioned by the Applicant but rather, by the advocates previously acting for the Applicant and the fact that they were not able to get the copies of proceedings and judgement on time.
11. It is Counsel's contention that the Applicant should not be made to suffer the wrongs of her advocate previously on record and that the intended Appeal is arguable and has merit.
12. He concludes his deposition by stating that the said application is based on the averment that the mistake of counsel should not be visited upon an innocent litigant and sought to be allowed to file the Appeal out of time.

Respondents Response

13. The 2nd Respondent filed a Replying Affidavit sworn on February 16, 2022.
14. She deposes that she has the consent of her Co-Respondent to respond to the Applicant's application dated February 1, 2022.
15. She also deposes that the Applicant's application is incompetent and inept in law and is therefore a waste of court's time.
16. deposes further that the Applicant filed her matter in Nakuru High Court being ELC case No. 286 of 2018 which the matter was later transferred to Molo.
17. She also deposes that when the suit was transferred to Molo it was given case No. ELC 89 of 2019. The suit was heard and judgement delivered on 21st September, 2021 by Hon. E G Nderitu Chief Magistrate Molo who dismissed the Applicant's case and a decree issued on 5th October, 2021.
18. She deposes that after the judgement was delivered, the Applicant did not file a Memorandum of Appeal until December 16, 2021.
19. The 2nd Respondent deposes that the Applicant has not demonstrated to the court the reasons for delay in lodging the intended Appeal.
20. She deposes further that the annexed Memorandum of Appeal is challenging the *Matrimonial Property Act* which came into effect on January 16, 2014. This she states is six years after the sale of the suit property.



21. She ends her deposition by stating that if the Applicant's application is allowed, it will delay justice for her as she will not enjoy the fruits of her judgement and that the Application should not be allowed since it has not demonstrated a triable case and should therefore be dismissed.

Issues for Determination

22. The Applicant filed her submissions on March 1, 2022 while the Respondents filed their submissions on March 7, 2022.
23. The Applicant in her submissions addressed the court on whether she has met the threshold for extension of time while the Respondents in their submissions addressed the court on whether the Applicant's application has merit.
24. The Respondent has filed submissions on March 7, 2022 and in the submissions addresses the following issues
- a. That counsel for the Applicant did not make an application seeking leave to come on record before filing the consent to act for the Applicant herein, considering that judgment had already been delivered.
 - b. That the application has grammatical errors
 - c. That the affidavit in support of the application is sworn by counsel and not the Applicant yet the issues raised in the affidavit are contested.
 - d. That counsel formerly on record for the Applicant has not sworn an affidavit to explain what transpired and that it is likely that the Applicant has not paid counsel or is acting against advice of counsel not to Appeal
 - e. That the Applicant is not allowed to plead lack of spousal consent for the reason that the rule was not applicable as at the time of sale of the suit property.
25. The Respondent ends his submission by praying that the Applicant furnishes a security deposit of Kshs. 500,000 to be deposited in a fixed deposit account held in the names of the Applicant and Respondents.

Analysis and Determination.

26. I have considered the application by the Applicant, the grounds on the face of the application and the affidavit in support, the replying affidavit, the rival submissions filed and the judicial decisions cited.
27. In my view, the issue for determination is
- a. Whether the applicant has satisfied the court that she had good and sufficient cause for not filing the Appeal within time.
 - b. Who bears the cost of this application?

A. Whether the applicant has satisfied the court that she had good and sufficient cause for not filing the Appeal within time.

28. The law pertaining to extension of time within which to file an Appeal is found in Section 79G of the [Civil Procedure Act](#). It provides as follows:

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. (Emphasis is mine)

29. The provisions of section 79G of the *Civil Procedure Act* are to the effect that the time for filing an Appeal from judgment of the subordinate court to the High court and/ or courts of equal status is 30 days. In this case, the judgment sought to be challenged was rendered on 21st September, 2021. Any Appeal challenging that decision ought to have been filed on or before 21st October, 2021.
30. If not filed within the 30-day period, the Applicant must satisfy the court that she had good and sufficient cause for not filing the Appeal within time.
31. According to the applicant's counsel, the firm of Odhiambo & Odhiambo was previously on record for the appellant and that the said firm received instruction to file an appeal against the decision in Molo CMCC (ELC) No. 89 of 2019 delivered on 21st September, 2021. For reasons not explained, the said firm of advocates did not do so.
32. Counsel for the applicant states that he received instructions on November 15, 2021 to file an Appeal and he quickly sought and was granted consent by the firm of Odhiambo and Odhiambo to take over conduct of the matter.
33. The Respondent has taken issue with the procedural lapse on the part of counsel for the Applicant. While it is evident that leave of the court should have been sought before counsel came on record, the Respondent did not challenge that procedural lapse, the consent entered by the two law firms has been received and endorsed by the Chief Magistrates Court-Molo. Therefore, as things stand, the firm of Odundo Odhiambo & Co Advocates remain on record.
34. The applicant's counsel further explains that on December 15, 2021 he wrote a letter requesting copy of the judgment and typed proceedings and the same were not supplied until after the time to file the Appeal had expired. I note that the request was made way after the time within which to file the Appeal had lapsed. This explanation though accepted is not to be blamed on the court.
35. The Respondents oppose the application stating that a decree was issued on October 5, 2021 and that the application for extension of time is coming 4 months late. This is correct and is basis for the current application.
36. The Respondent also takes issue with the merit of the Appeal stating that the grounds on which the Appeal relies are not legally sound, specifically the applicability of the *Matrimonial property Act* to the circumstances of the Appeal. This in my view will be resolved during the hearing of the Appeal.
37. In *Evans Kiptoo Vs Reinhard Omwoyo Omwoyo* [2021] eKLR, The Learned Judge while relying on the Supreme Court Decision in *Nicholas Kiptoo Korir Arap Salat vs IEBC & 7 Others* [2014] eKLR states as follows:

It is plain therefore that the Court, when considering an application such as the instant one, has unfettered discretion; and therefore, need only concern itself with whether justifiable cause has been shown to warrant such exercise of discretion. For this reason, the principles laid down



by the Supreme Court in *Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others* [2014] eKLR are pertinent; namely:

“(T)he underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any 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 a case to case basis;
4. Whether there is a reasonable reason 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.
7.”

38. It is therefore noteworthy that the power to extend time is an equitable remedy available to a deserving party at the discretion of the court.

39. The same principles were enunciated by the Court of Appeal in *Stanley Kaiyongi Mwenda Vs Cyprian Kubai* [2000] eKLR wherein it restated its decision in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997 (unreported). In the latter decision, the Court of Appeal held that:

“It is now well settled that the decision whether or not to extend the time for Appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the Appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

40. It is not in contention that the judgment in this matter was delivered over 4 months prior to filing the instant application. The reasons range from counsel previously on record not filing the Appeal to delay in obtaining copies of judgment and proceedings. I have noted and mention again that it was not necessary to obtain copies of the Judgement and proceeding in order to file the Appeal. The more plausible cause for delay is mistake of Counsel.

41. There are numerous decisions on how to treat mistake of counsel. One of them in *Tana & Athi Rivers Development Authority vs Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR. The Court of Appeal held:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be



remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

42. In *Sterol Corporation Limited vs Susan Awuor Mudemba* [2021] eKLR, the learned Judge, while speaking to mistake of counsel, cited the decisions in *Belinda Mural & 9 Others vs Amos Wainoni* [1978] eKLR, wherein, the Court of Appeal – Law JA, citing other cases such as *Shah H. Bharmal & Brothers vs Kumar* [1961] EA 679 held that:

“Mistakes of a legal adviser may however amount to ‘sufficient cause under the East African Rule.”

43. In *Hamam Singh & Others vs Mistri* [1971] EA 122}} where it was held that:

“...in relation to applications to this court for leave to Appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part...”

44. Section 65 of the *Civil procedure Act* provides for hearing of Appeals. I am keen on having the applicant exhausts the Appellate mechanism of the Kenyan court system to the extent possible if only it might enable her see that justice has been done.
45. It is my view that though there is a delay of over four months, counsel for the Applicant has explained the delay. It is also important to note that the Applicant is desirous of pursuing an Appeal in this matter and I am hesitant in closing the doors of justice on the Applicant.
46. The Respondent has also not shown any prejudice that might be occasioned to them in the event that this court allows the application. In fact, the Respondents are mostly interested in the Applicant furnishing a security of Kshs. 500,000 for the due performance of the decree. This, however, is not an application for stay pending Appeal and furnishing security is not with the realm of section 79.
47. There is no doubt that the discretion of this court to enlarge time for filing of a late Appeal is unfettered. I am reminded, however, that I must exercise my discretion judiciously and not capriciously.

B. Which party bears the cost of the application?

48. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition

49. Having regard to the circumstances of this case, I find that there has been adequate and reasonable explanation for the delay.
50. It is in the interest of justice that I allow this application for enlargement of time and I hereby do in the following terms:
- That the Applicant is granted leave to file an Appeal out of time against the judgment in Molo CMCC (ELC) No. 89 of 2019 delivered on 21st September 2021;
 - That the Applicant shall file and serve the memorandum of Appeal within 15 days from the date of this ruling;
 - The cost of this application shall abide the intended Appeal;



51. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF MAY 2022.

L. A. OMOLLO

JUDGE.

In the presence of: -

Miss Kiumbuku for Oondo for the Plaintiff/Applicant.

No appearance for the Defendants/Respondents.

Court Assistant; Ms. Jeniffer Chepkorir.

