



**Kurisha & 3 others v Waithera (Miscellaneous Application  
45 of 2019) [2022] KEELC 2988 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2988 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
MISCELLANEOUS APPLICATION 45 OF 2019**

**CG MBOGO, J  
JUNE 23, 2022**

**BETWEEN**

**JACOB KURISHA ..... 1<sup>ST</sup> APPLICANT  
SIMON KURISHA ..... 2<sup>ND</sup> APPLICANT  
TOWN COUNCIL OF NAROK ..... 3<sup>RD</sup> APPLICANT  
EMILY KOONYO ..... 4<sup>TH</sup> APPLICANT**

**AND**

**GRACE WAITHERA ..... RESPONDENT**

**RULING**

1. What is before this court for determination is a Notice of Motion application dated July 17, 2021 and a Notice of Preliminary Objection dated August 20, 2021. The application dated July 16, 2021 is expressed to be brought under section 1A, 1B, 3, 3A and 79 G of the *Civil Procedure Act*, Order 42 Rule 6 (1), (2), (3) and Order 50 Rule 6 of the *Civil Procedure Rules* seeking the following orders: -
  1. Spent.
  2. That the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants'/applicants application dated July 15, 2019 seeking leave to appeal against the judgment passed on May 7, 2019 allowing the respondent's suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/ applicants herein be listed for hearing and determination on priority basis.
  3. That the suit be preserved in its current state pending the hearing and determination of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellant's application dated 15<sup>th</sup> July 2019 seeking leave to appeal out of time against the judgment passed on May 7, 2019 allowing the respondent's suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/ applicants herein and or pending further orders of this honourable court.



4. That this honourable court be pleased to issue such other and or further orders that it may deem fit and just in the interest of justice.
5. That costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of the 4<sup>th</sup> applicant sworn on even date. The 4<sup>th</sup> appellant/applicant deposed that being aware that judgment was delivered in the matter by the trial court on May 7, 2019, they instructed the firm of Onesmus Lempaa & Company Advocates to lodge an appeal and before the matter could proceed for hearing, Mr Lempaa passed on and his office remained closed and as a result, they were unable to access their filed documents from his office.
3. The 4<sup>th</sup> appellant/applicant further deposed that their counsel was able to obtain documents from Mr. Lempaa's office which confirmed that indeed there was a pending application for leave to appeal out of time and as such there is need to have the judgment and the consequential orders on record stayed pending the hearing and determination of their application for leave to appeal out of time. The 4<sup>th</sup> appellant/applicant further deposed that given the serious nature of the prayers sought in the application dated January 8, 2021 seeking their eviction, the trial court ought to have ensured or ordered that the advocates for the respondent herein had properly served their advocates with the application dated January 8, 2021 and to the best of their knowledge they were never served with any notice requiring them to appear and show cause why the decree should not be executed and was taken by surprise when the auctioneers moved in and demolished their premises. Annexed to her supporting affidavit is a copy of the judgment dated May 7, 2019 and a copy of the ruling delivered on April 14, 2020.
4. The respondent filed a notice of preliminary objection dated August 20, 2021 in opposition to the application on the grounds that: -
  1. That the present application as taken out, drawn and filed is incompetent, fatally defective and unsustainable in law or at all.
  2. That the advocates who have come on record for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/applicants offend the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.
  3. That in the above premises this application should be struck out in its entirety.
5. The application is also opposed by a replying affidavit sworn on August 24, 2021 by Peter Kuria Njoroge. Peter Kuria Njoroge deposed that he is the respondent's duly authorized representative in this suit, well acquainted with the facts of this case and other relevant facts. The respondent deposed that the application is incompetent, misconceived, defective and an abuse of the court for the reason that the applicants advocates on record have not sought to come on record after judgment had been delivered and the application dated 15<sup>th</sup> July, 2019 was never served upon them neither was it heard.
6. That all along, the parties have been participating in applications raised after the judgment i.e. objection proceedings dated November 4, 2019, application dated January 8, 2021 and application dated February 18, 2021 and subsequently in rulings delivered thereafter dated April 14, 2020 and February 19, 2021.
7. The respondent further deposed that the applicant's prayer to seek leave to appeal out of time is in bad faith as they have not shown any efforts in meeting the judgment delivered. That the decree was issued on August 21, 2019 which was executed and the respondent took possession of Plot No. 212 Block 7



- and therefore the subject suit cannot be preserved as the same is in the process of transfer. Further that the applicants did not appeal the said judgment and therefore the instant application is an afterthought.
8. The respondent further deposed that the applicants have on several occasions tried to delay and frustrate the speedy determination of this matter by filing unnecessary applications. That the orders dated July 22, 2021 was served upon them on August 9, 2021 as a result of delay from the applicants' side.
  9. The 4<sup>th</sup> applicant filed a further affidavit sworn on November 5, 2021. The same was more or less similar to the issues raised in the supporting affidavit sworn on July 16, 2021.
  10. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants filed written submissions dated October 7, 2021. They have raised three issues for determination as follows: -
    1. Whether the applicants/appellants have satisfied the prerequisites for granting extension of time.
    2. Whether the intended appeal is arguable.
    3. Whether the order sought are available to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/applicants.
  11. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/applicants submit that a request to file an appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time. They relied on the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* Civil Application No. NAI 255 of 1997 and *County Executive of Kisumu versus County Government of Kisumu & others* [2017] eKLR.
  12. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> applicants submitted that the intended appeal was slightly over 30 days from lapse of the statutory timelines set by law which is 30 days and the same is not inordinate and that the applicants took all the necessary steps and diligently followed up on the matter. While relying on the case of *Almas Hauliers Limited v Abdulnasir Abukar Hassan* [2017] eKLR they submitted that delay is a matter of fact which ought to be decided on the circumstances of each case. On the second issue, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/applicants submitted that the grounds contained in the appeal have expressly shown that the applicants appeal is based on true facts and high chances of success is imminent on both facts and law. They submitted that an arguable appeal is not necessarily one that must succeed, but one which is not frivolous and merits consideration by the court. They relied on the case of *Athuman Nusura Juma v Afwa Mohamed Ramadhan* CA No 227 of 2015. In conclusion, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/applicants submitted that they have met the threshold to invoke this honourable court to exercise its discretion and allow the applicants to lodge their appeal out of time.
  13. The respondent filed written submissions dated 12<sup>th</sup> November, 2021. The respondent submitted that the firm of G. Wambura & Company Advocates have not sought to come on record after judgment has been delivered which act offends Order 9 Rule 9 of the *Civil Procedure Rules*. The respondent relied on the case of *Kazungu Ngari Yaa Mistry v Naran Mulji & Co.* [2014] eKLR and *Brigdes Exploration Limited v Stephen Karanja* [2019] eKLR. The respondent further submitted that the applicants have been able to participate in several applications after judgment was delivered but none of the said applications sought for appealing the judgment and, as such, the applicants have not made any effort to pursue the appeal as no request for typed judgment and proceedings have been made, therefore, it is a ploy to disenfranchise the respondent from the fruits of the judgment.
  14. The respondent further submitted that no substantial loss will be occasioned to the appellants/applicants in the event the orders being sought are not granted because judgment and decree have



already taken place. They relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2002] eKLR.

15. I have analysed the application dated July 16, 2021, the replies thereof and the written submissions together with the authorities cited and there are two issues for determination which are whether the notice of preliminary objection is merited and whether the application dated July 15, 2019 ought to be heard on a priority basis.
16. It is trite law that a matter in respect of which evidence is required to prove cannot be the basis of a preliminary objection. In this regard the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 where Sir Charles Newbold stated:

“... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
17. In the circumstances of this case, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/applicants have deposed that their previous counsel Mr. Lempaa passed on before hearing of the application seeking leave to file appeal out of time the same being a question of fact for which evidence is required. That notwithstanding, there being no dispute as to the question of the applicants’ previous counsel’s death, the issue of the firm of Onesmus Lempaa & Company Advocates and G. Wambura & Company Advocates and Masikonde & Company Advocates coming on record after the firm of Lelei & Associates Advocates with the current application and the application dated July 15, 2019 cannot be ignored or wished away.
18. Order 9 Rule 12 of the *Civil Procedure Rules* provides as follows: -
  - (1) Where an advocate who has acted for a party in a cause or matter has died or become bankrupt or cannot be found or has failed to take out a practising certificate or has been struck off the roll of advocates, or is otherwise unable to act as an advocate, and the party has not been given notice of change of advocate or notice of intention to act in person in accordance with this Order, any other party to the cause or matter may, on notice to be served on the first-named party personally or by prepaid post letter addressed to his last-known place of address, unless the Court otherwise directs, apply to the Court for an order declaring that the advocate has ceased to be the advocate acting for the first named party in the cause or matter, and the Court may make an order accordingly.
  - (2) Where the order is made, the party applying for the order shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) a copy of the said order and procure the order to be entered in the appropriate court, and also leave at the appropriate court a certificate signed by the applicant or his advocate that the order has been duly served as aforesaid; and thereafter, unless and until the first named party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person, any document may be served on the party so in default by being filed in the appropriate court.
  - (3) Any order made under this rule shall not affect the rights of the advocate and the party for whom he acted as between themselves.



19. Order 9, Rule 9 of the *Civil Procedure Rules* provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

20. Applying the above provisions to the circumstances of this case, it follows that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants/applicants ought to have complied with the provisions of Order 9 Rule 9 by seeking leave of the court to allow appointment of advocates. Equally any other party may move the court in the case of a deceased Advocate and where the party to the suit has not moved the court under Order 9 Rule 9, apply to court for an order declaring that the Advocate has ceased to be the Advocate acting for the named part.

21. In this case the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> applicants failed to comply with the provision of Order 9 Rule 9 and therefore the appointment of Messrs G Wambura & Company Advocates is contrary to the provisions of the said cited order.

22. Arising from the above, the notice of preliminary objection dated August 20, 2021 is upheld. The firm of G. Wambura & Company Advocates are not properly on record and therefore the notice of motion application dated July 16, 2021 is struck out. Costs awarded to the respondent. It is so ordered.

**DATED, SIGNED and DELIVERED VIA EMAIL ON 23<sup>RD</sup> JUNE, 2022.**

**MBOGO C.G**

**JUDGE**

In the presence of: -

CA: Timothy Chuma

