



**Muhoro & another v Ndwaru & another (Civil Appeal
E006 of 2022) [2022] KEELC 2508 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E006 OF 2022**

EK WABWOTO, J

JULY 14, 2022

BETWEEN

CHARLES GATHEE MUHORO 1ST APPELLANT

PAUL MUHORO MURIITHII 2ND APPELLANT

AND

WANJIKU NDWARU 1ST RESPONDENT

CITY COUNCIL OF NAIROBI 2ND RESPONDENT

*(Being an Appeal from the entire Judgment and Decree of the Chief
Magistrate's Court at Milimani Commercial Courts at Nairobi (Hon. M.W.
Murage SRM) dated 9th September 2019 in CMCC No. 2323 of 2011)*

RULING

1. The Memorandum of Appeal in this appeal was lodged on 04/02/2022. The judgment appealed against was rendered in Milimani CMCC No. 2323 of 2011 on 9th September 2019. The 1st Respondent then moved this court *vide* a Notice of Motion dated 18th February 2022 urging the court to strike out the Memorandum of Appeal on various grounds on the face of the Application.
2. The Application was supported by the 1st Respondent who filed a Replying Affidavit sworn by Abwao Erick Odhiambo on 27th April 2022.
3. The Appellants vehemently opposed the said Application and they relied on a Replying Affidavit sworn by Charles Gathee Muhuro on 21st April 2022.
4. The Application was heard on 2nd June 2022. During the plenary hearing of the application, Learned Counsel Mr. Okoyo for the 1st Respondent urged the court to strike out the Memorandum of Appeal dated 21st December 2021 which was filed out of time and without leave of the court. Counsel further



submitted that the reasons given by the Appellants for filing the Memorandum of Appeal out of time was that they was a delay in obtaining proceedings which delay was occasioned by the registry. According to the 1st Respondent this was not a sufficient reason since the Appellants had failed to comply with the directions given by Justice Okong’o pursuant to the ruling delivered on 21st October 2021.

5. Learned Counsel Ms. Gituma who was holding brief for Mr. Otieno while relying on the 2nd Respondent’s affidavit supported the Application and equally submitted that the Memorandum of Appeal was filed out of time and no court order had been obtained in seeking for extension of stipulated time for filing the said Appeal.
6. Learned Counsel Mr. Kamwami in opposing the Application argued that Section 79 (G) of the *Civil Procedure Act* allows an appeal to be admitted out of time. He added that courts have previously pronounced themselves over the same and outlined the applicable criteria. He further submitted that the court ought to look at the length of the delay and the prejudice that may be suffered by the affected party.
7. Counsel argued that they had filed their Memorandum of Appeal on 4th February 2022 and the delay was due to the fact that they had requested for a copy of the decree and judgment for the lower court but the same was not availed on time to file the said Appeal. Counsel further submitted that the Advocates for the Respondents had equally been notified of the said predicament and that the Appellants had even deposited security of costs as was directed in the Ruling delivered by Justice Okong’o. Counsel concluded his submissions by urging the court to dismiss the application and allow the Appeal to be heard on merit.
8. I have considered the Application, the affidavits filed in support and opposition to the Application and the oral submissions made by counsel for the parties. One of the substantive and specific grounds upon which the 1st Respondent/Applicant relied upon in seeking an order striking out the memorandum of appeal is that it was filed out of time and without leave of the court. The response which counsel for the Appellants gave is that there was a delay in obtaining certified copies of the proceedings and decree from the lower court. I do not think this is a serious response to a defect that flies in the face of a mandatory requirement of the law. Section 79G of the *Civil Procedure Act* provides as follows: -

“79G. 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.”

9. It is not in dispute that the Appellants were granted leave to file their Appeal out of time. The same having been granted by Justice Okong’o pursuant to the ruling that was delivered on 21st October 2021. The ruling was specific that the time for filing appeal was extended up to and including 15th November 2021. No attempt was made by the Appellants to have the appeal admitted out of time. In the circumstances, the court cannot allow the Respondents to respond, participate and or defend an appeal that has been filed in blatant disregard of the law and no attempt has even been made to regularize the defect. In the circumstances the court agrees with the 1st and 2nd Respondents submissions that the Memorandum of Appeal stands to be struck out on the ground that it was filed more than two months outside the stipulated time and without an order enlarging time for bringing the appeal.



10. I also wish to point out that *vide* a ruling delivered by Justice S. Okong'o on 21st October 2021, the Appellants were granted an extension and leave to time to file the Appeal out of time. The same was to be filed by 15th November 2021. The Appellants never complied with the said timeline neither did they file an Application for extension of the said timeline. As such the orders made by Justice Okong'o were not complied with. The said orders are still in existence and were never set aside. I have also considered the response given by the Appellants that they were delays in obtaining the certified copies of the proceedings and decree from the subordinate court which in my view did not in any way prevent them from seeking a further extension of the time to file the said Appeal. Being guided by the said ruling, I cannot breathe life into the Appeal. The Appeal herein cannot have the proverbial nine lives of a cat. Court orders are meant to be complied with. The Appellants would have been more proactive in complying with the ruling once they had been given a lifeline in respect to their appeal.
11. The net result is that the appeal herein is struck out for having been filed out of time and without an order enlarging the time for filing the appeal and also having been filed contrary to the orders made on 21st October 2021 in the ruling delivered by Justice S. Okong'o in ELC Misc No. 31 of 2020. On costs, I will direct each party to bear their own costs.
12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF JULY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kamwami for the Appellants

Mr. Okoyo for the 1st Respondent.

Mr. Otieno for the 2nd Respondent

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

