



Mbaka (Suing as Administrator Ad Litem of the Estate of the Late Margaret Njoki Mbaka alias Njoki Mbaka) v Bizer & another (Environment and Land Appeal E015 of 2024) [2025] KEELC 3029 (KLR) (Environment and Land) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

MC OUNDO, J

APRIL 3, 2025

BETWEEN

STEPHEN MWAURA MBAKA (SUING AS ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE MARGARET NJOKI MBAKA ALIAS NJOKI MBAKA) APPELLANT

AND

SUSAN WAMBUI BIZER 1ST RESPONDENT

KIAMBU NYAKINYUA FARMERS LIMITED 2ND RESPONDENT

(Being an Appeal from the Judgement of Hon. Y.M Barasa, Senior Principal Magistrate, in CMCELC Case No. E028 of 2023 delivered on 15th August, 2024)

RULING

1. Following the delivery of a Judgment on the 15th August, 2024 by Hon Y.M Barasa, Senior Principal Magistrate in CMCELC No. E028 of 2023, where in the Plaintiff's suit was dismissed with costs to the Defendant, the Plaintiff/Appellant being dissatisfied with the said judgement appealed against the decision of the court vide a Memorandum of Appeal dated the: seeking for the said judgment to be set aside and the suit be remitted back to a court of competent jurisdiction for hearing and final determination.
2. In response, both the Respondents herein filed their respective Notices of Preliminary Objection both dated 30th September, 2024 which Notices of Preliminary Objection were based on the ground that the Appeal herein was filed on 26th September 2024 which was twelve (12) days late contrary to the express provisions of Section 79G of the [Civil Procedure Act](#) was therefore improperly before the Honorable



Court and was an abuse of the court process. That further, the Memorandum of Appeal was incurably defective and the should be struck out with costs for being an abuse of the court's process.

- Directions were taken that the 1st and 2nd Respondents Preliminary Objections be disposed of in the first instance by way of written submission wherein only the 1st Respondent and the Appellant complied and filed their submissions to which I shall summarize as herein under.

1st Respondent's Submissions.

- In support of her Notice of Preliminary Objection dated 30th September, 2024, the 1st Respondent vide her submissions dated 25th November, 2024 summarized the factual background of the matter before framing one issue for determination to wit; whether the Preliminary Objection was properly before court and was meritorious.
- Her submission was in the affirmative to the effect that the said preliminary objection was meritorious, proper and had the potential to dispose of the appeal without wasting the Court's precious time.
- That it was trite law that a preliminary objection must be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, lead to but one conclusion; that the facts are incompatible with the point of law.
- She submitted that the instant appeal had been filed out of time as the same had been filed 12 days after the lapse of the window period provided for by the provisions of Section 79G of the Civil Procedure Act, without the mandatory leave of the court required under such circumstances. She placed reliance in the decided case of Catherine Kawira v Muriungi Kirigia [2016] eKLR.
- Her further reliance was hinged on the Supreme Court's decision in Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR to submit that the Appeal herein having been brought before the court out of time, the Preliminary Objection before the court was a plea of limitation which had arisen by clear implication out of the Memorandum of Appeal dated 13th September, 2024 but filed on 26th September, 2024.
- She thus urged the Court to hold that the Appeal before it had been brought in excess of the statutory time lines and without the leave of court, and thereafter allow her Preliminary Objection as a matter of urgency and proceed to strike the same out with costs for being improperly before the Court.

Appellant's Submissions

- The Appellant vide his written Submissions dated 21st January 2025 and in opposition of the Notice of Preliminary Objection, framed one issues for determination to wit; whether the Memorandum of Appeal in Naivasha ELC Appeal dated 13th September, 2024 and filed on 26th September, 2024 should be struck out.
- He then relied on the provisions of Section 79G of the Civil Procedure Act to submit that his Advocate had erroneously filed a Memorandum of Appeal being HCCA E106/2024 on 13th September 2024 in the High Court as opposed to the Environment and Land Court, wherein after he had filed a Notice to withdraw the same on 24th September, 2024 and had filed a fresh Memorandum of Appeal (current Appeal) in the Environment and Land Court on 26th September, 2024 by which time, it had been out of time.
- He placed reliance in a combination of decisions in the case of Gerald M'limbine v Joseph Kangagi [2008] eKLR, Ndungu Muhindi James & Another v Cecilia Wanjiku Waweru [2020] eKLR and Samuel v Agricultural Finance Co-operation & another (Miscellaneous Application E008 of 2021)



[2023] KEELC 16028 (KLR) (28 February 2023) (Ruling) to submit that indeed, after he had filed the Memorandum of Appeal on 26th September 2024, he had proceeded to file a Miscellaneous Application No. E014 of 2024 on 27th September, 2024 seeking leave to have the Memorandum of Appeal herein deemed as having been filed. That the Preliminary Objection herein therefore lacked Merit and should be dismissed with costs.

Determination

13. I have considered the Respondents preliminary objection and the Appellant's submissions. It should however be noted that whereas the Appellant herein filed submissions, the same would not be considered by the court in the absence of a Replying Affidavit which is a foundational pleading as was held by the Supreme Court in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR, where the court held as follows;

“A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely.”

14. Secondly, it is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an applicant who fails to file their submissions on an application as ordered by the court is deemed as a party who has failed to prosecute such an application and therefor that application is liable for dismissal. The filing of submissions having been ordered, and the 2nd Defendant/Applicant having failed to exercise the leave granted to them to file written submissions, clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness on their part in the prosecution of the matter.

15. What is left for me to decide on merit therefore is the 1st Respondent's preliminary objection which, as it stands, is unopposed. Considering the all-important case in *Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited* (1969) EA. 696, I find from the submissions and pleadings filed, it is clear that the 1st Respondent is challenging the Appellant's Appeal the same having been filed out of the stipulated period as provided for under Section 79G of the *Civil Procedure Act*.

16. The said provision of the law 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.”

17. I have considered the Pleadings herein filed and noted that indeed the Appellant filed his Memorandum of Appeal on the 26th September 2024 against a judgement that had been delivered on the 15th August 2024 which was about 11 days out of the time stipulated under Section 79G of the [Civil Procedure Act](#) wherein the Appellant did not obtain an order for extension of time.
18. In the case of *Ndungu Muhindi James & another v Cecilia Wanjiku Waweru* [2020] KEHC 1535 (KLR) the court stated as follows;

“There has been a long line of High Court decisions to the effect that a party should first file an appeal then seek leave to proceed with that appeal, if filed out of time. In other words, that the appeal should be filed and on record as the party seeks it be admitted for hearing out of time.”
19. In the case in *APA Insurance Limited v Michael Kinyanjui Muturi* [2016] eKLR, the judge had observed as follows;

“This court as correctly submitted by Mr Ochieng, has had on many occasions to decide on the same issue and has plainly, overtly and authoritatively pronounced itself that an appeal which is filed out of time can be validated by an application for leave to validate the appeal and that is what the proviso to Section 79G of the [Civil Procedure Act](#) stipulates. The decisions by Honourable H.M. Okwengu J (as she then was) in HCC 322/2008 *Michael Kinyanjui Mbutia V John Kamau Nganga*; Honourable R.V.P. Wendoh J in *Richard Ngetich & another V Francis Vozena Kidiga* HCCA 75/2012 ; and Honourable Mary Kasango J in *Asma Ali Mohamed V Fatime Mwinyi Juma* HCCA 75/2014 (Mombasa) among others all positive attestations to that pronouncement and so far there is no contrary decision from the Court of Appeal on that line of interpretation of Section 79G of the [Civil Procedure Act](#) Proviso.”
20. The provisions of Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period of time.
21. A look at the proceedings of 12th November 2024, the court was informed of such an application being Miscellaneous Application No. E014 of 2024 dated on 27th September, 2024 which sought leave to have the Memorandum of Appeal herein deemed as having been filed. To this end and in line with the authorities herein above cited and the implication of the provisions of Section 79G of the [Civil Procedure Act](#), I find no merit in the preliminary objection herein raised and the same is dismissed.

Each party shall bear its costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 3RD DAY OF APRIL 2025

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

