



**Mugo & another v Kathuni (Environment & Land Case E007 of 2021)
[2022] KEELC 4828 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4828 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E007 OF 2021
CK YANO, J
SEPTEMBER 21, 2022**

BETWEEN

BASILIO MWIATHI MUGO 1ST APPELLANT

ORESTE NJOKA JULIUS 2ND APPELLANT

AND

EMILIO MBAKA KATHUNI RESPONDENT

RULING

1. This Ruling is in respect of the Notice of motion application dated 20th June 2022 brought pursuant to Order 9 Rule 9 (a) of the [Civil Procedure Rules](#), 2010 and section 7 of the [Appellate Jurisdiction Act](#). The application seeks for orders:
 - i. That the firm of Basilio Gitonga Murithi & Associates Advocates be granted leave to assume the conduct of this matter from the firm of Kijaru Njeru & Co. Advocates.
 - ii. That the Appellants be granted leave to file and serve Notice of Appeal against the judgement delivered in this matter out of time.
 - iii. That the Notice of Appeal dated 17/05/2022 and filed on 18/05/2022 be expunged from the record.
 - iv. That cost of this application be in the cause.
2. The application is premised on the grounds:
 - a. That judgement in this matter was delivered on 09/05/2022.
 - b. That the Appellants being dissatisfied with the said decision lodged a Notice of Appeal on 18/05/2022.



- c. That the said Notice of Appeal was filed in person whereas the Appellants were represented by counsel.
 - d. That the said Notice of Appeal is defective both in form and substance.
 - e. That the Appellants have a strong Appeal with high chances of success against the judgement of this court.
 - f. That the delay in lodging a proper Notice of Appeal was occasioned by the lack of legal knowledge by the appellants.
 - g. That the time has lapsed since the expiry of the period stipulated for filing the Notice of Appeal and the filing of the instant application is not inordinate.
 - h. That no prejudice will be occasioned upon the Respondent that cannot be compensated by an award of costs.
 - i. That it is in the interest of justice and fairness that this application is filed.
3. The application is further supported by the affidavit of Basilio Mwiathi Mugo the 1st Appellant herein sworn on 20th June, 2022 wherein he averred that he has the authority of the 2nd Appellant to swear the affidavit.
 4. The deponent averred that on 09/05/2022 judgement in this matter was delivered against them dismissing the Appeal.
 5. The applicants contended that being aggrieved by the said decision they decided to pursue an appeal albeit in person having previously been represented by Advocate.
 6. The applicants further contend that they filed the Notice of Appeal on 18/05/2022 as evidenced by a copy thereof attached to the affidavit and marked 'BMM1'.
 7. The applicants state was that thereafter when they sought alternative legal representative, they were advised that the Notice of Appeal lodged was irregular for the reasons that: -
 - a. The procedure for change of Advocate after judgement has been rendered where one is represented by counsel was not adhered to.
 - b. The Notice of Appeal did not meet the requirement for endorsement by the Deputy Registrar of the court.
 - c. That the parties are wrongly described.
 8. The applicants aver that as can be deduced from the foregoing they were diligent enough in pursuit of the intended appeal.
 9. The Applicants further aver that their only undoing was failure to comprehend fundamental rules of procedure besides that requiring the filing of the Notice of Appeal within Fourteen (14) days of Judgement.
 10. The applicants contended that the delay in the attempt to rectify their mistake is not inordinate and is excusable.
 11. The applicants further state that they have a strong Appeal with high chances of success as can be deduced from the draft Memorandum of Appeal attached herein and marked 'BMM2'.



12. The Applicants averred that the respondent shall not suffer any substantial prejudice that cannot be compensated by an award of costs.
13. The applicants further averred that they bring the application in order to advance the course of justice and fairness.
14. The Respondent's counsel was served on 1st July, 2022 and there is an affidavit of service filed, but did not file any response. The application is therefore not opposed.

Analysis & Determination

15. I have carefully analyzed the application which did not elicit any response from the respondent Counsel. Although the application is not opposed, the court will consider the same on merit.
16. I have isolated three issues for determination:-
 - i. Whether the firm of Basilio Gitonga Murithi & Associates Advocates should be granted leave to come on record in place of Kijaru Njeru & Co. Advocates who were previously on record for the Appellants.
 - ii. Whether the court should grant the applicants leave to file an appeal out of time.
 - iii. Whether the Notice of Appeal dated 17/05/2022 and filed on 18/05/2022 should be expunged from the record.

Whether the the firm of Basilio Gitonga Murithi & Associates Advocates should be granted leave to come on record

17. With regard to the first issue, the Applicants advocates the firm of Basilio Gitonga Murithi & Associates Advocates have sought for leave to come on record in place of Kijaru Njeru & Co. Advocates who were previously on record for the Appellants. It is not in dispute that the said Advocates came on record after the delivery of Judgment and need to seek leave of court as per the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) which provides that:

“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.”
18. The provisions of Order 9 allows the court to grant leave upon an application with notice to all the parties, or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person. Rule 10 allows the said prayer seeking leave to be brought together with other prayers. I have perused the application herein and note that the same was served only upon the respondent's advocate. The outgoing advocate for the appellants has not been served. Order 9 rule 9 is clear that such an application be served upon all parties or upon a consent filed between the outgoing advocate and the proposed in coming advocate or party intending to act in person. In this case, there is no consent filed and the application herein has not been served upon the outgoing advocate. Therefore, although the application is not opposed, the same has not met the requirements of Order 9 Rule 9 since the same was not served upon the outgoing advocate. The leave sought is therefore declined.



Whether the court should grant the applicants leave to file an appeal out of time.

19. The reason advanced by the applicants is that being aggrieved by the decision herein, they decided to pursue an appeal albeit in person having previously been represented by Advocate. The applicants further averred that they filed the Notice of Appeal on 18/05/2022 attached hereto and marked 'BMM1' but contended that thereafter when they sought alternative legal representation they were advised that the Notice of Appeal lodged was irregular for the reasons that: -
- a. That the procedure for change of Advocate after judgement has been rendered where one is represented by counsel was not adhered to.
 - b. That the Notice of Appeal did not meet the requirement for endorsement by the Deputy Registrar of the court.
 - c. That the parties are wrongly described.
20. The applicants further averred that they were diligent enough in pursuit of the intended appeal and their only undoing was failure to comprehend fundamental rules of procedure besides that requiring the filing of the Notice of Appeal within Fourteen (14) days of Judgement.
21. I have perused the affidavit in support of the application. In paragraph 5 thereof, the applicants have stated that they have attached thereto and marked "BMMI" a Notice of Appeal. However, the alleged notice of appeal is not part of the annexures in the affidavit in support of the application herein. Moreover, the reason given by the applicants is not plausible since ignorance of the law is not a defence.
22. In *First American Bank of Kenya LTD -vs- Gulab P. Shah & 2 Others* Nairobi (Milimani) HCCC No. 2255 of 2000 (2002) 1EAG5 the court set out the factors to be considered in deciding whether or not to grant such an application and these are:
- i. The explanation if any for the delay;
 - ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the court of justice;
 - iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant."
23. The court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension of time, the court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.
24. As already stated, the grant of the extension of time is discretionary. The court is entitled to take into the account the nature of the process against which the extension is sought and satisfy itself that there is reasonable basis to justify the orders sought. This was the holding in the case of *Republic v Public Administrative Review Board & Another* (2019) eKLR.



25. In the case of *Abdul Azizi Ngoma vs Mungao Mathayo* (1976) Kenya LR 61,62, the Court of Appeal held:

“We would like to state once again that this courts’ discretion to extend time under rule 4 only comes into existence after sufficient reason’ for extending time has been established and it is only then that other consideration such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

26. Similarly, in *Karny Zabarya & Another vs. Shalom Levi*. C.Appl.No.80 of 2018, Koome, JA (as she then was) stated:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason (s) for the delay the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion: the conduct of the parties: the need to balance the interests of a party who has a decision in his favour against the interest of a party who has a constitutionally underpinned right of opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes: the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.....”

27. The court notes that the reasons stated by the applicants that the procedure for change of Advocate after judgement has been rendered where one is represented by counsel was not adhered to, that the Notice of Appeal did not meet the requirement for endorsement by the Deputy Registrar of the court and that the parties are wrongly described is not justified though the delay is not inordinate. In my view, the reasons given are not sufficient to grant the orders sought.

Whether the Notice of Appeal dated 17/05/2022 and filed on 18/05/2022 be expunged from the record

28. The third issue raised by the applicants is that the Notice of Appeal dated 17/05/2022 and filed on 18/05/2022 be expunged from the record. The applicants averred that the notice of appeal is defective both in form and substance due to the fact that that the procedure for change of Advocate after judgement had been rendered where one is represented by counsel was not adhered to. Secondly that the Notice of Appeal did not meet the requirement for endorsement by the Deputy Registrar of the court and that the parties are wrongly described.

29. On the first limb of the notice of appeal being defective in that the procedure of change of advocate after judgement had been rendered where one is represented by counsel was not adhered to. The court has already referred to the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

30. In the case of *David James Mbogo vs Alfred C Asikoyo & 3 Others*, Bungoma HCC 71/2000 where the court was confronted with a similar situation, it was held that:

“Such an advocate can only be competently on record after obtaining the order pursuant to order 111 Rule 9A now order 9 Rule 9 of the Civil Procedure Rules and after first filing the notice of change of advocates. Failure to comply with the above mentioned conditions renders any pleadings filed incompetent for being improperly on record.”

31. Order 9 Rule 9 of the Civil Procedure Rules is clear that no new advocate can take over the conduct of a suit and a party cannot act in person in a matter which has been finally determined by any court



while any proceedings or related proceedings are continuing before the same court or in continuation of the determined matter through notice of change of advocate without the leave and order of the court, through a formal application or by consent of the outgoing and incoming advocates. In addition, even if there was such consent, the same has to be acknowledged and or ordered by the court whose leave is intended to be sought as was correctly held by Muchelule J in the case of *John Lagat vs Kipkemoi Terer & 2 others* (2013) eKLR that:-

There was no application made to change advocate....the appellant swore an affidavit that there was consent entered into between his previous advocates and his present advocate to effect changes. This was done following the judgement. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more importantly, the consent could not effect the change of advocates' without the order of the court. No such order was sought or obtained. It follows That Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

32. The Second and third limb is that the Notice of Appeal did not meet the requirement for endorsement by the Deputy Registrar of the court and that the parties are wrongly described.
33. The procedure of instituting an appeal is laid out under Rule 75 of the *Court of Appeal Rules* with the pertinent portion being that;

Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

34. The rule specifically requires that the notice not only be written, but formally lodged with the registrar. In this case no written notice was given by the appellants within the meaning of Rule 75 (1) aforesaid.
35. In the result I find that the application is not merited and is dismissed with no order as to costs.
36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF SEPTEMBER 2022 IN THE PRESENCE OF:

CA: Martha

1st Appellant – present

N/A for 2nd Appellant

Respondent - present

C. K. YANO,

JUDGE.

