



County Government of Meru v Macharia (Environment and Land Miscellaneous Application E019 of 2022) [2022] KEELC 13718 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E019 OF 2022
CK YANO, J
OCTOBER 26, 2022**

BETWEEN

COUNTY GOVERNMENT OF MERU APPLICANT

AND

ZACHARIA MANYUIRI MACHARIA RESPONDENT

(An appeal against the judgment delivered on November 26, 2021 in Meru CMC ELC Suit No. 46 of 2019 Zacharia Manyiri Macharia vs County Government Of Meru.)

RULING

1. The application for consideration is the notice of motion dated June 27, 2022 and filed on June 28, 2022. It is brought under sections 1A, 1B, 3 and 79G of the [Civil Procedure Act](#) and order 51 rule 1 of the [Civil Procedure Rules](#).
2. The main prayer that the applicant seeks is for leave to appeal out of time against the judgment delivered on November 26, 2021 in Meru CMC ELC Suit No 46 of 2019 Zacharia Manyiri Macharia vs County Government of Meru.
3. The grounds upon which the application is predicated are that the judgment in the subordinate court was delivered in the absence of the applicant's advocates, that the notice served upon the applicant's advocate indicated that the judgment was to be delivered on November 25, 2021, but it was never delivered on that date, that the applicant became aware of the judgment when the respondent herein served their bill of costs on April 28, 2022 and on May 16, 2022, the applicant forwarded a copy of the judgment to their legal department for directions and on June 2, 2022 the said department instructed on the filing of this application and the intended appeal. It is the applicant's contention that no prejudice will be occasioned to the respondent if the applicant is granted leave to file an appeal out of time.



4. The application is supported by an affidavit sworn by Irah Nkuubi on June 27, 2022 and another sworn by Mwirigi Kaburu on the same date. The two affidavits basically explain out the grounds upon the application is predicated and setting out the history of the dispute as determined by the subordinate court, annexing the pleadings and judgment.
5. The depositions by Mr Mwirigi Kaburu advocate explain the reason why the judgment was delivered in their absence and without notice. He has annexed a notice served on their firm indicating that the judgment was to be delivered on November 25, 2021 and the judgment that was delivered on November 26, 2021.
6. The application is opposed by the respondent through a replying affidavit sworn by himself on August 18, 2022. He depones that judgment was delivered on November 26, 2021 and the applicant alleges to have only become aware of the judgment on April 28, 2022 when they were served with a bill of costs. He avers that almost four months have passed since the judgment was delivered and the applicant is putting the blame on the respondent's counsel of not informing them of the date when the judgment was delivered. That nothing but a mere delaying tactic by the applicant to stop the respondent from executing the judgment and prayed that the application be dismissed with costs.
7. The application was canvassed by way of written submissions. The applicant filed their submissions on August 29, 2022 through the firm of Mwirigi Kaburu & Co Advocates, while the respondent filed his on September 1, 2022 through the firm of Gichunge Muthuri & Company advocates.
8. I have considered the application, the response and the submissions filed as well as the authorities relied upon. The issue for determination is whether the court should grant the applicant leave to file appeal out of time.
9. The applicant pleads the judgment in the subordinate court was delivered in the absence of their advocates. That whereas their advocates were served with a notice indicating that judgment was to be delivered on November 25, 2021, the same was not delivered on the said date. Instead, the judgment was delivered on November 26, 2021.
10. The respondent on the other hand does not deny the depositions made on behalf of the applicant. However, the respondent contends that no explanation has been given from the time the applicant alleged to have become aware of the judgment on April 28, 2022 when they were served with a bill of costs and the time the judgment was delivered.
11. In the case of *Stanley Kaiyongi Mwenda Vs Cyprian Kubai [2000] eKLR*, the Court of Appeal stated as follows-;

As it has been said on numerous in an application of this nature this court is being asked to exercise its unfettered discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in his favour. If the explanation given is acceptable, the court will then exercise its discretion in favour of the applicant'
12. It is therefore trite that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matter which the court takes into account in deciding whether to grant an extension of time are first the length of the delay, and secondly, the reason for the delay.
13. In this case, the lower court delivered its judgment on November 26, 2021. The applicant has a six months delay, putting them outside the mundane of section 79G of the *Civil Procedure Act* which provides that an appeal from the subordinate court to this court shall be filed within a period of thirty



days from the date of the decree or order appealed against. There is however, a proviso under the said section 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.

14. The applicant claim that the delay in filing the appeal in time was occasioned by confusion in the notice which indicated that the judgment was to be delivered on November 25, 2021 but was delivered on November 26, 2021. The applicant has also stated that when they eventually received communication from their advocates on May 17, 2022 forwarding the judgment, they sought advice from their legal department who subsequently instructed on the filing of the intended appeal. The respondent has not given any explanation why a notice was issued that judgment was to be delivered on November 25, 2021 but instead was delivered on November 26, 2021. From the material on record, there is no notice served upon the applicant's advocates that show that the judgment had been rescheduled from November 25, 2021 to November 26, 2021.
15. Having regard to the circumstances of this case, I find that there has been adequate and reasonable explanation for the delay. Hence the applicant ought not be shut out of exercising their statutory right to be heard on appeal.
16. Accordingly, I allow this application in the following terms:-
 - a. Leave is granted to the applicant to file an appeal against the decree and judgment of Hon T Mwangi SPM in Meru CMC ELC No 46 OF 2019 delivered on November 26, 2021.
 - b. The memorandum of appeal shall be filed within seven (7) days from the date of this ruling.
 - c. As regards the costs of this application, I order that the same shall abide the intended appeal.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF OCTOBER, 2022

In presence of

C.A Mwenda

Mwirigi Kaburu for applicant

Gichunge for Respondent

C.K YANO

ELC JUDGE

