



Kiprop & 2 others v Korir & 2 others (Miscellaneous Civil Application E005 of 2022) [2022] KEELC 13552 (KLR) (17 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
MISCELLANEOUS CIVIL APPLICATION E005 OF 2022**

**L WAITHAKA, J
OCTOBER 17, 2022**

BETWEEN

**MUSA KIPROP 1ST APPELLANT
SAMSON K.A TIM 2ND APPELLANT
MICHAEL K. KURGAT 3RD APPELLANT**

AND

**JONAH KORIR 1ST RESPONDENT
AGNES JEPTEKENY 2ND RESPONDENT
AGNES CHANGWONY 3RD RESPONDENT**

RULING

1. On July 1, 2022, the applicant herein filed the notice of motion of an even date seeking leave to file an appeal against the judgment of Hon R Koech SPM delivered on March 17, 2022 in Eldama Ravine CMCC ELC Case No 60 of 2019-Musa Kiprop & 2 others v Jonah Korir & 2 others.
2. The application is brought under sections 1, 1A, 3, 3A, 3B and 79G of the *Civil Procedure Act* and order 50 rule 6 of the Civil Procedure Rules. It is premised on the grounds that the applicants were aggrieved by the decision of the trial court; that the applicants applied for certified copies of proceedings and judgment for purpose of appealing and that by the time the applicants were supplied with certified proceedings, the time within which they ought to have appealed had lapsed. Explaining that they filed the instant application immediately after they were supplied with proceedings, the applicants have deposed that the intended Appeal has high chances of success. The applicants have deposed that no prejudice will be occasioned on the respondents if the application is allowed.
3. The application is supported by the affidavit of the Samson KA Tim, the 2nd applicant in which the grounds on the face of the application are reiterated. The deponent of the affidavit has annexed to the



affidavit letter Ref 18/CIV/MK/243 dated 18th March, 2022 addressed to the Executive Officer of the lower court requesting for copies of proceedings (JKT1), the proceedings and judgment of the lower court (JKT2). The deponent has also annexed a memorandum of appeal to the affidavit (JKT3).

4. The application is opposed through the replying affidavit of the 1st respondent and grounds of opposition filed by the 3rd respondent on 20th July 2022. Through his replying affidavit, the 1st respondent contends that the application is misconceived, incompetent, lacking in merit and an abuse of the court process; that there was unreasonable, inordinate and unexplained delay of 4 months. Terming the application a belated afterthought calculated at delaying the conclusion of the case between the applicants and the respondents, the 1st respondent urges the court to dismiss it with costs.
5. The 3rd respondent opposes the application on the grounds that it is a feeble attempt to circumvent the provisions of section 75G of the *Civil Procedure Act*; that there was a delay of approximately four months in filing the application which delay is not justifiable and unexplained and that the applicants did not serve the respondent with a memorandum of appeal within seven days as required by order 42 rule 12 of the Civil Procedure Rules. Terming the intended appeal an afterthought, the 3rd respondent contends that the memorandum of appeal annexed to the applicants' supporting affidavit is frivolous and unmerited.
6. On September 21, 2022 when the application came up for hearing, counsel for the applicants relied on the grounds on the face of the application and the affidavit in support thereof. He informed the court that the judgment sought to be appealed from was handwritten when it was delivered. They applied for typed proceedings on March 18, 2022. They received the proceedings and judgment on July 5, 2022. Urging that it is in the interest of justice to allow the application, counsel informed the court that the applicants are willing to furnish the court with costs of the appeal.
7. Counsel for the 3rd respondent, Mr Kibet, made reference to the reasons given in the affidavit sworn in support of the affidavit, particularly the alleged delay in obtaining certified proceedings, and submitted that there is no requirement in Civil Procedure for a party filing an Appeal against the decision of a lower court to have typed proceedings. Based on section 79G of the *Civil Procedure Act*, he submitted that the Law requires that a memorandum of appeal be filed within 30 days. With regard to the proviso in section 79G of the *Civil Procedure Act* that allows for admission of appeal filed out of time, he submitted that the law requires that the intended appeal be filed before it can be admitted. He argued that, in the instant application, the court has not been given any appeal to admit. Pointing out that counsel for the applicants was in court when the impugned judgment was delivered, counsel for the respondents submits that counsel for the applicant was able to come up with a memorandum of appeal even without the typed proceedings.
8. For the foregoing reasons, counsel for the respondents submits that no convincing reason has been given why the applicant failed to file the intended appeal within the time provided by law. The delay of about four months in applying for leave to file appeal is said to be inordinate. The court heard that the respondents are the ones in occupation of the suit property.
9. In a rejoinder, counsel for the applicants stated that the issues raised by the respondents' counsel have been explained in the affidavit sworn in support of the application, paragraph 3 and 4 thereof. On whether the court has been given any appeal on which to exercise its discretion, he stated that the applicants have supplied the court with their memorandum of appeal.



Power of the court to grant leave to file an appeal out of time

10. This court has discretionary power to grant leave to file an appeal out of time. That power is granted by section 79G of the *Civil Procedure Act*. In that regard see the case of *Edward Kamau & another v Hannah Mukui Gichuki & another* where it was stated:-

“On whether this court should grant extension of time for filing an appeal, the applicable law is section 79G of the *Civil Procedure Act*...

Under the proviso to the said section 79G of the *Civil Procedure Act*, an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

The court further stated:-

“The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, SC Appl 16/2014 laid down the following as the underlying principles that a court should consider in exercise of discretion to extend time: -

- i. Extension of time is not a right of a party. It is equitable remedy that is available to a deserving party at the discretion of the court;
 - ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. As to whether the court should exercise the discretion to extend time, is a consideration to be made a case by case basis;
 - iv. Whether there is a reason for the delay; the delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
 - vi. The application should have been brought without undue delay; and
 - vii. In certain cases, like election petitions, public interest should be a consideration for extending time.”
11. In the circumstances of this case, it is not in dispute that the judgment sought to be appealed from was delivered in the presence of counsel for the appellant. Explaining that there was delay in obtaining typed proceeding and judgment for purpose of crafting a memorandum of appeal, the applicants moved this court for leave to file appeal out of time about four months after the judgment sought to be appealed from was delivered. Arguing that the applicants did not require the proceedings and judgment before they could apply for the judgment, the respondents contend that no sufficient reason has been given for filing the appeal. The respondents have also challenged the application on the ground that no appeal has been filed which the court can admit as contemplated under section 79G of the *Civil Procedure Act*.
12. The issue raised by counsel for respondents, that the proviso in section 79G requires that there be an appeal filed which the court can admit before an application for leave to file appeal out of time can



be allowed, was addressed in the case of *Gerald M'Limbine v Joseph Kangagi* -Meru High Court Misc Application No 40 of 2007 where it was stated:-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such 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. To do so would actually be an abuse of the court’s process which under section 79B says-.....It seems therefore, it is open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be “admitted” not to be “filled out of time”. Admission presupposes the appeal has been filed, and will be “admitted” for hearing after a judge has established under section 79B, that there is “sufficient ground for interfering with the decree, part of a decree or order appealed against”.

13. I agree that in exercising the discretion whether or not to admit the appeal the court has to be satisfied that the appeal is arguable. In the circumstances of this case, where the applicant have annexed a memorandum of appeal to the application for leave to appeal out of time, I am satisfied that the reason behind the requirement that there be in existence an appeal for the court to consider before it can exercise its discretion in favour of the applicant has been met/satisfied; the applicants have annexed a memorandum of appeal to the affidavit sworn in support of the application. Having read and considered the judgment and the memorandum of appeal, I am satisfied that the intended appeal is arguable.
14. Although there was a delay of about four months before moving the court for leave to file the intended appeal, in the circumstances of this case, where the subject matter of the suit property is land, that is occupied by the respondents, I am of the considered view that no prejudice incapable of being compensated by costs will be occasioned on the respondents if the application is allowed.
15. The concerns raised by the respondents of the appeal being an afterthought and meant to delay the conclusion of the dispute between the applicants and them can be addressed by fast-tracking the hearing and determination of the appeal. For those reasons, I am inclined to grant the applicants an opportunity to prosecute their intended appeal.
16. The upshot of the foregoing is that the application is allowed. Costs of defending the application shall abide the outcome of the appeal.
17. To address the concerns raised by the respondents, I direct the applicants, with assistance of the registrar of this court, to ensure that the appeal is filed, served and set down for hearing within 45 days from the date of delivery of this ruling failing which the appeal shall be deemed to have been dismissed with costs to the respondents, upon lapse of that time.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 17TH DAY OF OCTOBER, 2022.

L. N. WAITHAKA

JUDGE

Ruling read virtually in the presence of:

Ms. Rotich holding brief for Mr. Maritim for the Applicant



Ms. Kibet holding brief for Mr. Kibii for the 1st Respondent

N/A for the 2nd Respondent

Mr. Kibet for the 3rd Respondent

Christine Towett: Court Assistant

