



Ooro v Hongo & 2 others (Environment and Land Miscellaneous Application E032 of 2021) [2022] KEELC 15019 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E032 OF 2021
A OMBWAYO, J
NOVEMBER 24, 2022**

BETWEEN

GORRETY AKINYI OORO APPELLANT

AND

WILLIAM ODIYO HONGO 1ST RESPONDENT

SAMWEL ODUMBE 2ND RESPONDENT

KENYA COMMERCIAL BANK LTD 3RD RESPONDENT

RULING

Brief Facts

1. The matter for determination is the appellant's application dated December 6, 2021 filed under section 79G and 95 of the *Civil Procedure Act* where she sought for the following orders:
 1. That this matter be certified as urgent and be heard on priority basis.
 2. That the honourable court be pleased to grant the plaintiff/applicant leave to appeal out of time against the judgement of the Honourable Principal Magistrate F Rashid delivered on October 8, 2021 in Winam Pmc Land Case No 37 Of 2018.
 3. That the memorandum of appeal hereto annexed by the appellant be deemed as properly and duly filed.
 4. That costs of the application be provided for.
2. The application was based on grounds that the subordinate court sitting as the trial court delivered its judgement on October 8, 2021 in which the plaintiff's case was dismissed with costs to the 3rd respondent and being dissatisfied with the said judgement, the applicant herein preferred an appeal. That the circumstances giving rise to the delay in lodging the appeal are that new date of delivery of



the judgement after being deferred from August 27, 2021 was never communicated to the applicant nor her Advocate on record.

3. It was averred that the delivery of the judgement only came to their knowledge on November 15, 2021 and by then the 30 days period within which to file an appeal had lapsed. That failure of the part of the applicant to lodge the appeal was not a deliberate mistake but was inadvertent and was caused by a fault on the part of the trial court.

It was stated that there are risks of the 3rd respondent disposing off the suit property unless this application I allowed and the respondents are not likely to suffer any prejudice. That the delay is not inordinate so inordinate or so great as to be inexcusable and it is in the interest of justice that the application be allowed. The application was supported by the affidavit of the applicant which affidavit relied on the grounds in the application.

4. The 3rd respondent herein filed a replying affidavit on February 28, 2022 where Lillian Sogo who is the principal litigation counsel of the 3rd respondent stated that on July 9, 2021, the parties in PMCC (ELC) No 37 of 2018 (Winam) being Gorrety Akinyi Ooro v KCB Bank Kenya Limited & 2 Others closed their case and this matter was fixed for mention on August 13, 2021 to confirm filing of written submissions and to fix a judgement date.

That the matter was fixed for judgement on August 27, 2021 but the court did not sit on that day and parties and judgement was to be delivered on notice. That the court delivered its judgements on October 8, 2021 where the applicant's case was dismissed with costs.

5. It is the 3rd respondent's case that the circumstances in the instant case do not warrant the exercise of the court's discretion in favour of the applicant as the application has been filed with undue delay. That the applicant is guilty of indolence and has failed to demonstrate the actions she took before November 15, 2021 to learn whether the judgement had been delivered as she ought to be vigilant and conduct due diligence in relation to the status of the case.

It was further stated that the applicant has failed to furnish this court with sufficient reasons for the delay in filing the appeal. That the intended memorandum of appeal lacks merit and should be dismissed and that the 3rd respondent will suffer prejudice if the orders sought in the application are allowed as it shall be deprived of the fruits of its judgement.

6. It is also the 3rd respondent's case that the applicant has not approached this court with clean hands and is therefore underserving of any equitable reliefs. That the applicant lacks merit, is incompetent, misconceived, misinformed and is an abuse of the process of this court.

The 1st and 2nd respondents did not file their reply to the application.

This matter came before for mention before me where I directed parties to file and serve written submissions. I have perused the file and do confirm that parties failed file their respective submissions.

Analysis and Determination

7. Section 79G of the *Civil Procedure Act* 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.”

Section 95 provides as: -

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

8. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

75 (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) An order on an award stated in the form of a special case;
- (c) An order modifying or correcting an award;
- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) An order under section 64;
- (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) Any order made under rules from which an appeal is expressly allowed by rules.

9. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi, C A Appl No Nai 251/97 (ur)* the court stated as follows:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly, (possibly); the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.”

10. On the length of delay and reasons thereof, it is not in dispute that judgement in Winam PMCC Land Case Number 37 of 2018 was delivered on October 8, 2021. The present application was filed on December 6, 2021 that is 58 days delay beyond the statutory period of filing an intended appeal.

The reasons for the delay are that on August 27, 2021 when the matter came up for judgement at the trial court, the same was differed to another date that was not communicated to the applicant herein. In as much as the 3rd respondent has stated that after the date of the judgement was differed, judgement was to be delivered on notice the 3rd respondent has failed to disclose whether the court issued a notice for the delivery of the said judgement. I have also taken notice of the fact that the applicant has failed



to demonstrate the necessary steps taken before November 15, 2021 to learn that judgement had been delivered.

11. I am convinced that although the applicant has given reasons for the delay in filing the appeal, the same are not enough reasons however since none of the parties herein have explained to this court as to whether there was notice issued by the court on delivery of judgement, I am of the view that the delay is not inordinate as the applicant was not informed of the judgement date.

On the issue of whether the appeal has chances of succeeding if the applicant is granted the orders sought, I have looked at the memorandum of appeal and I am of the view that the applicant has demonstrated the appeal is arguable and is not frivolous.

In the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR* the court stated that:

“Lastly, looking at the draft memorandum of appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the applicants have to show at this stage is arguability – not high probability of success. At this point, the applicant is not required to persuade the appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The applicants have easily met that standard. I believe that the applicant has discharged this burden.”

12. On the issue of whether the respondents will be prejudiced, it is the applicant’s case that the respondents will not suffer in the event the orders sought are granted. The 3rd respondent on the other hand has stated that they are likely to suffer if the appeal is allowed but have not clearly stated what prejudice they are likely to suffer.

In the upshot this court allows the application and orders as follows:

1. That the applicant is hereby granted leave to appeal out of time against the judgement of the Honourable Principal Magistrate F Rashid delivered on October 8, 2021 in Winam PMC Land Case No 37 Of 2018.
2. That the memorandum of appeal hereto annexed by the appellant is deemed to be properly and duly filed.
3. That each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24th DAY OF NOVEMBER 2022.

A O OMBWAYO

JUDGE

