



**Kinyua v Mbabu (Environment and Land Miscellaneous Application  
E013 of 2022) [2022] KEELC 14781 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14781 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2022  
CK YANO, J  
NOVEMBER 16, 2022**

**BETWEEN**

**EMILY KINYUA WIFE OF FEDESIO KINYUA MARK  
(DECEASED) ..... APPLICANT**

**AND**

**LAWRENCE MURIITHI MBABU ..... RESPONDENT**

**RULING**

1. The applicant herein has moved this court by way of the notice of motion dated May 16, 2022 seeking leave to file appeal out of time and stay of execution of the judgment and decree and all consequential orders thereto in Meru C M ELC No 75 of 2020. The application is brought under section 3, 3A, 63(e) and 79G of the *Civil Procedure Act*, order 51 rule 1 and order 42 rule 6 of the *Civil Procedure Rules* and is premised on the following grounds:
  - i. That the judgment was a nullity have (sic) been adjudicated during the pendency of Meru CM ELC No 181 of 2018 and Meru ELC appeal No 58 of 2018.
  - ii. That on February 22, 2022 the appellant herein applied for typed copies of judgment but the same was never delivered to her save for a photocopy received on March 20, 2022.
  - iii. That for the interest of justice the applicant is seeking enlargement of time to file appeal out of time.
  - iv. That the judgment in Meru ELC No 75 of 2020 was entered against the applicant.
  - v. That the respondent is threatening to execute the said judgment against the applicant which will render the applicant and her entire family squatters, vagabond, and homeless as they have no other place to call home.



- vi. That unless the orders sought herein of stay of execution of the said judgment issued, the applicant shall be disinherited and rendered destitute.
2. The application is supported by the affidavit of Emily Kinyua sworn on May 16, 2022 and a supplementary affidavit of Emily Gacheri dated June 21, 2022 in which it is deponed inter alia, that judgment in Meru CM ELC No 75 of 2020 was delivered on February 10, 2022 in her absence, and being aggrieved by the said judgement intends to appeal against it. That the judgement was delivered during pendency of application for substitution and therefore was a nullity having been delivered during the pendency of Meru CM ELC No 181 of 2018 and Meru ELC Appeal No 58 of 2018.
  3. The applicant avers that on February 22, 2022, she applied for a certified copy of judgment in ELC No 75 of 2020, but has never been supplied with the same save for a photocopy which she obtained on April 22, 2022, and by then 30 days period within which the appeal was to be filed had lapsed. The applicant has annexed copies of the said judgment, application and letter and certificate of delay.
  4. It is the applicant's contention that there was no inordinate delay in filing the application herein, and if the same is allowed, the respondent would not suffer any prejudice. The applicant avers that she has a good appeal with high chances of success, adding that if stay of execution is not granted, the applicant shall be rendered homeless, destitute and a squatter and shall suffer irreparable loss and damage not compensable by any award of damages.
  5. In the supplementary affidavit, the applicant has annexed copy of application for substitution of parties dated October 30, 2020, copy of plaint in Meru CM ELC No 181 of 2018 and copy of appeal in Meru ELC appeal No E013 of 2022.
  6. In opposing the application, the respondent filed grounds of objection dated June 13, 2022 and a replying affidavit sworn by Lawrence Muriithi Mbabu, the respondent on July 25, 2022. It is the respondent's contention that the application is incompetent, misconceived, bad in law, and abuse of the court process and a waste of the court's judicial time hence it should be dismissed with costs. The respondent argues that the applicant has not advanced any reasons at all that may have prevented her and her advocates on record from perusing the subordinate's court's file and filing a memorandum of appeal within the required timelines. That there is no requirement in law that a memorandum of appeal has to be filed together with the record of appeal therefore there was no requirement for a certified copy of the impugned judgment.
  7. The respondent contends that the grounds set out in the memorandum of appeal annexed to the application herein demonstrate that the intended appeal is a non-starter, frivolous and with no chances of success for the reasons listed thereon. The respondent avers inter alia, that the application for substitution dated February 17, 2021 that had been filed by the applicant herein was dismissed with costs to the respondent for want of prosecution and on October 12, 2021 subsequently Meru ELC Appeal No 58 of 2018 was struck out with costs to the respondent on January 19, 2022 both by Justice Nzili. That there was neither a pending application for substitution nor was there a pending appeal in Meru ELC No 58 of 2018 when the judgment in Meru CM ELC No 75 of 2020 was delivered on February 10, 2022. Copies of the pleadings, ruling, judgment and orders are annexed.
  8. The respondent avers that he is now the absolute registered owner of the suit property together with his wife, Jane Kathure M'Ikunyua having purchased the same through a public auction and has annexed a copy of the title deed. That allowing the instant application will be tantamount to encouraging the applicant to subject the respondent to unnecessary litigation and legal costs in litigating over issues that have been over and again determined as between the parties herein over the suit property by the courts



of law in total abuse of the court process. The respondent urged the court to dismiss the application with costs.

9. I have considered the application herein, the response and the rival submissions. The issue for determination are whether the applicant should be granted leave to appeal out of time and whether the orders of stay of execution of the judgment and decree in Meru CM ELC No 75 of 2020 should be granted pending the hearing and determination of the intended appeal.
10. The decision sought to be appealed against is from the magistrate's court. Under section 79G of the *Civil Procedure Act*, appeals from the decisions of the lower court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking extension of time to file an appeal must show that he has good cause for doing so.
11. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now well settled. The court ought to consider the length of the delay, the reasons 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. (see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997 (unreported) and *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR). The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.
12. As for the length of the delay, the impugned judgment was delivered by the trial court on February 10, 2022 while the instant application was filed on May 18, 2022. The 30 days period within which the applicant ought to have filed the appeal lapsed on March 11, 2022. The application herein has been brought after a period of over three (3) months.
13. In justifying the said delay, the applicant deposed that the judgment was delivered in her absence and that on February 22, 2022, she applied for a certified copy of judgment but only obtained a photocopy on April 22, 2022, by which time the thirty days period within which the appeal was to be filed had lapsed.
14. From the applicant's averments, it is clear that as at February 22, 2022, the applicant was aware that a judgment had been delivered on February 10, 2022. Order 42 rule 1, 2 and 3 of the Civil Procedure rules provides that:
  - “(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
  - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative and such grounds shall be numbered consecutively.
  2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in an event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79G of the Act until such certified copy is filed.



3(1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13”

15. It is clear from the above provisions that the law on appeals to the High Court are instituted by way of filing a memorandum of appeal. There is no requirement that a certified copy of the decree or order should be filed at the time of the memorandum of appeal at first instance. The rules are clear that an applicant shall file the certified copy of decree or order appealed against as soon as possible and within such time as the court may order. Therefore, the applicant could have filed her memorandum of appeal before the lapse of 30 days since she became aware of the impugned judgement on February 22, 2022. In this case, the applicant has not explained to this court satisfactorily what prevented her from filing the memorandum of appeal on February 22, 2022 or before the lapse of 30 days on March 11, 2022. Having learnt of the delivery of the impugned judgment on February 22, 2022 the applicant still had 18 days to file her appeal before the lapse of the 30 days required by law. I am in agreement with the respondent’s submissions that the applicant has not given any sufficient reasons for the delay of over 2 months, which delay in my view was inordinate.
16. In my considered view, the applicant slept on her rights to challenge the impugned judgment for too long and has failed to explain the delay. Attributing the delay to the supply of typed copies of the judgment which to me was not necessary, is not sufficient reason to allow the exercise of this court’s discretion in favour of the applicant.
17. For the above reasons, it is my finding that the applicant herein has not satisfied the conditions for grant of leave to appeal out of time. Consequently, the application dated May 16, 2022 is dismissed with costs to the respondent.
18. It is so ordered.

**DATED SIGNED AND DELIVERED AT MERU THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**In the presence of**

**C.a Mwenda**

**Ms Ndinda for Respondent**

**No appearance for Kiogora Mugambi for applicant but applicant present in person.**

**C.K YANO**

**ELC JUDGE**

