Matiri v M'Nkoroi & another; M'Nkoroi (Plaintiff); M'Iria & another (Defendant); Matiri (Applicant) (Appeal E010 of 2025) [2025] KEELC 1389 (KLR) (12 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1389 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

APPEAL E010 OF 2025

JO MBOYA, J

MARCH 12, 2025

BETWEEN

SOLOMON MUKABA MATIRI ..... APPELLANT

AND

KARAGO M'NKOROI ..... 1ST RESPONDENT

GODFREY MURIUKI (LEGAL REPSENTATIVE OF ISAAC MUTWIRI (DECEASED) ..... 2ND RESPONDENT

AND

KARAGO M'NKOROI ..... PLAINTIFF

AND

NKIROTE M'IRIA ..... DEFENDANT

GODFREY MURUKI (LEGAL REPSENTATIVE OF ISAAC MUTWIRI (DECEASED) ..... DEFENDANT

AND

SOLOMON MUKABA MATIRI ..... APPLICANT

RULING

1. The Appellant/Applicant herein has approached the court vide the Notice of Motion application dated 11th February, 2025 and wherein the applicant has sought for various reliefs. The reliefs sought by the applicant are as hereunder;

    a. The Courts be pleased to certify this Application as urgent and be heard on priority basis.

    b. That the court be pleased to grant leave to the Applicant to file an appeal out of time.

c. That an order be and is hereby issued that ruling issued at the lower court on 4th December, 2024 be set aside pending the hearing and determination of this Application.

d. That an order be and is hereby issued that the ruling issued at the Lower Court on 4th December, 2024 be set aside pending the hearing and determination of the Appeal.

e. That an order be and is hereby issued for stay of execution of the orders issued at the lower court dated 18th October, 2024 and 6th December, 2024 pending the hearing and determination of this Application and the Application pending in the lower court.

f. That an order be and is hereby issued for stay of execution of the orders issued at the Lower Court dated 18th October, 2024 and 6th December, 2024 pending the hearing and determination of the Appeal.

g. Any other order that the court may deem fit.

2. The instant application is premised on the various grounds which have been enumerated in the body thereof. In addition, the application is supported by the affidavit of Solomon Mukaba Matiri [deponent] sworn on even date, namely; the 11th February, 2025.

3. Upon being served with the instant application, the second Respondent filed a Notice of preliminary objection dated the 10th of March, 2025; and a Replying affidavit sworn by Geoffrey Muriuki on even date.

4. On the other hand, the applicant herein [sic] filed an amended memorandum of appeal and brought on board a third respondent. The 3rd respondent appeared during the hearing of the application, but same [3rd respondent] had not filed any response to the application or at all.

5. The application beforehand came up for hearing on the 12th of March, 2025, wherefrom same [application] proceeded for hearing. Suffice to state that the application was canvassed by way of oral submissions. Furthermore, the submissions ventilated on behalf of the parties are on record.

6. On behalf of the Appellant/Applicant, it was submitted that the appellant/applicant was aggrieved by and dissatisfied with the ruling of the Chief Magistrate delivered on the 4th of December, 2024 and as a result of the foregoing, same[applicant] proceeded to and filed the memorandum of appeal on the 11th of February, 2025.

7. It was further submitted that even though the ruling was delivered on the 4th of December, 2024, the copy thereof [ruling] was never availed to the applicant up to and including the 21st of December, 2024.

8. In this regard, it has been submitted that owing to the fact that the ruling was never availed and/ or supplied to the applicant up to the 21st of December, 2024, the time for filing an [the intended] appeal did not commence to run.

9. Additionally, it has been submitted that the duration between 21st of December, 2024 up to [sic] the 16th of January, 2025, is not taken into account in computation of time. To this end, learned counsel for the applicant has therefore submitted that the time for filing the appeal ran up to the 15th of February, 2025.

10. Secondly, it has been submitted that if the time for filing the appeal had lapsed, then the application beforehand has been filed without unreasonable and inordinate delay. In this regard, it has been submitted that the delay in question ought not to militate against the exercise of the discretion in favour of the applicant.

11. Thirdly, it has been submitted that the appellant /applicant herein is entitled to partake of and benefit from the right to the hearing. In this regard, learned counsel for the applicant has cited and referenced the provisions of article 50 of the *Constitution* 2010. For good measure, the applicant contended that same [applicant] has not been afforded the opportunity to be heard, which is a constitutional right.

12. Moreover, the applicant has submitted that same has an arguable appeal and thus same ought to be afforded an opportunity to canvass the appeal before the court. In this regard, it has been submitted that the applicant was a purchaser for value and same [applicant] has been issued with certificate of title to the suit property.

13. Finally, it has been submitted that the Respondent herein shall not be disposed to suffer any prejudice or at all, if the orders sought at the foot of the application are granted. Consequently, the court has been invited to find and hold that the application is merited.

14. The 2nd respondent adopted and relied upon the Replying affidavit sworn on the 10th of March, 2025; and the Notice of preliminary objection of even date.

15. Furthermore, the 2nd Respondent submitted that the appeal beforehand was filed/lodged outside the stipulated duration provided for under Section 79G of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

16. To the extent that the appeal was filed/lodged out of time, it has been submitted that the entire Appeal and by extension the application filed thereunder, are a nullity. In this regard, it has been posited that the appeal ought to be struck out.

17. Secondly, it has been submitted that the applicant herein had filed an application for joinder into the suit before the subordinate court long after the delivery of judgment. However, it has been contended that the said application was dismissed by the Subordinate Court and hence the Appellant/ Applicant was not a party in the suit before the subordinate Court.

18. Owing to the fact that the application sought joinder pursuant to the provisions of Order 1 of the Civil Procedure Rule, 2010, it has been submitted that the applicant herein ought to have sought for and obtained leave to appeal in accordance with the provisions of order 43 Rules 1 and 2 of the Civil Procedure Rules 2010. Nevertheless, the 2nd Respondent has submitted that no leave to appeal was ever sought for and/or obtained.

19. Finally, learned counsel for the 2nd Respondent has submitted that the appeal having been filed out of time and without leave, same [appeal] cannot be validated by the court in the manner sought by the applicant. In any event, it has been submitted that the court is divested of jurisdiction to validate what is otherwise a nullity. To this end, learned counsel for the 2nd Respondent has cited and invoked the decision of the Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat vs. IEBC and 7 others [2014] eKLR.

20. Arising from the foregoing, learned counsel for the 2nd Respondent has therefore, implored the court to find and hold that the entire application is devoid of merit[s] and thereafter to dismiss the application with costs to the 2nd Respondent.

21. The 3rd Respondent [who was brought on board vide the amended Memorandum of Appeal dated 11th of March, 2025] also made submissions before the court. It was the submission by the 3rd Respondent that in so far as an appeal has since been filed, it behooves the court to invoke and deploy the provisions of Article 159 (2) (d) Of the *Constitution*, 2010.

22. To this end, learned counsel for the 3rd Respondent submitted that it will not be appropriate for the court to strike out the appeal, merely, because same [appeal] was filed out of time. In any event, it was submitted that the applicant has since filed an application for leave to appeal out of time and which application ought to be granted, with a view to validating the appeal.

23. Furthermore, it was submitted that the court is seized of the inherent jurisdiction, which ought to be deployed to ensure that the ends of justice are served and additionally, to avert injustice. In this regard, it was submitted that unless the court intervenes, the applicant herein is likely to suffer a miscarriage of justice.

24. Arising from the foregoing, learned counsel for the 3rd Respondent submitted that the filing of the appeal out of time is a procedural technicality, which is curable by invoking the provision of Article 159 (2) (d) of the *Constitution* 2010.

25. Having reviewed the application; the response, thereto and notice of Preliminary Objection and upon consideration of the oral submissions made on behalf of the respective parties, I come to the conclusion that the determination of the subject application turns on three [3] issues; namely, whether the appeal was filed out of time and if so, whether an appeal filed out of time is a nullity; whether an appeal filed out of time is capable of being validated ex-post facto or otherwise; and whether the filing of an appeal out of time is a procedural technicality curable vide the provisions of Article 159 (2) (d) of the *Constitution* 2010.

26. Regarding the first issue, namely; whether the appeal was filed out of time without leave and whether such an appeal is a nullity, it is imperative to take cognizance of the fact that the impugned ruling was rendered on the 4th of December, 2024. To this end, if the applicant was desirous to mount an appeal, then it behooved the applicant to file the intended appeal within 30 days from the date of delivery of the ruling under reference.

27. Furthermore, it is important to recall and reiterate that in computing the timeline for filing of the appeal, the first day, namely; the date of delivery of the ruling is excluded whereas, the last date is included. In this regard, the computation of time would be reckoned by excluding the 4th of December, 2024 but including the last day, namely; the 30th day, being the last day for filing of the intended appeal.

28. Additionally, in computing the timeline for filing the appeal against the impugned ruling, the timeline between the 21st of December, 2024 up to the 13th of January, 2025 [being the year following] would be excluded. [See the provision of order 50 rules 1, 2 and 3 of the Civil Procedure Rules, 2010]

29. Bearing the foregoing in mind, it is now expedient to revert to the instant matter and to discern whether the appeal was filed within time. Needless to say, that the first day in the computation of time is the 5th of December, 2024. In this regard, the total number of days that were available in December, 2024 work to 15days.

30. Moreover, the remainder 15 days for purposes of concluding the 30 days period provided for by section 79G of the *Civil Procedure Act*, would then be procured in January, 2025. Suffice to state that the 15 days would be recorded from the 14th of January, 2025. To this end, the 30-day period for filing the appeal lapsed on or about the 29th of January, 2025.

31. Flowing from the foregoing, there is no gainsaying that by the time the memorandum of appeal dated 11th of February, 2025 was being filed, the statutory time [duration] for filing the appeal had lapsed. In this regard, no appeal could have been filed without leave of the court.

32. Pertinently, the limitation underpinning the filing of an appeal is statutorily provided for. In this regard, once the duration lapses, any aggrieved party, the applicant not excepted, can only appeal with leave. For good measure, the limitation period cannot be waived by anybody, save pursuant to an Order of the Court. In any event the limitation period is intended to ensure that litigants are not held at ransom by slovenliness, lethargy and/or indolence. [See the holding in the case Gathoni Vs. Kenya Cooperative Creameries Limited [1992]eKLR [See also the decision of the Court of Appeal in the case of Kakuta Maimai Hamisi Vs. Peris Pessi Tobiko and others (2014)eKLR, respectively, where the significance of the statutory timeline[s] were highlighted and underscored.

33. The instant appeal having been filed out of time, same [appeal] is a nullity and thus void for all the intents and purposes. [See the decision in the case of McFoy Vs. United Africa Limited (1952) ALL ER 1159 where the House of Lords remarked about the legal implication of an act which is void and posited that once an act is void, same is irredeemable.

34. Taking the foregoing into account, I come to conclusion that the appeal beforehand and which was filed out of time, is a nullity and void for all intents and purposes.

35. Next is the question as to whether an appeal, which is a nullity and void, can be redeemed/validated ex post facto or otherwise. In answer to this question, it is imperative to take cognizance of the holding of the Supreme Court of Kenya in the case of Nicholas Kiptoo Korir Arap Salat Vs. IEBC and 7 others [Civil Application no. 16 of 2014] [2014] eKLR where the court stated as hereunder.

> What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.
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> By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.
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> To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record.

36. In the case of County Executive of Kisumu v County Government of Kisumu & 8 others (Civil Application 3 of 2016) [2017] KESC 16 (KLR) (Civ) (12 April 2017) (Ruling), the Supreme Court of Kenya [the apex Court] re-visited the foregoing position and stated thus;

> We are in total agreement with the respondent that an appeal filed in this Court out of time without leave of this Court is irregular and this Court will not invoke such 'novel' principles as urged by applicant so as to validate that petition and deem it as properly filed. We buttress this Court's position in Nicholas Salat when this Court stated thus:...In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed. What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time.
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37. Flowing from the dicta espoused in the decisions cited above [supra], it is crystal clear that an appeal that has been filed out of time, is a nullity and incapable of being validated. In this regard, the invitation by the applicant to have the appeal deemed as duly filed is not only misconceived but legally untenable.

38. Before departing from this issue, it is imperative to take cognizance of the provision of Article 163 (7) of the *Constitution* 2010, which underpins the common law doctrine of the precedence [stare decisis]. Notably, the decision[s] of the Supreme Court [Apex Court] are binding on this court and all the other courts in the Republic of Kenya [save for the Supreme Court itself].

39. The import and tenor of the doctrine of precedence has been highlighted in a plethora of decisions. Instructively, it is appropriate to reference the decision in the case of Asanyo *& 3 others v Attorney-General (Petition 7 of 2019)* [2020] KESC 62 (KLR) (10 January 2020) (Judgment) where the Supreme Court re-affirmed and reiterated the doctrine as hereunder;

> In Dodhia v National & Grindlays Bank Limited and Another [1970] EA 195, Duffus, V.P. expounded the principle of stare decisis stating that; "The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in

> the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State."
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> We had thus recounted in another case, Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others Supreme Court Petition No. 4 of 2012, [2013] eKLR, "Adherence to precedent should be the rule and not the exception ....; the labour of judges would be increased almost to breaking-point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

40. Simply put, the decision[s] of the Supreme Court are binding and thus this court is obligated to abide by and adhere to the decision of Supreme Court. In this regard, the application for the grant of leave to appeal out of time on the face of an existing appeal albeit out of time, is not tenable.

41. Moreover, learned counsel for the 3rd Respondent invited the court to deploy and invoke the provisions of Article 159 (2)(d) of the *Constitution* 2010, to cure the lateness in the filing of the appeal. In the mind of the learned counsel for the 3rd Respondent, the filing of the appeal of out of time is a procedural technicality and thus capable of being excused.

42. My short answer to the submission by the learned counsel for the 3rd Respondent is to the effect that the filing of an appeal out of time is a substantive question of law, which goes to the root of the matter. Instructively, where an appeal is filed out of time, the court is deprived of jurisdiction to entertain such an appeal. [See the decision of the court of appeal in the case of Attorney General v Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment)

43. Finally, learned counsel for the 3rd Respondent has also invited the court to invoke and deploy the inherent jurisdiction of the court to validate the appeal and thereafter, hear the appeal on merits, in an endeavor [sic] to afford the applicant the right to be heard in terms of Article 50 of the *Constitution* 2010.

44. Similarly, it is not lost on this court that the inherent jurisdiction of the court cannot be deployed where there are clear and express statutory provisions dealing with a particular situation. In this regard, it is imperative to cite and reference the decision of the Court of Appeal in the case Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] KECA 431 (KLR)

45. For coherence, the Court of Appeal stated thus,

> It was held in Taparn vs Roitei [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The *Advocates Act* and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered.

46. In my humble view, the inherent jurisdiction, which is also referred to as the residual/ intrinsic Jurisdiction, of the court cannot be relied upon by the applicant and the third Respondent, to salvage the appeal before hand. In any event, the inherent jurisdiction of the court cannot be deployed as a shortcut by a party who pays scant respect to the statutory provisions of the law.

47. Put differently, the inherent jurisdiction of the court is not a panacea for every breach, violation and disregard of substantive provisions of the law. Suffice to state that the applicant and the 3rd Respondent must learn to comply with the dictates of the law. [see the dicta in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR

Final Disposition:

48. Flowing, from the foregoing analysis, it must have become evident and apparent that the appeal beforehand and the application filed thereunder are irredeemably bad and thus incapable of redemption. In this regard, the only available alternative is to strike out the appeal and the application.

49. In the premises, the final orders of the court are as hereunder.

    i. The appeal be and is hereby struck out.

    ii. The application dated 11th of February, 2025 be and is hereby struck out.

    iii. Costs of the appeal and the application be and are hereby awarded to the 2nd respondent only.

48. It is ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH MARCH, 2025.

OGUTTU MBOYA,

JUDGE.

In the presence of;

Mr. Mutuma – Court Assistant

Mr. Charles Kimathi for the Appellant/Applicant.

Mr. Mwirigi Batista for the 2nd Respondent.

Mr. Karatu for the 3rd Respondent.