



**Muchee v Njiru (Miscellaneous Application E007 of 2023)  
[2024] KEELC 6207 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 6207 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
MISCELLANEOUS APPLICATION E007 OF 2023**

**A KANIARU, J**

**JUNE 4, 2024**

**BETWEEN**

**SIMON BUNGU MUCHEE ..... APPLICANT**

**AND**

**JOSEPH MUTURI NJIRU ..... RESPONDENT**

**RULING**

1. I am called upon to determine a notice of motion dated 17.05.2023 and filed on 23.05.2023. The motion has been filed by Simon Bungu Muchee who was the defendant in the ELC No 43 of 2019 in the lower court at Siakago. The respondent - Joseph Muturi Njiru - was the plaintiff. The motion has been brought under Section 79 of the *Civil Procedure Act* and Order 51 rule 1 of the civil procedure rules. It is mainly for leave to appeal out of time and the orders sought are as follows;
  - i. That the applicant be granted leave to appeal against the undated judgement of the principal magistrate Hon W. Ngumi in Siakago ELC No. 43 of 2019.
  - ii. That after granting of the leave prayed the applicant files the appeal within 30 days from the date thereof.
  - iii. There be no orders as to costs.
2. The applicant supported the motion on the grounds set out on its face and on his supporting affidavit dated 17.05.2023. He deposed that he was not notified of the date of delivery of judgement as the same was delivered online without notice to him. That he became aware that there was a judgement on 04.05.2023 when he was served with a decree of the court dated 27.04.2023. That he could not appeal on time as he was not aware that judgement had been delivered. That the judgment of the court is not dated and so he was not able to know the actual date of delivery.



3. The application was responded to by the respondent via a replying affidavit dated 04.07.2023. It was his case that the application is frivolous, vexatious, misleading and an abuse of the court process. That the judgment of the court was fair and just and so he should be allowed to enjoy the fruits of the judgement. He urged that the application be dismissed with costs.
4. It was agreed that the application be disposed of by way of written submissions. The applicant's submissions were filed on 18.12.2023 whereas the respondent's submissions were filed on 12.03.2024.
5. The applicant submitted that from the wording of section 79(G) of the *civil procedure act*, all that a party seeking extension of time needs to do is to show good and sufficient cause why he was not able to file the appeal on time. That what constitutes good and sufficient cause is a matter of discretion of the court considering the application. That the discretion as stated in the case of *Shah v Mbogo & Anor [1967] EA 116* is intended to be exercised to avoid injustice arising from excusable error and that the primary concern of the court is to do justice for the parties.
6. He submitted that after the close of the hearing in the lower court, directions were given that judgement shall be delivered on notice after the trial magistrate was transferred to another working station. That he kept following up and making inquiries on the date of delivery of judgment with no success. That from the copy of decree served upon him it shows that judgement was delivered on the 17.08.2022. He submitted that he has good and sufficient cause for his failure to file an appeal on time as he didn't know when the judgement was delivered. He also didn't know the contents of the judgement and therefore he could not file an appeal.
7. He urged the court to exercise its discretion in his favour and grant the orders sought. The case of *Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Co Ltd [2015] Eklr* was cited to persuade the court. The court was also urged to consider the nature of the orders of the trial magistrate as they are orders of eviction which would result in his eviction from the suit land with all attendant consequences of loss of property, suffering and anguish. That these are serious consequences and the applicant should be given a chance to ventilate his case in a higher court. He also submitted that his submissions were made without the benefit of the respondents replying affidavit as the same was not served upon him as directed. He urged that the replying affidavit be expunged from the record.
8. The respondent on the other hand submitted that the evidence on record as well as the judgment of the trial court show a clear picture that the prayers allowed in the lower court were carefully considered on a balance of probabilities and therefore there is no need to overturn the same. That the applicant did not provide the court with the intended memorandum of appeal. It was urged that the application be dismissed with costs.
9. The applicant has urged this court to expunge from the record the respondent's replying affidavit which was filed but not served upon him. I have looked at the record, it shows that on 12.10.2023, the respondent was directed by the court to serve the applicant with the said replying affidavit. There is no evidence of service of the same on the affidavit neither is there an affidavit of service on record. I am satisfied that the replying affidavit was not served upon the applicant as directed and therefore the same is expunged from the record.
10. Having considered the application as well as the party's submissions, I find that the issue for determination is whether the applicant is entitled to leave to file his appeal out of time.



11. The relevant provision of law when making such consideration is Section 79G of the Civil Procedure Act which provides that:

“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.”

12. Whether or not to extend the time for filing an appeal is a matter of court’s discretion. The principles that guide the court in exercising such discretion were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* [1990] 2 EA 231 as cited in *Sigilai v Mugambi (Civil Application E034 of 2022)* [2023] KECA 637 (KLR) (3 February 2023) (Ruling). They comprise the length of the delay; the reason 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. Similar factors were also stated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Salat v IEBC* [2013] eKLR.

13. The applicant herein stated that the judgment of the lower court was undated which fact I have confirmed from the judgement attached to his application. He however said that the decree that he was served with showed that judgment was delivered on 17.08.2022. He also said he learnt of the judgment on 04.05.2023 upon being served with the decree, facts which were not disputed by the respondent. Going by that account of events, the applicant ought to have filed his appeal on or before 17.09.2022. He however explained that he was unable to do so as his attempts to get the lower court’s date of delivery of the judgement were futile as the trial court at the time was on transfer and had indicated that the judgement would be delivered on notice. Notice was not issued to him at the time of delivery and the fact of not knowing the existence of a judgment or its content made it was impossible to file an appeal.

14. He also explained that upon learning of the judgment on 04.05.2023, he moved the court for leave to file the appeal out of time on 23.05.2023, which was about two weeks and 5 days later. In my view, the application was brought without unreasonable delay. It also my view that the explanation given for failing to appeal on time is good and sufficient in the circumstances.

15. As to whether the appeal has chances of succeeding, I note that the applicant has not attached a memorandum of appeal to enable this court determine the same. However I think that is not fatal to his application though it was necessary to demonstrate the arguability of the intended appeal. The other reasons given by the applicant seem to me compelling even without the memorandum of appeal.

16. As to the degree of prejudice to the respondent, I am called upon to balance the injustice to the applicant in denying him leave to appeal out of time as against the injustice to the respondent in granting the said leave. The applicant’s right to appeal is guaranteed under the constitution and having given a sufficient explanation for failing to file his appeal in time, I find no reason to deny him the chance of filing his appeal. On the other hand, I see no prejudice to be occasioned to the respondent by granting the said leave.

17. The upshot of the above is that I allow the applicant’s notice of motion application dated 23.05.2023 in its entirety. I make no orders as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 4<sup>TH</sup> DAY OF JUNE, 2024.**

**In the presence of Murango Mwenda for applicant.**



Court Assistant - Leadys

**A. KANIARU**

**JUDGE – ELC, EMBU**

**4.6.2024**

