



**Munyinyi v Ngendo; Njuguna & another (Interested Parties)  
(Environment and Land Miscellaneous Application E001 of 2024)  
[2024] KEELC 5222 (KLR) (Environment and Land) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5222 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2024**

**MC OUNDO, J**

**JULY 11, 2024**

**BETWEEN**

**BONIFACE MUKURIA MUNYINYI ..... APPELLANT**

**AND**

**GRACE NGENDO ..... RESPONDENT**

**AND**

**NANCY WAIRIMU NJUGUNA ..... INTERESTED PARTY**

**KIRIKO FARM LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before me for determination is a Notice of Motion dated 23<sup>rd</sup> January, 2024 brought pursuant to the provisions of Section Order 40 Rule 1(A), 2(1), (2), 4 (1), (2), (3) and 8; order 51 Rule 1 of the *Civil Procedure Rules 2010*; section 79G of the *Civil Procedure Act*; Section 13 of the *Environment and Land Court Act* and all enabling provisions of the law in which the Appellant/Applicant sought for leave to appeal out of time against the judgment delivered by honorable Y.M Barasa on 24<sup>th</sup> August, 2023 as well as for a temporary injunction. Finally, the Applicant sought for the cost of the Application.
2. The application was supported by the grounds therein and the Supporting Affidavit of even date sworn by Boniface Munyiri Mukuria the Applicant herein, who deponed that he had been the 2<sup>nd</sup> Defendant in the lower court wherein pursuant to a judgment delivered on 24<sup>th</sup> August 2023, by the honorable Magistrate, the plaintiff had been granted an order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants, employees, agents or anybody acting on their behalf from trespassing onto



- land parcel No. L.R 10243-809 Kiriko Farm (the suit property). That further the Plaintiff had also been awarded general damages of Kshs. 100,000/=.
3. That he had not been made aware of the hearing of the instant matter and therefore did not present his defence. That subsequently in September, 2023 a third party named Martha Wanjiru to whom he had sold a portion of the suit property, had made him aware of the lower court judgment which had been delivered on the 24<sup>th</sup> August 2023. That subsequently he had instructed his Advocate to lodge an Appeal at the Nakuru Environment and Land Court, who contrary to his instructions had filed an application for review which application had been declined in December, 2023.
  4. That he was now facing an imminent threat of eviction from the suit property as a result of the judgement that had been made by a court without the requisite jurisdiction.
  5. That the suit property belonged to Kenya National Hawkers Association, where he was a member and had beneficial rights over the same. That he stood to be subjected to mental distress and anguish if evicted. That no other party stood to be prejudiced in a manner that could not be adequately compensated monetarily.
  6. That he was desirous of pursuing an appeal on account of jurisdiction which intended appeal was neither frivolous nor vexatious as he had intended to raise a point of law on limitation of actions and the pecuniary jurisdiction of the court. That he had not been indolent and the mistake of his counsel should not be visited upon him. He thus prayed that the Application to appeal out of time be allowed and the injunctive reliefs be issued.
  7. In response and in opposition to the Applicant's Application, the Respondent filed the Grounds of Opposition and a Replying Affidavit both dated 29<sup>th</sup> March 2024 stating that the application had been brought in bad faith, was intended to deny her Respondent the fruits of her judgment and further that no security had been offered.
  8. The Replying Affidavit was sworn by Grace Ng'endo, the Respondent herein had been to the effect that the impugned judgment was sound in law, that the instant Application was fatally flawed and brought in utmost bad faith such that it did not meet the minimum threshold for grant of the orders sought hence the same should be dismissed with costs.
  9. That the Applicant had been granted leave to appeal upon the delivery of the impugned judgement but he had elected not to do so within the prescribed time. That the Applicant had not demonstrated sufficiently why the Appeal had been lodged out of time. Reliance was placed on the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* to depone that no orders of stay should be allowed unless the court had been satisfied that substantial loss may ensue. That the Applicant had neither annexed any document to prove that he was at risk of execution nor had he deposited security in court so as to deserve an order of stay of execution. That whereas the Applicant had appointed an advocate to act for him in the lower court, he did not raise the issue of the court's jurisdiction during the hearing of the suit. That instead, he was now seeking to mislead the court by asserting that the value of the subject matter at the lower court had exceeded Kshs. 100,000,000/= while placing reliance on a business plan relating to 30 acres parcel of land which business plan did not amount to a valuation and further that the same had related to a totally different land parcel hence it had no probative value in the instant proceedings.
  10. That a perusal of annexures marked as BMM 1 and BMM2 confirmed that the land parcels mentioned therein were LR No. 10243 and LR No. 10243-807(Plot No. 4) while the Amended Plaint at paragraph 5 had referred to LR No. 10243-809 thus the land parcels that the Applicant had been



referring to had no co-relation to the subject matter herein hence no prejudice would befall the Applicant as it was apparent that he had no proprietary interest on the suit property.

11. The application was canvassed by way of written submissions wherein the Applicant framed two issues for determination to wit; -
  - i. Whether the application ought to be allowed
  - ii. Who should bear the costs of the Application?
12. On the first issue for determination, as to whether the Application should be allowed, the Applicant while placing reliance on the provisions of Section 79G of the *Civil Procedure Act* as well as the decided case of *Mugo & Others v. Wanjiru and Another* (1970) EA. 481 submitted that the appeal and the instant application had been filed without unreasonable delay as only a period of 5 months had passed from the date of the impugned judgement. That the delay had been sufficiently explained to the effect that his advocate had failed to act on his instructions prompting him to assign the firm of Muturi S. K & Company Advocates to take up the matter. He relied on a combination of decisions in the case of *Cristopher Murithi Ngugu v Eliud Ngugu Evans* [2016] eKLR and *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR.
13. The Applicant also placed reliance on the provisions of order 42 Rule 6 (1) on stay of execution to submit that he had sold part of the suit property herein to a third party, one Martha Wanjiru who had invested over Kshs. 10,000,000/= in avocado farming and who would suffer substantial loss should the Application not allowed.
14. That further, the impugned judgement having not been a monetary one coupled with the fact that the Applicant was not in occupation of the suit land, the Respondent would not suffer any loss should the application be allowed. That the claim for security was unsubstantiated as the orders that had been issued had been declaratory in nature. That he had an arguable appeal with a high probability of success as the subject matter in Naivasha ELC 24 of 2020 had exceeded the pecuniary jurisdiction of the court having been valued at over Kshs. 20,000,000/=.
15. Reliance was placed on the decision in the land mark case of *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd* [1989] eKLR to submit that jurisdiction was everything and that he had submitted evidence to prove that the value of the suit land had exceeded the pecuniary jurisdiction of the trial court. That his former advocate had failed to raise the same at the earliest opportune time and the Applicant being a layman, his representation had failed to sufficiently represent him.
16. That subsequently, the judgment that had been rendered at the trial court had been nullity ab initio for lack of pecuniary jurisdiction hence the Applicant ought to be accorded a fair hearing and a chance to defend himself being that the intended appeal had a high probability of success.
17. The Respondent on the other hand in an undated submissions framed her issues for determination as follows:
  - i. Whether the Applicant has demonstrated the conditions necessary for grant of leave to appeal out of time.
  - ii. Whether the Appellant has demonstrated the conditions necessary for grant of an order for stay pending the hearing and determination of the Appeal.
18. On the first issue for determination, the Respondent outlined the factors to be considered before determining on whether or not to grant leave to appeal out of time as follows:



- i. Whether the application has been brought without unreasonable delay;
  - ii. Whether the delay can be satisfactorily explained;
  - iii. Whether the Applicant has an arguable appeal; and
  - iv. Whether the Respondent would be prejudiced if the application is allowed
19. She thereafter placed reliance on the provisions of Order 42 Rule 6(2) and a combination of decisions in the case of *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365 and *Nandi Tea Estates Ltd v George Ochieng Oduogo* [2015] eKLR to submit that the instant application had been brought after unreasonable delay. That whereas judgment herein had been delivered on 24<sup>th</sup> August, 2023, the instant Application and the Memorandum of Appeal had been filed on 23<sup>rd</sup> January, 2024 which was about 120 days after the time permissible by the law. That the Applicant had thus been indolent and the delay remained inexcusable.
  20. As to whether substantial loss would be occasioned upon the Applicant should stay orders not be granted, reliance was placed on a combination of decisions in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR to submit that no evidence had been tabled to affirm that the Appellant/Applicant had any title and/or claim to the suit property thus no prejudice would be suffered by the Appellant/Applicant since he was entitled to damages at the very least should the impugned judgment be overturned. That the Appellant/Applicant had not demonstrated that substantial loss would be occasioned to him.
  21. On the need to furnish security for the due performance of decree, the Respondent placed reliance in the decided case of *Absalom Dowa v Tarbo Transporters* [2013] eKLR to submit that the Appellant/Applicant had been ordered to pay a sum of Kshs. 100,000/= as damages which sum should be deposited as security should the court find merit in the instant Application.
  22. She thus submitted that the Appellant/Applicant had not met the conditions necessary for the grant of leave to appeal out of time and/or stay pending Appeal hence the instant Application should be dismissed.

### **Determination.**

23. Having heard submissions by both sides as well as having regard to the annexures filed herein, consequently the pending issue for determination is whether this court should grant the Applicant the orders sought for being;
  - i. Enlargement of time to enable her file her Appeal after the expiry of the statutory period.
  - ii. Orders of injunction restraining the Respondents by themselves, their servants, agents or any person acting on their behalf howsoever from evicting, alienating, transferring or interfering in any manner with L.R No. 10243-809 Kiriko Farm, pending the hearing and determination of the intended Appeal.
24. On the first issue concerning the order of Leave to appeal out of time, Section 79G of the *Civil Procedure Act* which gives an appellate court discretion to extend time for filing an appeal from the subordinate Court to the High Court.(read Land and Environment Court) stipulates 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. “

25. In the case of *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR the court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- i. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
- ii. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
- iii. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
- iv. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
- v. whether there will be any prejudice suffered by the Respondent, if extension is granted;
- vi. whether the application has been brought without undue delay; and
- vii. whether in certain cases, like election petitions, public interest should be a consideration for extending time”

26. Has the Applicant fulfilled the above requirements so as to be granted leave to file her appeal out of time? The gist of the matter in question is that vide a Judgment delivered by the Magistrates’ Chief Magistrate’s Court at Naivasha in ELC No 24 of 2020, on the 24<sup>th</sup> August 2023, the Court had entered judgment in favor of the Plaintiff as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants wherein an order of permanent injunction had been issued restraining them, their servants, employees, agents or any person acting on their behalf from trespassing on to land parcel No. LR 10243-809 Kiriko Farm. The plaintiff had further been awarded general damages of Ksh. 100,000/= and costs of the suit plus interest.

27. Anyara Emukule J in *Gerald M’limbine v Joseph Kangangi* [2009] eKLR interpreted the proviso to Section 79G of the *Civil Procedure Act* as follows;

“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 an 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 provision does not mean that an intending appellant first seeks the Court’s permission to



admit a nonexistent Appeal out of the statutory period. To do so would actually be an abuse of the Court's process which under Section 79B says.....”

28. It is clear that Section 79G of the Civil Procedure Act permits such filing of an Application for leave out of time if the appellant satisfies the Court that (s) he had good and sufficient cause for not filing the Appeal in time.
29. The case of Mwangi v Kenya Airways Ltd [2003] KLR laid down three conditions to be fulfilled with regard to delay which are:
- i. The length of delay
  - ii. The reason for the delay.
  - iii. Possibly, the chances of Appeal succeeding if the Application is granted and
  - iv. The degree of prejudice to the Respondent if the Application is granted.
30. The judgment of the Magistrate's Court was delivered on 24<sup>th</sup> August 2023. The Applicant has submitted that failure to file his Appeal on time was to fold, that his former Advocate had failed to inform him of the pending judgment and/or to lodge an appeal as instructed but had chosen to file an application for review which application had been declined in December, 2023. That he had subsequently sought services of a different advocate who had acted diligently and expeditiously to lodge an Appeal. That the delay of a period of 5 months was not inordinate and had been sufficiently explained.
31. Having considered the application, the supporting affidavit and the submissions hereto, I find that the Application dated 23<sup>rd</sup> January 2024 herein was not brought without unreasonable/excusable delay. The extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court.
32. The Applicant herein has not come to court with clean hands. I say so because he has lay blame on his former Advocate for not informing him of the outcome of the case before the Magistrates court and/or lodging the Appeal on time yet it is trite that that cases do not belong to the advocate or the court but to litigants themselves and therefore the Applicant's indolence lay squarely on his door. I shall however exercise my discretion and allow the Application for enlargement of time to enable the Applicant file their Appeal after the expiry of the statutory period so as to enable him exercise his right of Appeal and there having been no evidence of prejudice brought forth by the Respondent should the application be allowed.
33. On the second issue for determination as to whether Orders of injunction should issue restraining the Respondents by themselves, their servants, agents or any person acting on their behalf howsoever from evicting, alienating, transferring or interfering in any manner with L.R No. 10243-809 Kiriko Farm, pending the hearing and determination of the intended Appeal, Order 42 Rule 6(6) of the Civil procedure Rules provides as follows;

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”



34. The principles for granting of temporary injunction pending appeal are settled. In the persuasive case of *Patricia Njeri & 3 Others vs. National Museum of Kenya* [2004] eKLR, where the court had held the following principles as governing a grant of temporary injunction pending appeal;
- a. “An order of injunction pending appeal is a discretionary which will be exercised against an Applicant whose appeal is frivolous.
  - b. The discretion should be refused where it would inflict great hardship than it would avoid.
  - c. The Applicant must show that to refuse the injunction would render the appeal nugatory.
  - d. The court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358.”
35. The Applicant’s application on this limb is to be considered on whether he has established the Principles set in the case of *Giella –vs- Cassman Brown & Company Ltd* (1973) EA 358 which is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. The Applicant needed, firstly to establish and demonstrate that he had a *prima facie case* with a probability of success, secondly that he stood to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and he is successful at the trial, and thirdly in case the court was in any doubt in regard to the first two conditions the court would determine the matter by considering in whose favor the balance of convenience tilted.
36. The court has been moved by the Applicant, to issue temporary injunction against the Respondent restraining her, her servants, agents or any person acting on her behalf howsoever from evicting, alienating, transferring or interfering in any manner with L.R No. 10243-809 Kiriko Farm pending the hearing and determination of the intended Appeal post judgment.
37. On the first issue as to whether the Plaintiff/Applicant in this matter has made out a *prima facie case* with a probability of success, I am guided by the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, where a *prima facie case* was described as follows:
- “a *prima facie case* in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
38. The Applicant has based his reason for seeking the injunctive orders that the trial court lacked pecuniary jurisdiction to hear and determine the matter and secondly that should the order not be granted, a third party one Martha Wanjiru who had invested over Kshs. 10,000,000/= in avocado farming on the suit land, would suffer substantial loss.
39. I find that the Applicant has not established a *prima facie case* to warrant the grant of the injunctive orders so sought, he has neither annexed a registertable document of ownership of the suit land, nor provided any valuation report of the same. I further find that the Applicant has not demonstrated how he would suffer substantial loss were the orders of injunction not issued.



40. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraba Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

41. Consequently, I dismiss the application seeking injunctive orders as sought by the Applicant restraining the respondents from dealing with land parcel L.R No. 10243-809 Kiriko Farm. The Applicant shall within 30 days from the date of this ruling compile, file and serve upon the Respondents a complete record of appeal failure to which the window granted to file the Appeal shall automatically lapse.

There shall be no orders as to Costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 11<sup>TH</sup> DAY OF JULY 2024.**

**M. C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

