



**Mutuku v Katelembo Athiani FCS Limited & another (Environment and Land Miscellaneous Application E007 of 2023) [2024] KEELC 5281 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5281 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2023**  
**A NYUKURI, J**  
**JULY 10, 2024**

**BETWEEN**

**MUTETI MUTUKU ..... APPLICANT**

**AND**

**KATELEMBO ATHIANI FCS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HENRY MUSYOKA MWANZA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is an undated Notice of Motion filed on 17<sup>th</sup> July 2023 by the applicant seeking the following orders;
  - a. Spent
  - b. That this honourable court be pleased to grant leave the firm of M/s Evans Muli & Company Advocates to come on record for the appellant/ applicant.
  - c. That leave be granted to the applicant to file an appeal out of time with respect to Machakos Melc Case No 80 of 2021; Henry Musyoka Mwanza v Muteti Mutuku And Another.
  - d. That this honourable court be pleased to issue an order of stay of execution of the judgment delivered by Honourable E.H. Keago Chief Magistrate sitting at Machakos Magistrates Law courts and which was delivered on 26/10/2022 and all other consequential orders issued thereafter pending the hearing and determination of the intended appeal.
  - e. That upon grant of prayer 2, the annexed memorandum of appeal be deemed as duly filed and served upon payment of requisite fees.
  - f. That costs of this application be provided for.



2. The application is premised on the grounds on its face and the supporting affidavit sworn by Muteti Mutuku the applicant. The applicant's case is that he was dissatisfied with the judgment delivered by the lower court on 26<sup>th</sup> October 2022 as he did not get a fair hearing. Further that the respondent will not suffer prejudice but that the applicant may be evicted from his home and will suffer irreparable damage. He stated that he had requested for certified copies of proceedings and judgment in vain and that the delay is not inordinate. He attached a copy of the judgment, application for certified copies of proceedings and judgment dated 28<sup>th</sup> October 2022 and a draft Memorandum of Appeal.
3. The application is opposed. Henry Musyoka Mwanza, the respondent filed a replying affidavit dated 20<sup>th</sup> September 2023. He stated that the application was in bad faith meant to stop the respondent from enjoying the fruits of his judgment. He stated that there is no requirement that a party must be supplied with a certified copy of the judgment before they can file Memorandum of Appeal and that the delay of close to 1 year has not been explained and hence it is not excusable. He asserted that the claim of unfair trial is unfounded as the applicant was represented by counsel, filed defence and was heard by the court and that the appeal has no chance of success. He stated that execution had already been partly done as transfer was effected and what is pending is costs of the suit as the decree was drawn and an order to arrest the applicant issued. He stated that the file before the trial court has been handled by court severally post judgment and the issue of an appeal has never arisen. He attached a decree with certificate of costs dated 3<sup>rd</sup> April 2023 and an order dated 3<sup>rd</sup> April 2023 directing compliance by the applicant in 30 days and in default warrants of arrest to issue.

#### **Analysis and determination**

4. I have care fully considered the application and the response thereto. The issues for determination are as follows;
  - a. Whether leave should be granted to the firm of Evans Muli & Company Advocates to come on record for the applicant.
  - b. Whether the applicant has met the threshold for extension of time to file appeal out of time.
  - c. Whether the applicant deserves an order of stay of execution pending determination of intended appeal.
5. A party is entitled to be represented by an advocate of their choice. However, in a matter where there is judgment and a party intends to change their advocate, they need leave of court. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides for leave as follows;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

  - a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
6. Considering that it is only in a case where there is a judgment that leave would be required, and there being no judgment in this case as it is a fresh matter, I find and hold that the prayer for leave was superfluous as the firm of Evans Muli and Company Advocates is validly, properly and lawfully on record for the applicant and does not need leave to validate their representation.



7. This court has jurisdiction to extend time for filing appeal. 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.

8. Therefore, where there is good and just cause, the court may extend time for filing appeal out of time. Extension of time is discretionary remedy and is not a right of a party, but a party seeking such order must explain the delay to the satisfaction of the court.
9. In the case of [Nicholas Salat v IEBC](#), the Supreme court held as follows;
1. 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;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
10. In the instant suit, the lower court delivered its judgment on 26<sup>th</sup> October 2022. The applicant applied for proceedings on 28<sup>th</sup> October 2022 and alleges that the delay to file appeal was caused by delay in receiving judgment. He has attached a copy of the judgment but did not disclose when the same was supplied to him. He has also not demonstrated any step taken after writing to the court on 28<sup>th</sup> October 2022 and when he filed the instant application in October. As the judgment was delivered on 22<sup>nd</sup> October 2022, the 30 days period for filing appeal lapsed on 21<sup>st</sup> November 2022. The period between 21<sup>st</sup> November 2022 and 17<sup>th</sup> July 2023 has not been accounted for especially in view of the fact that it is clear that the lower court file was active post judgment when not only was the decree issued but also a certificate of costs and an order requiring 30 days compliance or warrants of arrest to issue against the applicant were granted. In my view therefore, the delay of over seven months is inordinate and the applicant has not attempted to explain the same. In any event, the judgment shows that the applicant testified to have sold the suit property to the respondent and admitted having been paid the entire consideration and therefore the allegation (which is unsupported) that he may be evicted from the suit property where his home is, is in my view irrelevant and therefore the intended appeal prima facie has no chance of success.



11. In the premises, the application filed on 17<sup>th</sup> July 2023 is unmerited and the same is hereby dismissed with costs to the respondent.
12. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10<sup>TH</sup> DAY of JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

Mr. Loki for 2<sup>nd</sup> respondent

No appearance for 1<sup>st</sup> respondent

No appearance for the applicant

Court assistant – Josephine

