



REPUBLIC OF KENYA



**Malindi Holding Limited v Shutu (Miscellaneous Civil Application  
E006 of 2023) [2024] KEELC 5052 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5052 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS CIVIL APPLICATION E006 OF 2023**

**EK MAKORI, J**

**JULY 3, 2024**

**BETWEEN**

**MALINDI HOLDING LIMITED ..... APPLICANT**

**AND**

**NOTI CHARO SHUTU ..... RESPONDENT**

*(Being an application to appeal out of time pending the filing, hearing, and determination of an appeal against the ruling delivered on the 30th day of August 2023 by Hon. J. Ongondo (SPM) and the orders issued in the Chief Magistrate Court at Malindi in Land Case No. 23 of 2018)*

**RULING**

1. The application before this Court is the one dated the 23<sup>rd</sup> day of March 2023 seeking the following orders:
  - a. Spent
  - b. The intended appellant/applicant be granted leave to appeal out of time against the whole ruling delivered on the 30<sup>th</sup> day of August 2023 by Hon. J. Ongondo (SPM) and the resultant orders issued in the Chief Magistrate Court at Malindi in Land case No. 23 of 2018.
  - c. Costs for this application be provided.
2. The applicant instituted a Notice of Motion Application dated 5<sup>th</sup> October 2023 and filed it in Court on 9<sup>th</sup> October 2023 against the respondent, which he responded to via the replying affidavit dated 22<sup>nd</sup> November 2023.
3. The Court directed parties to file written submissions, which they complied with.
4. From the submissions and materials placed before me, the issues I frame for the determination of this Court are whether or not there has been an inordinate delay in filing the application herein. Does



the applicant give sufficient reasons to warrant an extension of time? What orders should the Court pronounce as to costs?

5. The applicant submits that having been supplied with a copy of the ruling delivered on 30<sup>th</sup> August 2023 in the trial Court and being aggrieved with the said decision, instructed its advocates on record to proceed and file an appeal. The advocates, under the specific instructions of the applicant and vide a Letter dated 1st September 2023 a day later, requested a certified typed copy of the proceedings and ruling to appreciate the reasoning of the trial Magistrate and thereby make an informed decision on whether or not to appeal. The copies of the ruling and proceedings were never delivered on time and up to date. The Advocates for the Applicant proceeded to peruse the Court file to note the orders the trial Magistrate issued. On perusing the court file, the advocates pointed out that the orders adversely affected the applicant's interests, noting that the evidence produced by the deponent in the supporting affidavit was never considered.
6. The applicant avers that under Section 79 G of the *Civil Procedure Act*, 30 days are given for filing an appeal from the judgment of the Subordinate Court to the High Court. In this case, the ruling sought to be challenged was rendered on 30<sup>th</sup> August 2023. Any appeal challenging that decision should have been filed before 30<sup>th</sup> September 2023. Instead, the applicant's advocates appealed on 9<sup>th</sup> October 2023 (9 days later) to have the time enlarged and the appeal filed out of time validated and deemed duly filed within the time so enlarged. Further, the applicant states that the applicant's advocates, knowing the lapse of time in filing the Memorandum of Appeal, visited the Malindi Environment & Land Court Registry on Friday, 29<sup>th</sup> September 2023, which was a day before the 30 days lapsed to file the Memorandum of Appeal but were advised that the Judiciary e-Filing system was not working due to downtime.
7. The applicant relied on the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, which provides the consideration the Court ought to give before allowing an extension of time to appeal, including the period of delay, the reasons for the delay, the degree of prejudice to respondent if the application is granted, and whether the matter raises issues of public importance, amongst other things. This case is particularly relevant to the current application because this Court must consider those factors before enlarging the time to appeal.
8. The applicant cites Article 48 of the *Constitution* of Kenya as guaranteeing every person access to justice; in addition, under Article 50(1) of the *Constitution*, every person has the right to have any dispute that the application of law can resolve decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial Tribunal or body. It is the applicant's submission that the ultimate goal and purpose of the justice system is to hear and determine disputes fully. No person who has approached the Court seeking an opportunity to vent their grievances fully should be locked out. In the instant case, the applicant filed the Appeal 9 days late and has approached this court for an extension of time as stipulated in Section 79G of the *Civil Procedure Act* and the proviso thereof. Before this Court, the applicant seeks to be granted a chance to agitate its appeal and challenge the ruling of the Lower Court.
9. The applicant contends that there is no evidence to demonstrate what prejudice the respondent will suffer if the applicant is granted an extension of time.
10. The applicant's submission is that it instituted the suit in the Lower Court and is desirous of having it heard and determined since orders were issued in favour of the applicant. However, despite being the registered proprietor, the respondent has continued to be in contempt of the said orders to the detriment of the applicant's possession of the suit property. The significance of the applicant's status



as the registered proprietor is that, therefore, without colour of right, the respondent is wasting the suit property.

11. The respondent submits that the extension of time is discretionary; this discretion was well explained in the case of *Aviation Cargo Ltd v St. March Freight Services Ltd* [2014] eKLR and *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, the Court in the latter case gave guidelines on factors to be considered while exercising discretion to enlarge time, which includes; period of the delay, reasons for the delay, and the degree of prejudice to the respondent. This underscores the importance of the Court's discretion in making decisions of this nature.
12. The respondent states that in the case of *George Peter Mutiso v Jimack Engineering Workshop Nairobi* ELRC Cause No. 726 of 2011 [2017] eKLR, the Court declined to extend time on such grounds as the instant application for inordinate delay. In the case before this Court, the respondent submitted that the applicant had a deep lull from the date the ruling was delivered and could not come to Court after more than 60 days, asking the Court to exercise its discretion in its favour. The period of 60 days from the date of judgment is disproportionately late.
13. Respondent contends that in the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR, the Court held that even one day after judgment could be an unreasonable delay. Equally, In *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another* [2014] eKLR, the Court stated that the litmus test is the period of delay, which leads the Court to the inescapable conclusion that it is inordinate and, therefore, inexcusable. In this case, the respondent believes the more than 60 days taken by the applicant to approach this Court is indefensible and unwarranted.
14. Whether or not the reasons given by the applicant are sufficient grounds to warrant an extension of time, the respondent contends that among the reasons advanced by the applicant for the delay includes having failed to get typed proceedings in good time to appreciate the reasoning of the trial Magistrate and thereby make an informed decision on whether or not to appeal. The typed proceedings and ruling were not received on time, and the applicant has decided to appeal nonetheless, even without seeing the typed proceeding. Appeals are governed under Order 42 of the Civil Procedure Rules, which make it clear that all appeals from the Subordinate Courts to the High Court should be presented within 30 days from the date of the order or judgment. The respondent asserts that there is nowhere in the procedure or the substantive law that provides that one must obtain typed proceedings before preferring an appeal. In any case, the application before the Subordinate Court was disposed of through written submissions followed by the ruling. The only hand-written proceedings are directions for filing submissions, which cannot be an excuse for failing to file an appeal in time. Under Section 79G, the only excusable reason is the time to issue the extracted order or decree, not the proceedings. The applicant alleges to have requested for typed proceedings but never sought for the extracted order. On the other hand, the applicant has not demonstrated difficulties in reading handwritten proceedings, if any, and deciding whether to appeal. Just applying for certified proceedings is not enough reason; every other litigant could be using such excuses, and in the respondent's view, we could have endless applications in our judicial system.
15. Regarding the degree of prejudice, the respondent stated that the orders complained about were issued on the 22<sup>nd</sup> day of October 2018. The orders were never served upon the respondent, though cited for contempt. More than six years later, the applicant applied for the respondent to be cited for contempt, alleging that the respondent herein defiled some orders issued six years ago. The Subordinate Court matter has never proceeded due to the applicant's failure to appear every time the matter was listed for hearing. The respondent believes that the application herein is meant to delay the hearing in the Lower Court since the file has now been forwarded to this Court to consider the current motion. The applicant is playing all tricks to ensure the matter in the Lower Court is not heard on its merits.



Respondent states he shall suffer great prejudice if the applicant is granted leave to appeal out of time as the orders by the Magistrate were long implemented on the ground.

16. I did not get the advantage of perusing the Lower Court file to reckon when the impugned ruling was delivered from the submissions by the applicant; the same was delivered on 30<sup>th</sup> of August 2023, and the current application was filed on 9<sup>th</sup> October 2023 – nine days late. The respondent seems to suggest the delay period as being 60 days without providing the date when the same was delivered. It was important in an application of this nature to provide the ruling by the Magistrate for consideration so that this Court could make an informed decision. The applicant contends that the proceedings and ruling were applied but never supplied.
17. Section 79 G of the *Civil Procedure Act* states 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 a good and sufficient cause for not filing the appeal in time.
18. There are abundant judicial decisions on the factors to consider before enlarging the time within which to appeal; see, for example, *Edith Gichungu Koine v Stephen Njagi Thoitbi* [2014] eKLR, where the Court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
19. I will take it that the applicant was nine days late in filing the appeal. The reasons for the delay are said to be that the counsel for the applicant needed to read the ruling and make an informed choice on the next course of action for his client's benefit; the proceedings and the verdict have not been provided to date. Counsel perused the file and reckoned that the ruling never factored in the submissions by the applicant and that the ruling did not consider that the respondent had been restrained from further construction on the suit property. Besides, there was a problem with the Judiciary e-filing platform on connectivity.
20. The nine-day delay may not be inordinate but excusable, considering the teething problems posed by the e-filing platform. The Court cannot ignore those challenges, but the judiciary is addressing them.
21. This Court's primary concern is the tenor and reasoning of the trial Court in its ruling, dated 30<sup>th</sup> September 2023, which sought to have the respondent cited for contempt. The respondent thinks he will be prejudiced since the primary suit, which has not been heard, will stall. The orders said to have been issued by Hon. Wewa and disobeyed by the respondent were issued on the 24<sup>th</sup> day of June 2019 and were never extended after a year and, therefore, spent. This, if true, can be a prejudice to not only the respondent but also the overall progression of the matter in the trial Court.
22. In the intended appeal (from the annexed Memorandum of Appeal), I will be asked to decide whether the Magistrate exercised his discretion imprudently by failing to punish for contempt. As stated earlier, I did not have the advantage of perusing the ruling by the Magistrate; the applicant says none has been supplied yet. I would be operating in darkness if I were to allow the current application minus



perusing that file, which would have given me an insight into how the intended appeal will look like and whether it will be arguable (albeit not a factor in applications of this nature), but necessary in Active Case Management. Considering that the main suit in the Lower Court has not been heard, and the orders said to have been disobeyed were issued in 2009, in the nature of an injunction, I am not sure whether they were extended after a year or had lapsed as submitted by the respondent. The applicant needed to attach the ruling by the Magistrate. The main suit still awaits the outcome of this application. To me, the pendency of this application and the intended appeal will prejudice the main trial in the Lower Court. Let parties push for the conclusion of the primary suit. All issues should be trashed at that level, and the rights of ownership should be decided immediately.

23. I see no merit in enlarging the time to appeal. The application dated the 23<sup>rd</sup> day of March 2023 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 3<sup>RD</sup> DAY OF JULY 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Kandia for the Applicant

Happy: Court Assistant

In the absence of:

Mr. Otara, for the Respondent

