



**Munyi v Kabita (Environment & Land Miscellaneous Case
2 of 2024) [2024] KEELC 6364 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6364 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND MISCELLANEOUS CASE 2 OF 2024**

JM MUTUNGI, J

OCTOBER 3, 2024

BETWEEN

MARY MUTHONI MUNYI APPLICANT

AND

FREDRICK MURIUKI KABITA RESPONDENT

RULING

1. Before me for determination is the Applicants undated Notice of Motion filed on 15th February, 2024 brought under Section 79(g) of the Civil Procedure Act, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and Article 159 of the Constitution of Kenya. The Applicant, Mary Muthoni Munyi, claims to represent the estate of Jacob Munyi Andrea (deceased), who was the Respondent in the Lower Court suit, while the Respondent, Fredrick Muriuki Kabita, was the Plaintiff. This is essentially an application for leave to appeal out of time against the Lower Court's Ruling dated 18th August, 2023. The prayers sought are as follows:
 1. That this Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the Ruling of Principal Magistrate Hon. E. O Wambo delivered on 18th August 2023 in Kerugoya CM ELC Case No. 153 OF 2018 and the appeal herein be deemed as duly and properly filed.
 2. That the costs of this application be provided for.
2. The application is premised on the grounds set out in the body of the application and on the Supporting Affidavit of the Applicant dated 6th February 2024. The Applicant states that she is the Legal Representative of the estate of Jacob Munyi Andrea (deceased) and was granted Letters of Administration intestate on 29th March 2021. She explains that as a result of a consent agreement that was fraudulently entered between the Respondent and Alice Nyawira Muriuki, the Trial Court in Kerugoya CM ELC Case No. 153 of 2018 issued orders on 27th May 2021. These orders were to



the effect that 2 acres of land parcel Mutira/Kirimunge/582 were to be transferred to the Respondent. Aggrieved by this decision, the Applicant avers that she applied before the Lower Court to have the order reviewed and set aside. However, the application for review and to set aside the consent order was dismissed on 18th August 2023. The Applicant avers that the Ruling was delivered in the absence of the parties and that no notice had been issued regarding its delivery. She asserts that she only became aware of the Ruling after her Advocate on record perused the Court file and, therefore, the delay in filing the appeal was not intentional. She now seeks leave from the Court to appeal out of time, contending that the appeal has merit.

3. The Respondent filed Grounds of Opposition dated 5th March 2024, along with a Replying Affidavit dated 22nd April 2024, in opposition to the application. The Respondent inter alia avers that the application is legally flawed, frivolous, vexatious, and an abuse of the Court process. The Respondent alleges that the application was filed in bad faith, is malicious, and is intended to waste the Court's time. The Respondent asserted that the application is incompetent, fatally defective, and ought to be struck out or dismissed with costs as the delay was inordinate. The Respondent contends that the Applicant lacks legal standing as she failed to provide any Letters of Administration of the estate of Jacob Munyi Andrea. Furthermore, the Applicant failed to demonstrate an arguable appeal that raises any triable issues with a likelihood of success and did not attach a certificate of delay or an application for proceedings to show her interest in pursuing the appeal.
4. The Respondent filed a Replying Affidavit dated 22nd April 2024 where inter alia he deponed that the application should not be allowed because the Applicant was never a party to the suit ELC 153 OF 2018. The Respondent further averred that the Applicant never sought leave to be joined as a party in the suit and thus had no locus standi. The Respondent asserted that the consent order was adopted by the Court on 27th May 2021 and was subsequently implemented and he was issued with a title deed to the portion of 2 Acres after subdivision. The Respondent avers that he became the registered proprietor of LR NO Mutira/Kirimunge/3153, a resultant subdivision of LR NO Mutira/Kirimunge/582, on 3rd August, 2021. The Respondent contends that the Applicant is abusing the Court process as she was not joined as a party in the Lower Court and hence lacked the locus standi to file the application that gave rise to the present application. Further the Respondent avers that the Applicant has not given any valid reasons for the inordinate delay in filing the appeal and asserts that the Applicant is undeserving of the Court's discretion.
5. The application was canvassed by way of written submissions. I have considered the motion, the Affidavits in support, the response thereto, and the rival submissions. The issue for determination is whether the Court given the circumstances of this matter ought to exercise its discretion to allow the Applicant to lodge an appeal out of time.
6. Section 16A of the *Environment and Land Court Act*, 2011 provides for appeals from the Subordinate Courts in the following terms:-

16A. Appeals from Subordinate Courts

1. All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13 (2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.



2. 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.
7. Section 79G of the [Civil Procedure Act](#) echoes the provisions of Section 16A of the [Environment and Land Court Act](#) and provides for Appeals from the subordinate Courts as follows:-

79G. Time for filing appeals from subordinate courts

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. Section 95 of the [Civil Procedure Act](#) grants the Court the power to enlarge the time to do a certain act prescribed or allowed by the same Act and provides thus:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
9. From Section 79(G) above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This, therefore, means that an appeal may indeed be admitted out of time at the court's discretion. Some of the factors that aid courts in exercising the discretion of extending the time to file an appeal out of time were laid out in the Case of [Edith Gichungu Koine v Stephen Njagi Thoitbi](#) (2014) eKLR where the Court cited the Case of [Stecol Corporation Limited v Susan Awuor Mudemb](#) [2021] eKLR with approval where the Court stated thus:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not 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.” Emphasis mine.
10. The Ruling in this case was issued on 18th August, 2023, while the current application was filed on 5th February, 2024, which was well over Four (4) months after the 30-day period specified in the Act for filing appeals. The Appellant has stated that the delay was due to her not being aware of the ruling being delivered and not receiving any notification regarding when the Ruling was to be delivered. Upon reviewing the Ruling, it is evident that it was delivered in the absence of the parties. The delay, although significant, has been adequately explained by the Applicant and may be excusable under the circumstances. The Applicant however has to demonstrate that she has an appeal that is arguable and/or raises triable issues.
11. The Respondent has argued that the Applicant lacks the legal standing or locus standi to file the instant appeal and/or the intended appeal. Firstly, the Respondent contends the Applicant was not a party in the case before the Lower Court and never sought to be joined as a party in the case. Secondly, the Respondent has contended the Applicant did not demonstrate she had a grant of representation to the estate of Jacob Munyi Andrea (deceased) as she never exhibited any copy of grant and thus lacked the capacity to represent the deceased estate. In the Replying Affidavit in response to the application, the Respondent has annexed a copy of the ad lite grant (“FMK2”) issued to Alice Nyawira Muriuki



- on 8th March, 2021 in Kerugoya CM Succession Cause No. E96 of 2020 which enabled the said Alice Nyawira Muriuki to substitute the original Defendant in the suit before the Subordinate Court.
12. The Applicant while filing the instant application underground(a) in support of the application stated thus:-
 - a. That the Applicant is the legal representative of the estate of Jacob Munyi Andrea (deceased) vide grant of Letters of Administration Intestate issued on 29th March 2021.
 13. The Applicant acknowledged underground (c) that Alice Nyawira Muriuki had been substituted as the Defendant in Kerugoya CM ELC Case No. 153 of 2018 to replace Jacob Munyi Andrea (deceased). The Applicant and the said Alice Nyawira Muriuki could not legally take out separate grants of representation to the deceased estate under the Law of Succession Act, Cap 160 Laws of Kenya. The grant issued to the said Alice Nyawira Muriuki was the first in time having been issued on 8th March 2021 as opposed to 29th March 2021 when the Applicant claims to have been issued hers. If the Applicant had any issue respecting the grant issued to Alice Nyawira Muriuki, she ought to have gone back to the succession Court that had issued the same to challenge it. The Lower Court in its Ruling rightly observed that the Applicant was not a party to the consent she was seeking to have set aside and proceeded to dismiss the application.
 14. The Applicant did not apply to be joined as a party in the Primary suit before the Lower Court, and even if she did, it is doubtful that she would have been successful considering that she sought reliefs as the Personal Legal Representative of the deceased, yet Alice Nyawira Muriuki had been substituted as the personal Legal Representative of the deceased estate. I am thus persuaded that the Applicant had no locus standi to file the application that she did before the Lower Court and likewise she lacks the locus standi to bring the present application before this Court. See the Case of *Alfred Njau & Others v City Council of Nairobi* (1982) KAR 229, and *Trovistik Union International & Another v Jane Mbeyu & Another* (2008) IKLR (G & F) 730 on who has authority to represent the estate of a deceased person.
 15. Lack of legal capacity and/or Locus standi goes to the root of the suit and the absence of it renders the suit fatally defective. Accordingly it is my determination that the Notice of Motion by the Applicant is devoid of merit and constitutes an abuse of the Court process. I dismiss the same but order that each party bears their own costs of the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 3RD DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE

