



County Government of Mombasa v Gulambas & another (Environment and Land Appeal E027 of 2024) [2024] KEELC 13655 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E027 OF 2024
LL NAIKUNI, J
DECEMBER 4, 2024**

BETWEEN
COUNTY GOVERNMENT OF MOMBASA APPELLANT
AND
SHIRINBHAI GULAMBAS 1ST RESPONDENT
JELANI BADAWI BOOSRI 2ND RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked to determine the Notice of Motion application dated 28th August, 2024 by County Government of Mombasa, the Appellant herein, under Sections 3A, 79G & 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 50 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. There was also Notice of Preliminary objection dated 19th August, 2024 and filed by Jelani Badawi Boosri, the 2nd Respondent herein challenging the filing of the Memorandum of Appeal out of the stipulated 30-day timeline.
2. Upon service of the application to the Respondents, the 2nd Respondent filed grounds of opposition dated 11th October, 2024.

II. The 2nd Respondent's Preliminary Objection

3. The 2nd Respondent raised a 3 paragraphed preliminary objection dated 19th August, 2024 challenging the Appellant's Memorandum of Appeal dated 9th July 2024 on the following grounds:
 - a. That the Appeal has been filed outside the 30 days' timeline stipulated under Section 79G of the *Civil Procedure Act*, Cap. 21



- b. That the Ruling was delivered on 13th June 2024 whereas the Appeal was filed on 25th July 2024, without leave of the Honourable court as such the Appeal as filed is incompetent, bad in law and fatally defective.
- c. That from the foregoing the appeal was an afterthought, an abuse of the court process and the same should be struck out with costs to the 2nd Respondent.

III. The Appellant's case

4. The Appellant sought for the following orders in the Notice of Motion application dated 28th August, 2024:-
 - a. That leave be granted to the Appellant to file an Appeal out of time against the Ruling of the Learned Hon. M.L. NABIBYA (Senior Principal Magistrate) delivered on the 13th June, 2024 in CMELC CASE NO. E1718 OF 2022.
 - b. That costs of this Application be in the Appeal.
5. The application was premised on the grounds, testimonial facts and averments made out under the 14th Paragraphed Supporting Affidavit of –FRED WANEKHWE, a Clerk working for the Law firm of Messrs. Sherman Nyongesa & Mutubia Advocates who were on record for the Applicant herein sworn and dated 28th August, 2024 with one (1) annexure marked as 'FW-1'. The Applicant averred that:
 - a. On the 10th July, 2024 the Appellant's Advocate's Clerk was duly instructed by the Appellant's Advocate to file the Memorandum of Appeal dated 9th July, 2024 vide CTS Platform, which process was commenced on the said date, however, he encountered challenges since the system declined to upload the Memorandum of Appeal as drawn.
 - b. The Clerk visited the Environment & Land Court Registry on several occasions between 12th July, 2024 and 19th July, 2024 where the Registry Staff checked the CTS and confirmed that there was no discernable challenges and/or system failure on their side and advised that assistance be sought at the ICT Department.
 - c. The Clerk visited the ICT Department on the 24th July, 2024 where he was advised that the system had been configured in such a way that it could not accept any input which contained explanations with forward slash marks or a combination of letters and figures when inputting monetary amounts.
 - d. In registering the case details, the Deponent had described the suit property as Title No. MOMBASA/BLOCK/XL/46 while and the outstanding rates claimed as a sum of Kenya Shillings One Hundred and Seven Million Thirty Eight Thousand and Sixty Hundred (Kshs. 107,038,016/-) resulting in the system rejecting the registration details.
 - e. On 25th July, 2024, he submitted the registration details without using the forward slash or combining words and figures in describing the outstanding rates.
 - f. The delay in filing the Appeal was therefore not deliberate as the same was occasioned by challenges encountered while trying to upload the Appeal on the CTS Platform and is therefore excusable.
 - g. The delay in filing the Appeal was for about eleven (11) days which delay is not inordinate in the circumstances and it is only fair and just that the Appeal be admitted out of time and the same be heard on merits.



- h. The Appellant’s appeal was not frivolous and raised serious issues in regards to interpretation of the provisions of the Rating Act and the Limitation of Actions Act. Annexed in the affidavit a true copy of the Memorandum of Appeal marked as “FW-1”.
- i. The Appeal involved the loss of colossal amount of Public Funds by way of unpaid rates and penalties whose payment is necessary and crucial to enable the Appellant provide Public Services to the residents of Mombasa County.
- j. No prejudice will be suffered by the Respondents if the orders sought are granted.

III. The Response by the 2nd Respondent

- 6. While opposing the application filed by the Appellant/Applicant, the 2nd Respondent brought an 8th Paragraphed grounds of opposition dated 11th October, 2024 on the following grounds that:-
 - a. This application was an afterthought only brought after the 2nd Respondent raised their preliminary objection stating that the appeal offends the provision of Section 79G of the Civil Procedure Act, Cap. 21 having been filed outside the stipulated timeframe.
 - b. In any event the appeal was improperly before the court as the Applicant should have sought leave of the court first before filing this appeal especially having full knowledge that the same was being filed out of time.
 - c. No plausible reason had been given for filing the appeal out of time and that the delay was inordinate and inexcusable.
 - d. All land matters, when filed, have descriptions of the property which includes forward slashes and combination of words and figures as evidence from the matter as filed before trial court.
 - e. There was no proof on record showing that the deponent’s clerk had sought help from the registry and/ or ICT depart. Further, no evidence had been filed showing the alleged challenges encountered during filing.
 - f. The Application dated 28th August, 2024 was bad in law and only intended to waste precious judicial time. The Applicants were fully aware of the delay and chose not to seek leave prior to the filing of their appeal as required by law.
 - g. The Applicant’s application lacked merit, was a non-starter bereft of any substance or factual backing hence an abuse of this cost process, made in bad faith and intended to waste the precious judicial time hence ought to be dismissed with costs to the 2nd Respondent.
 - h. The Application dated 28th August, 2024 was frivolous, vexatious, abuse of the Court process and wholly unmerited and ought to be dismissed with costs to the 2nd Respondent.

IV. Submissions

- 7. On 15th October, 2024 while all the parties were present in Court, they were directed to have the Preliminary Objection dated 19th August, 2024 and Notice of Motion application dated 28th August, 2024 be disposed of by way of written submissions. Unfortunately, at the point of penning down the Ruling, the Honourable Court was not able to access the written submission by the parties herein. Pursuant to that a ruling date was reserved on 18th November, 2024 by Court on its own merit accordingly.



V. Analysis & Determination.

8. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
9. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has four (4) framed issues for its determination. These are:-
 - a. Whether the objection raises pure points of law based on Law and precedent?
 - b. Whether the Preliminary objection dated 19th August, 2024 is merited?
 - c. Whether the Notice of Motion application dated 28th August, 2024 seeking leave to file appeal out of time is merited
 - d. Who bears the costs of the Preliminary objection dated 19th August, 2024 and Notice of Motion application dated 28th August, 2024.

Issue No. a). Whether the objection raises pure points of law based on Law and precedent.

10. Under this Sub heading, the main substratum is whether the Preliminary objection raised by the 2nd Respondent is merited. In determining this instant Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
11. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
12. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue.”
13. The same position was held in the case of “Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;

“A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
14. Similarly, in the case of “United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;

“A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used



to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed.”

15. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCC Misc. App No. 247 of 2003” where the Court held that;

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”

16. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

17. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 2nd Respondent:-

- a. That the Appeal has been filed outside the 30 days' timeline stipulated under Section 79G of the [Civil Procedure Act](#) 2010.
- b. That the Ruling was delivered on 13th June 2024 whereas the Appeal was filed on 25th July 2024, without leave of the Honourable court as such the Appeal as filed is incompetent, bad in law and fatally defective.
- a. That from the foregoing the appeal was an afterthought, an abuse of the court process and the same should be struck out with costs to the 2nd Respondent.

18. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection is on the procedure of appeals and timelines under Section 79G of the [Civil Procedure Act](#) 2010.

Issue No. b). Whether the Preliminary objection dated 19th August, 2024 is merited

19. Under this sub title, the Court shall determine the merits of the Preliminary objection with regards to extension to file an appeal out of time. Section 79G of the [Civil Procedure Act](#) provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.

20. The provision of 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.”

21. The provision of Section 95 of the *Civil Procedure Act*, Cap. 21 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.”

22. The principles to be considered in exercising the court’s discretion on whether or not to enlarge time to file appeal were set out in the case of “Leo Sila Mutiso – Versus - Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997”, the court, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

23. The Appellant only filed the Application to seek for leave to have their appeal admitted out of time after the Preliminary Objection was filed. Be that as it may I find that there was no inordinate delay being that the same was filed one month and 12 days after the delivery of the ruling and that by the act of the Appellant actually approaching the Court formally through unprocedural should not be shown the door for the mis up they made. I therefore find the Preliminary objection unmerited and proceed to declare it overruled.

Issue No. c). Whether the Notice of Motion application dated 28th August, 2024 seeking leave to file appeal out of time is merited.

24. Under this sub – title we shall discuss whether leave can be granted to the Appellant to file appeal out of time. I have largely examined the cases and the principles while examining the preliminary objection therefore I will just proceed with the principles of granting leave to file appeal out of time. These principles were also reiterated in “First American Bank of Kenya Limited – Versus - Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65” as follows: -

- 1) The explanation if any, for the delay;
- 2) The merits of the contemplated action, whether the appeal is arguable;
- 3) Whether or not the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

25. This Court will therefore proceed to address each limb of the principles outlined in the cases above and establish whether the Applicant has satisfactorily met each of the said principles. It is not disputed that the impugned ruling of the lower court was delivered on 13th June, 2024. After the delivery of the ruling it was not until 25th July, 2024 that the Appellant filed the Memorandum of Appeal challenging the decision of the court without leave. The memorandum was filed after 1 month and 12 days of the delivery of the ruling.

26. On the length of the delay and the explanation if any. The Appellant/ Applicant filed this present application on 28th August, 2024 after the trial court delivered its ruling on 13th June, 2024. The



Applicant gave his reason for the delay as an error in the registration of the details of the suit in the CTS Platform. I must not however there was no evidence advanced to these averions.

27. Be that as it may, even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. From the delivery of the ruling to the filing of the instant Application is about 2 months and 15 days. This in my view does not amount to inordinate delay further, the explanation given by the Applicant is sufficient and I therefore find that the Application was filed without undue delay.
28. On the issue of the chances of the success of the intended appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. The 2nd Respondent contended that the Appeal was improperly before the Court first before filing this appeal especially having full knowledge that the same was being filed out of time; no plausible reason has been given for filing the appeal out of time and that the delay was inordinate and inexcusable and all land matter filed, have descriptions of the property which includes forward slashes and combination of words and figures as evidence from the matter as filed before the trial court. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on the utmost critical importance to the Appellant's and the interests of the people of Mombasa County.
29. The third limb is whether the Respondents can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative, I find that no prejudice will be caused to the Respondents that cannot be compensated by an award of costs if the Application is allowed.
30. The principles laid down by the Supreme Court in "Nicholas Kiptoo Korir Arap Salat – Versus - IEBC & 7 Others [2014] eKLR" are pertinent in this case; namely:

“(T)he underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

31. Guided by the above principles, the upshot of the foregoing is that the orders sought by the Applicant; for leave to file the Appeal out of time is merited and for that reason the Notice of Motion dated 28th August, 2024 is allowed.



Issue No. d). Who bears the costs of the Preliminary objection dated 19th August, 2024 and Notice of Motion application dated 28th August, 2024.

32. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
33. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
34. In this case, this Honourable Court has reserved its discretion in not awarding costs.

V. Conclusion & Disposition

35. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the omnibus application, this court arrives at the following decision and makes the orders below:-
- a. That the Notice of Motion application dated 28th August, 2024 be and is hereby found to have merit hence hereby allowed.
 - b. That the Preliminary Objection dated 19th August, 2024 be and is hereby found to lack merit and the same is subsequently overruled with no orders as to costs.
 - c. That the Memorandum of Appeal herein attached dated 9th July, 2024 be and is herein admitted after payment of the requisite filing fees and the appeal be filed within (15) fifteen days from the date of this ruling.
 - d. That the Applicant to file and serve a Record of Appeal within 45 days from the date of this Ruling and there be a mention of the matter on 17th February, 2025 for taking direction on the admission and disposal of the appeal under the provision of Section 79B of the *Civil Procedure Act*, Cap. 21; Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.
 - e. That in the given circumstances the scheduled hearing date for 16th December, 2024 shall be vacated accordingly.
 - f. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH the MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF DECEMBER 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**



Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Juma Advocate for the Appellant/Applicant.
- c. M/s. Amina Advocate for the Respondent.

