



**Gichuru v Kangarua & another (Environment & Land Case
61 of 2017) [2023] KEELC 718 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 61 OF 2017**

**YM ANGIMA, J
FEBRUARY 9, 2023**

BETWEEN

LEAH WANGARI GICHURU PLAINTIFF

AND

FRANCIS KANGARUA 1ST DEFENDANT

SAMUEL NJUGUNA NJOROGE 2ND DEFENDANT

RULING

A. Introduction

1. By a judgment dated and delivered on December 7, 2017 the court (Hon MC Oundo J) allowed the Plaintiff's claim against the Defendant as prayed for in the plaint. The judgment was ex parte since the Defendant did not enter appearance to defend the suit.
2. By a notice of motion dated June 7, 2021 based upon Order 10 rule 11 of the *Civil Procedure Rules*, the 1st Defendant sought the setting aside of the ex parte judgment together with all consequential orders on the basis that she was never served with summons to enter appearance hence she was unaware of the proceedings.
3. By a ruling dated and delivered on January 27, 2022 the court dismissed the said application with costs.

B. The 1st Defendant's Instant Application

4. By a notice of motion dated April 6, 2022 and amended on June 27, 2022 expressed to be based upon Section 7 of the *Appellate Jurisdiction Act* (Cap 9) and all other enabling provisions of the law, the 1st Defendant sought an extension of time to file a notice of appeal against the dismissal order dated January 27, 2022.



5. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Defendant, Francis Kangarua on a date which is not discernible from the record. He contended that the delay in instructing his advocates to lodge a notice of appeal within time was occasioned by his ill-health. He annexed a copy of a letter from Bethany Hillcrest Hospital indicating that he was attended at the hospital in February and March, 2022 due to his hypertensive and diabetic condition.

C. The Plaintiff's Response

6. The Plaintiff filed a notice of preliminary objection dated May 9, 2022 in opposition to the application on jurisdictional issues. It was contended that the court had no jurisdiction to entertain the application or to grant the orders sought.

D. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that both the application and the preliminary objection shall be canvassed together through written submissions. The parties were consequently granted timelines within which to file and exchange their submissions. The record shows that the 1st Defendant filed his submissions on October 11, 2022 whereas the Plaintiff filed hers on October 19, 2022.

E. The issues for determination

8. The court has considered the 1st Defendant's application, the Plaintiff's notice of preliminary objection thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the court has jurisdiction to entertain the application.
 - b. If so, whether the 1st Defendant has made out a case for extension of time.
 - c. Who shall bear costs of the application.

F. Analysis and Determination

a. Whether the court has jurisdiction to entertain the application

9. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that the court had no jurisdiction to entertain the application, the 1st Defendant contended otherwise.
10. Section 7 of the *Appellate Jurisdiction Act* stipulates as follows:

' The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.'
11. The Plaintiff's contention was that the said section applied only to judgments as opposed to rulings hence it does not apply to the dismissal order made on January 27, 2022. The 1st Defendant, on the



other hand, contended that this court has the same status as the High Court hence it could grant the extension sought. The 1st Defendant did not address the distinction between a judgment and a ruling.

12. The court has perused the interpretation section of the *Appellate Jurisdiction Act*. Section 2 thereof states that a judgment includes 'decree, order, sentence and decision.' The court is thus of the opinion that the meaning of a judgment under the said Act is much under than the meaning of the term as defined under the *Civil Procedure Act* (Cap 21). Accordingly, whether one considers the dismissal order of January 27, 2022 as a decision or order, it falls well within the meaning of the term 'judgment' as employed in Section 7 of the *Appellate Jurisdiction Act*. Accordingly, the court is of the opinion that it has jurisdiction to entertain the instant application.

b. If so, whether the 1st Defendant has made out a case for extension of time

13. The main reason given by the 1st Defendant for his inability to lodge a notice of appeal within the prescribed period was ill-health. The material on record shows that he was both diabetic and hypertensive. There is a letter from a medical facility indicating that he received medical attention in the months of February and March, 2022. The material on record also indicates that his advocates wrote a letter dated February 9, 2022 notifying him of the dismissal order of January 27, 2022 but it is not clear from the record when he received the said letter.
14. The factors to be considered in an application for extension of time were considered by the Court of Appeal in the case of *Thuita Mwangi -vs- Kenya Airways [2003] eKLR* where the court quoted the following passage from the case of *Mutiso -vs- Mwangi [1997] KLR 630*:

' 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 generally the matters which this court takes into account in deciding whether to grant an extension of time are; firstly, the length of the delay; secondly, the reason for the delay; third (possibly) the chances of that appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.'

15. The court is satisfied that the 1st Defendant has tendered a reasonable explanation for the delay in filing a notice of appeal within the prescribed period and the delay in filing the instant application. The court, however, notes that the 1st Defendant was not totally incapacitated for the entire period of about 3 months. That should not, however, disentitle the Defendant from obtaining the extension sought even though he may be penalized in costs. In the case of *Mutiso -vs- Mwangi* (supra) the Applicant was granted an extension of time despite a delay of 3½ months.

c. Who shall bear costs of the application

16. Although costs of an action on proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act*. Accordingly, the successful party should ordinarily be awarded costs unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court is of the opinion that although the 1st Defendant is the successful party he should not be awarded costs of the application since he was not fully incapacitated during the entire period of delay. The court is further of the opinion that the Plaintiff is not entitled to costs since he has failed in his preliminary objection. Accordingly, the court shall make an order for each party to bear his own costs.



G. Conclusion and Disposal Order

17. The upshot of the foregoing is that the court finds merit in the 1st Defendant's application for extension of time. However, the court finds no merit in the Plaintiff's preliminary objection to the application. Accordingly, the court makes the following orders for disposal of the application and the preliminary objection:

- a. The Plaintiff's notice of preliminary objection is hereby overruled.
- b. The 1st Defendant is hereby granted an extension of time within which to lodge his notice of appeal against the order made on January 27, 2022.
- c. The 1st Defendant shall file and serve his notice of appeal within 14 days from the date hereof in default of which the leave shall lapse automatically.
- d. Each party shall bear his own costs of both the application and the preliminary objection.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 9TH DAY OF FEBRUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

IN THE PRESENCE OF:

MR. NDERITU KOMU FOR THE APPLICANT

MS. NDEGWA FOR THE RESPONDENT

C/A - CAROL

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Y. M. ANGIMA

JUDGE

