



**Macharia v Ngati (sued as the administrator of the Estate of Rose  
Munyiva Nzioka) (Environment and Land Civil Miscellaneous Application  
E038 of 2022) [2023] KEELC 563 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 563 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E038 OF 2022  
LC KOMINGOI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**CHARLES MACHARIA ..... PROPOSED APPELLANT**

**AND**

**RONALD KIMATU NGATI ..... RESPONDENT**

**SUED AS THE ADMINISTRATOR OF THE ESTATE OF ROSE MUNYIVA  
NZIOKA**

*(Being an application for stay of execution and leave to appeal out of  
time against the judgment of the Hon. Kabuya I. Principal Magistrate,  
delivered on 19th January, 2022 at Kajiado in CMELC No. 160/2018)*

**RULING**

1. This is the notice of motion dated September 22, 2022 brought under sections 79G and 95 of the [Civil Procedure Act](#) and order 50, rule 6 of the [Civil Procedure Rules](#).
2. It seeks orders;
  - (i) Spent
  - (ii) Spent
  - (iii) That the proposed appellant be granted leave to appeal out of time against the whole judgment of the Hon Kahuya I.M principal magistrate, delivered on January 19, 2022 at Kajiado in CMELC No 160 of 2018.
  - (iv) That the said leave do operate as a stay of the decree and all proceedings before the Chief Magistrate Court at Kajiado, CMELC No 160 of 2018.



- (v) That the notice of appeal annexed hereto be deemed as duly filed and served.
  - (vi) That upon prayer 3 being granted the applicant do file its appeal within 14 days thereof.
  - (vii) That the costs of this application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs (a) to (m).
  4. The application is supported by the affidavit of Charles Macharia Mwai, the applicant herein, sworn on the September 22, 2022 and a further affidavit sworn on December 14, 2022.
  5. The application is opposed. There are grounds of opposition filed by the respondent dated October 11, 2022. He has also filed replying affidavit sworn on October 11, 2022.
  6. On the November 3, 2022 the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

### **The Applicant's Submissions**

7. They are dated December 14, 2022. They raise the following issues for determination.
  - i. Was the delay inordinate?
  - ii. Whether the respondent will suffer prejudice.
  - iii. What discretion does this court have to allow the application?
8. The delay as explained in the applicant's affidavit in support was due to the mistake occasioned by the applicant's former advocate. The applicant ought not to be punished for the mistakes of his former counsel on record. He has put forward the cases of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR; *Belinda Mural & 9 others v Amos Wainaina* [1978] eKLR; *APA Insurance Limited v Michael Kinyanjui Muturi* [2016] eKLR.
9. The applicant had every intention to file a notice of appeal having been affected by the judgment and decree delivered in Chief Magistrates Court Kajiado CMELC No 160 of 2018. The applicant having issued instructions to his then counsel on record, he believed the said counsel will make good on his promise to act on his instructions and lodge a notice of appeal.  
The applicant after realizing that his instructions were not acted upon, made a personal effort to get the judgment and decree from the court registry.
10. The applicant has arguable grounds of appeal with good prospects of success as demonstrated in the annexed memorandum of appeal. It is submitted that the court in the interest of fairness and justice should allow the application so that it can be determined on its own merits.
11. The applicant has a right to be heard under article 48, 50(1) and 159(2) (d) of the *Constitution* of Kenya, 2010.
12. The respondent in his replying affidavit did not demonstrate that he will be greatly prejudiced if the application to file appeal out of time is granted. He has put forward the case of *APA Insurance Limited v Michael Kinyanjui Muturi* [2016] eKLR.
13. In the matter of *Edith Gichugu Koine v Stephen Njagi Thoithi* (2014) eKLR the court in relying on the overriding objective allowed the filing of an appeal even after a delay of 2 months and 8 days.



14. This court has a duty to exercise its discretion in a manner that promotes the interest of justice and right of parties to be heard.
15. He prays that leave to file notice of appeal and record of appeal be granted. He also seeks stay of execution of the decree in Kajiado CMELC No 160 of 2018.

### **The Respondent's Submissions**

16. They are dated October 26, 2022. It is submitted that the judgment was delivered in the presence of the applicant and his then advocate. The applicant was therefore aware of the legal duty to give sufficient instructions to his then advocate to lodge an appeal.  

There is no evidence that the applicant or his advocate applied for copies of proceedings and judgment.
17. The trial magistrate upon delivery of judgment gave the applicant sixty (60) days to lodge an appeal if he was dissatisfied but he never did so. The applicant is indolent and does not deserve this court's sympathy.
18. This application was filed after the respondent took steps to execute the judgment. It is an after thought and meant to deny the respondent the fruits of his judgment.
19. The proposed grounds of appeal in the annexed memorandum of appeal raise no arguable grounds of appeal both in fact and in law. The trial magistrate correctly legally and procedurally based her judgment on both clean and reliable evidence of the documents produced by the respondent while the applicant lay claim to the property as a buyer.  

He produced a sale agreement between him and other persons who did not have any legal capacity to sell the suit property. The applicant herein did not file a counterclaim therefore his grounds of appeal hold no water at all.
20. The delay in filing this application is inordinate and no sufficient reasons have been given to justify the same. He prays that the application be dismissed with costs.
21. I have considered the notice of motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issues for determination are;
  - (i) Whether this application is merited?
  - (ii) Who should bear costs of this application?
22. This application arises from the judgment of Kahuya I.M principal magistrate delivered on January 18, 2022. In the said judgment a permanent injunction was issued against the applicant herein restraining him from interfering with the peaceful enjoyment and ownership of the suit property by the respondent.  

The applicant was directed to vacate the suit property within sixty (60) days. He was also directed to pay Kshs 300,000 being general damages for trespass to the respondent.
23. It is the applicant's case that he then instructed his then advocate to lodge an appeal but he not do so.  

I agree with the respondent's submissions that there is no evidence to demonstrate that the applicant gave such instructions to his then advocate.
24. There is no evidence by way of application for certified copies of judgment and proceedings attached to the application herein.



It is the applicant's word only. There is no affidavit from the previous advocate on record to confirm that such instructions were given.

25. Section 79 G of the *Civil Procedure Act* provides that;

“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 [Rev 2012] cap. 21 Civil Procedure 35 [issue 1] 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”.

The notice of appeal was filed before this court on September 22, 2022 together with the application herein. The decree in the lower court was issued on March 21, 2022.

26. It has been held that appeals lodged out of time can only be admitted if the applicant has demonstrated sufficient cause.

In the case of *Nicholas Kiptoo Arap Kerin Salat v IEBC and 7 others* [2014] eKLR, the Supreme Court of Kenya held as follows;

“This being the first case in which this court is called upon to consider the principles of extension of time, we deliver the following as the underlying principles that a court should consider in exercise of such discretion;

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 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 before extending time”.

27. Also in the case of *Telkom Kenya Limited v John Ochanda and 996 others* [2015] eKLR it was held thus;

“(18) In instances where there is delay in filing the notice of appeal, this court has inherent jurisdiction to admit such an appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this court. Parties should comply with the procedure, rather than look to court discretion curing the pleadings before it. This court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place.

...(19) It is this courts position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the court will consider the relevant circumstances surrounding a particular case, and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant, but are the handmaidens of justice that facilitate the right of access to justice,



in terms of article 48 of the Constitution, can only be fully realized within a disciplined programme of procedural rules”.

28. I am guided by the above authorities in finding that the applicant herein has not explained the delay in filing the appeal. The delay is inordinate and inexcusable.
29. The applicant’s claim that he ought not to be punished for the mistakes of his then counsel does not come to his aid.  
  
He was not able to prove that such instructions were given. There is no affidavit from his previous counsel to confirm such instructions. It was the applicant’s case. He ought to have been vigilant that the appeal had been filed.
30. I agree with the respondent’s submissions that the appellant was jostled into action when the respondent commenced execution.
31. The delay of about seven months is inordinate. The explanation given by the applicant is not convincing.
32. I find that great prejudice will be occasioned to the respondent who has waited for so long to enjoy the fruits of his judgment.
33. In conclusion, I find no merit in this application and the same is dismissed with costs to the respondent.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**L.C. KOMINGOI**

**JUDGE**

**In the Presence of;**

No appearance for the Applicant

No appearance for the Respondent

**Court assistant- Mutisya.**

