



**Musee v Musee (Miscellaneous Application E015 of 2022)
[2023] KEELC 647 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
MISCELLANEOUS APPLICATION E015 OF 2022**

**LG KIMANI, J
FEBRUARY 7, 2023**

BETWEEN

GEOFFREY MUGAMBI MUSEE APPLICANT

AND

PETER MAKUNYI MUSEE RESPONDENT

(Application for extension of time to file and serve the Memorandum of Appeal and record of Intended Appeal from the Judgment of the Senior Resident’s Magistrate’s Court delivered by Honourable John Aringo SRM on 27th July 2022 in the SRM Land Case No. E003 OF 2022)

RULING

1. The intended Appellant filed an Application by way of Notice of Motion under Certificate of Urgency dated November 29, 2022, seeking the following orders:
 1. Spent.
 2. That pending the hearing and determination of this application, this Honourable Court be pleased to issue orders of injunction restraining the Respondent either by himself, his agents or his servants from interfering with the Land Parcel No. Plot No. 993 Kaiviria Adjudication Section.
 3. That this Honourable Court be pleased to order the extension of time to file and serve the Memorandum of Appeal.
 4. The costs of this application be in the cause.**
2. The grounds upon which the application is based are:
 - a. That the time to lodge the appeal have since elapsed.



- b. That the intended appeal raises various arguable points with very high chances of success.
 - c. That the Respondent has already started interfering with the Respondent's land Parcel No. P/ N993 Kaiviria Adjudication Section.
 - d. That this Honourable Court has the jurisdiction.
3. The Application is supported by the affidavit of the applicant deposing that the Respondent Peter Makunyi Musee is his step brother and states that the land in dispute is registered under his (the Applicants) name after adjudication proceedings.
 4. According to the Applicant, the Respondent filed the suit before the trial court on March 30, 2022 without consent from the ministry of lands and the said consent was issued on July 20, 2022 when the suit had already been filed. That he filed the suit without notifying the applicant and the suit was heard and determined in his absence. He states that he only came to know about the suit when the Respondent forcefully entered into his land and showed him the judgment.
 5. The Applicant states that the Respondent has started cutting down trees and destroying the Applicant's water pipes and is now threatening him and only the court can protect his rights.

The Respondent's Replying Affidavit

6. The Respondent filed a Replying affidavit stating that the application is misplaced, misconceived and an abuse of the court process and that it is unfounded, frivolous and lacks merit. He claims that the applicant was properly served with summons and court documents and was aware of the case but chose to ignore the summons. He claims that he filed a bill of costs which was taxed at Ksh.33, 500 and the applicant was served with a decree.
7. The applicant claims that family members had a meeting after adjudication called by their father to sub-divide land but his two blood brothers refused to attend the meeting when the land was sub-divided and also failed to appear in the court case.
8. The Respondent contends that it is in the interest of justice that he be allowed to enjoy the fruits of his judgment and that the land was acquired fraudulently by the Applicant because he was supposed to register their father as the owner but gave his name out during the recording in the adjudication process.

Submissions

9. The application proceeded by way of oral hearing on December 6, 2022, where the parties made submissions in person. The applicant reiterated that he was not aware of the lower court case. He stated to the court that the respondent has entered the land and threatened him. He further stated that he has been on the land for over 15 years and that he has reported the matter to the police.
10. In response, the respondent stated that he is a brother to the applicant and had come to court with their father. According to him, it is their father who had sent someone to work on the land. He confirmed that he obtained judgment at the Senior Resident Magistrate's Court at Kyuso and reiterated that the Applicant had the land registered in his own name but that it belongs to their father.
11. In rebuttal, the Applicant stated that their father has two wives and has favoured the other wife against his mother and has failed to give him land. According to him, he is on the suit land by virtue of a court order.
12. The court issued an order of status quo pending the final determination of the Application.



Analysis and Determination

13. Judgment in the trial court was delivered by Hon. John Aringo, Senior Resident Magistrate ELC Case No. E003 of 2022 on July 27, 2022 and the applicant wishes to file an appeal but is out of time.

14. Section 79G of the *Civil Procedure Act* cap 21 laws of Kenya provides that the period allowed for filing an appeal from a subordinate court to the High Court is 30 days. The provision is 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”

15. The reason that the Applicant has given for the delay is that he was unaware of the court case at the Magistrate’s court and only became aware when the Respondent entered the suit land and gave him a copy of the judgment. The Respondent has refuted this and states that the Applicant was served with summons and court documents and annexed a copy of the affidavit of service sworn by Nicholas Mwenga Kimwele, a court process server, who states that upon calling the Applicant he informed him that he was at Meru town but he proceeded to his home and served the court documents on his family members. The Applicant later on called the process server and confirmed that he received the court documents and will defend his land in court. The trial court noted in the judgment that:

“The defendant did not enter an appearance, nor file any papers in response to the suit. Interlocutory judgment was entered for the plaintiff and the matter went to formal proof.”

16. Order 5 Rule 8 in *Civil Procedure Rules*

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

17. In an application for extension of time, the court ought to take into account several factors. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the *locus classicus* case for extension of time, laid down the parameters 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.”

18. It is mainly an exercise in the court’s discretion as was observed by Odek, J.A in *Edith Gichugu Koine vs. Stephen Njagi Thoithi* [2014] eKLR, as,

“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 the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

19. In [Charles Karanja Kiiru v Charles Gitbinji Muigwa](#) [2017] eKLR the Court of Appeal held that:

“There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.”
20. The period of delay has been around four months since July 27, 2022 when the judgment in the trial court was delivered and November 30, 2022 when the current application was filed. In my view that period of time is not excessive. I have considered that the ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. It is stated in [Stelco Corporation Ltd. vs Susan A. Mudembwa](#) 2021 eKLR;

“Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.”
21. In addition, Article 159(2)(d) of [the Constitution](#) of Kenya (2010) provides that:

“... justice shall be administered without undue regard to procedural technicalities.”
22. Consideration is also given to the overriding objective of the court established by Sections 1A of the [Civil Procedure Act](#) that the Plaintiff/Applicant has also quoted. It provides as follows:

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).”

Section 3A provides that: “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
23. One of the considerations in the above precedent is the chances success of the appeal if the application is granted. In my opinion, the issue of service of summons is a strong issue for consideration, the issue of service of hearing notice, the issue of consent of the Land Adjudication Officer, issue of entry of interlocutory judgment are all strong issues for determination. Further, the issue of merit of the case itself is also one that is worth exploring at the appeal. I am therefore of the view that the application for extension of time has merit.
24. On the 2nd prayer seeking orders of injunction, I am of the view that the prayer as worded seeks injunction pending determination of this application. The said prayer is thus now spent since the application stands determined by this ruling.
25. The final order of the court is that;



1. The application dated November 29, 2022 be and is hereby allowed in the following terms;
2. The time within which to file and serve a Memorandum of Appeal against the judgement of the Senior Resident Magistrate's Court delivered by Honourable John Aringo SRM on July 27, 2022 in the Kyuso SRM Land Case No. E003 be and is hereby extended by a period of 14 days from the date of this ruling.
3. Each party to bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT KITUI THIS 7TH DAY OF FEBRUARY, 2023.

HON L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A Moses

Geoffrey Mugambi Musee present in person

Peter Makunyi Musee present in person

