



**Kilungu v Musangi (Environment and Land Miscellaneous Application  
E001 of 2022) [2023] KEELC 16267 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16267 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2022  
A NYUKURI, J  
MARCH 8, 2023**

**BETWEEN**

**FRANK NDONYE KILUNGU ..... APPLICANT**

**AND**

**JAPHETH MUTUA MUSANGI ..... RESPONDENT**

**RULING**

1. By Originating Summons dated January 4, 2022, the applicant sought the following orders;
  1. That this application be certified urgent and the same be heard ex-parte in the first instance in view of its urgency.
  2. That the firm of Omanga Nyabwengi & Co. Advocates be and is hereby granted leave to come on record for the Applicant.
  3. That pending interparte hearing and determination of the application; the court be pleased to stay the orders issued by Hon. C. A. Ocharo (SPM) on November 5, 2021 in Machakos CMCC No. 428 of 2015.
  4. That leave be granted to the Applicant to file the Appeal out of time.
  5. That upon grant of leave to file appeal out of time, the Memorandum and Record of Appeal lodged herein to be deemed as duly filed.
  6. That the honourable court be pleased to issue any order and or directions it deems fit and just in the circumstances.
  7. That the costs of this application be in the cause.
2. The summons were supported by the affidavit sworn by the applicant on January 4, 2022. The applicant's case is that delay in filing the appeal was occasioned by the fact that their former advocate



did not attend court on the judgment date and failed to communicate to the applicant what transpired on that date. Further that the applicant was made to believe that judgment had been scheduled for January 2022 and only learnt of delivery of judgment when the decree holder threatened him with eviction, on December 30, 2021.

3. The applicant further stated that he has a meritorious case with high chances of success and should not be shut out because of the delay. His position was that no prejudice will be suffered by the respondent.
4. The application was opposed. The respondent swore a replying affidavit dated April 8, 2022. He stated that he had not spoken to the applicant for three years and therefore the allegations of threats to evict were not true. He also stated that the applicant's counsel was present during the judgment. According to the respondent, the application was filed out of time and that the reasons given are neither candid nor cogent. He stated that the draft Memorandum of Appeal does not raise triable issues.
5. The application was disposed by way of written submissions. On record are submissions filed by the Respondent dated May 27, 2022.

### Submissions

6. Counsel for the respondent submitted that the applicant's counsel was aware of the judgment date and he ought to have diarized the same and informed their client. Counsel took the position that a matter belongs to the litigant and therefore the client cannot blame their counsel because they ought to follow up on their suit. To buttress this submission, counsel relied on the case of *Edney Adaka Ismael v Equity Bank Limited* [2014] eKLR, for the proposition that it is not in every case that a mistake committed by counsel would not be held against the client.
7. While relying on the case of *County Executive of Kisumu v County Government of Kisumu & 7 others*, counsel submitted that the period of delay must be explained to the satisfaction of the court. Counsel pointed out that judgment was delivered on November 5, 2021 and this application lodged on January 4, 2022, therefore the same was filed out of time and contrary to section 79 G of the *Civil Procedure Act*.

### Analysis and Determination

8. I have carefully considered the Originating Summons, the replying affidavit and submissions. The issues arising for determination are as follows;
  - a. Whether the firm of Omanga Nyabwengi & Co. Advocates ought to be granted leave to come on record for the Applicant.
  - b. Whether the prayer for filing appeal out of time is meritorious.
9. The Applicant invoked the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* in seeking for leave for his advocates to come on record. Under Order 9 Rule 9 of the *Civil Procedure Rules* where there is already a judgment and a party was represented by an advocate, a change of that advocate can only be effected by an order of the court or by consent of parties.
10. The applicant stated that he had an advocate in Machakos CMCC No. 428 of 2015, that he now appointed a new advocate after delivery of judgment and therefore, he needs leave to come on record. My understanding of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* is that leave is required within the same proceedings where the judgment was made. There is no requirement in law for leave to come on record in subsequent suits like this suit. In my view, this being a new suit seeking for new orders, the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* do not apply and therefore the firm of Omanga Nyabwengi & Co. Advocates does not need leave on this file to come on record



for the Applicant herein. He can only be required to obtain leave if he intends to come on record for the Applicant in Machakos CMCC No. 428 of 2015 and not in this matter.

11. On the question of leave to appeal out of time, section 79 G 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.

12. Therefore, while an appeal ought to be filed in 30 days, where the delay is explained by good and sufficient reason, the court ought to allow filing of an appeal out of time. Extension of time is an equitable remedy and therefore a party seeking such orders must show that there is no unreasonable delay and the court should also consider the prejudice that may be suffered by the respondent, and the reasons for the delay.

13. In the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#), the court held as follows;

- (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 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 on 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; and
- (7) Whether in certain cases like election petitions, public interest should be a consideration for extending time.

14. It is not disputed that judgment in the lower court was delivered on November 5, 2021. Therefore, the appeal ought to have been filed on or before December 5, 2021. The applicant filed this application on January 4, 2022. Order 50 Rule 4 of the [Civil Procedure Rules](#) provides that in computing time, the period between 21<sup>st</sup> December and 13<sup>th</sup> January in the subsequent year, ought not be included. Therefore the delay herein is 15 days. The explanation given for the delay is that delivery of judgment was not communicated by the former advocate to the applicant, and that the threats of eviction by the respondent on December 30, 2021 are what made the applicant aware of the judgment provoking this application.

15. The respondent argued and rightly so, that a case belongs to the client and not the advocate and therefore that a client must do the follow up. Having noted that the applicant instructed a new advocate to move the court 15 days after the lapse of time, it is clear that even though the former advocate may have failed, the applicant was proactive in remedying the situation without unreasonable



delay by ensuring his new advocate moved the court even when time was not running, in law; as early as January 4, 2022 when ordinarily most advocates offices may likely be closed for the festivities. I also note that the delay of 15 days is not inordinate and the reasons given by the applicant is a good reason for extension of time. A right to appeal is a Constitutional right which ought not be denied unless the ends of justice demand so. In the premises, the applicant deserves an opportunity for extension of time to file his appeal.

16. The prayer that the Memorandum and Record of Appeal lodged herein be deemed as duly filed cannot be granted. First, this is a miscellaneous application and not an appeal and therefore, an appeal which is a distinct suit should be filed independently by lodging a Memorandum of Appeal. An appeal cannot be filed within this application. Secondly, no record of appeal was lodged herein.
17. In the premises, I find the application dated January 4, 2022 is merited. I hereby order as follows;
  - a. Leave be and is hereby granted to the Applicant to file appeal against the judgment in Machakos CMCC No. 428 of 2015, out of time.
  - b. The applicant to file and serve the Memorandum of Appeal within thirty days of the date of this ruling.
  - c. In view of the proviso to the provisions of Order 50 Rule 6 of the *Civil Procedure Rules*, I order that the costs of this application shall be borne by the Applicant.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8<sup>TH</sup> DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

**Ms. Wanjiru holding brief for Mr. Omanga for Applicant**

**Mr. K. Musyimi holding brief for Mr. Mutinda for Respondent**

**Court Assistant – Josephine**

