



**Pertet & another v Manche aka James Kinyua Manji Peter Manji Waweru
(Suing as the Administrators and Personal Representatives of the Estate
of Samwel Waweru Manji - Deceased) & 3 others (Environment and Land
Appeal 27 of 2020) [2023] KEELC 17753 (KLR) (6 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 27 OF 2020**

CG MBOGO, J

JUNE 6, 2023

BETWEEN

**ESTATE OF THE LATE STEPHEN LEIYAN PERTET 1ST APPLICANT
PERSONAL REPRESENTATIVE OF THE LATE STEPHEN LEIYAN
PERTET 2ND APPLICANT**

AND

**JAMES KENYUA MANCHE AKA JAMES KINYUA MANJI PETER
MANJI WAWERU (SUING AS THE ADMINISTRATORS AND PERSONAL
REPRESENTATIVES OF THE ESTATE OF SAMWEL WAWERU MANJI -
DECEASED) 1ST RESPONDENT
DISTRICT LAND REGISTRAR NAROK NORTH/ SOUTH
DISTRICTS 2ND RESPONDENT
ESTATE OF THE LATE FREDRICK SIMIREN NKURUNA .. 3RD RESPONDENT
PERSONAL REPRESENTATIVE OF THE ESTATE OF FREDRICK SIMIREN
NKURUNA 4TH RESPONDENT**

(Ruling delivered by Kullow J on March 16, 2022)

RULING

1. Before this court for determination is a notice of motion application dated November 14, 2022, which is expressed to be brought under Articles 50 and 159 (2)(d) of the Constitution, Order 50 Rule 6 of the Civil Procedure Rules and Sections 1A,1B,3A of the Civil Procedure Act seeking the orders that: -



1. That this honourable court be pleased to enlarge time within which the applicants should lodge the record of appeal.
2. That costs of this application be provided for.
3. The application is premised on the grounds on the face of it and more so in the supporting affidavit of the 1st applicant.
4. The application is supported by the affidavit of Anne Pertet sworn on even date. The applicants deposed that by a ruling delivered by Kullow J on March 16, 2022 via email, he directed that they file a record of appeal within 45 days from the date of the ruling. The said ruling was earlier scheduled to be delivered on July 13, 2021 but it was not ready on the said date and the court directed that it would be delivered on notice. Further, that no ruling notice was delivered and they only got to learn of the ruling through an email sent by the respondent's advocates on August 1, 2022 which was extracted from the Kenya Law website.
5. The applicants deposed that they have sought typed proceedings which are yet to be availed by the court and that it is imperative that the application be allowed enlarging time as their memorandum of appeal raises triable grounds with chances of success.
6. The application was opposed by the replying affidavit of the 1st respondent sworn on November 23, 2022. The 1st respondent deposed that the applicants are guilty of indolence for the reason that this court had on October 18, 2022, directed the applicants to file the application within seven days. Further, that upon expiry of the stipulated timeline, no application had been filed and no application for extension of timelines was also filed.
7. The 1st respondent further deposed that a notice dated March 2, 2022 was issued detailing when the ruling would be delivered which notice was uploaded on the Kenya Law website and also at the court's premises which area and site is accessible to the applicants'. Further, that the allegation of ignorance of the existence of the ruling is a flimsy excuse for their delay in filing their record of appeal and they are engaging in delaying tactics in order to frustrate his quest for justice. Also, that Narok CMCC 138 of 2019 had progressed greatly and the parties have given evidence and as such, the instant application are fetters to the speedy conclusion of the matter.
8. The applicants filed a further affidavit in response thereto which was sworn on April 18, 2023 by the said Anne Pertet. The applicants deposed that the attached notice relied on by the 1st respondent seemingly posted on the court's notice board is a printout and it should be noted that their advocates are based in Nairobi and could not have reasonably come across the said notice. Further that there is nothing indicative that the same was posted or extracted from an online source.
9. The applicant's deposed that a proper notice would have been sent to their advocates via email, whatsapp, postal address or physically through a court process server.
10. The application was canvassed by way of written submissions. The applicants filed written submissions dated April 18, 2023. The applicants raised one issue for determination which is whether the applicants had notice of delivery of the ruling delivered on March 16, 2022 and consequently whether the application herein is merited.
11. The applicants submitted that there was no ruling notice and they only got to learn of the ruling sent by the respondents' advocates via email on August 1, 2022. Further, that it is clear that they are not to blame for the time lapse leading to inability to file the record within the stipulated timeline. The applicants relied on the case of *Stecol Corporation Limited versus Susan Awuor Mudemb* [2021]eKLR



and submitted that they already have on record a memorandum of appeal raising arguable grounds and that the 1st respondent has not demonstrated any prejudice he stands to suffer.

12. The 1st respondent filed written submissions dated April 18, 2023. The 1st respondent raised one issue for determination which is whether the application dated November 14, 2022 seeking the enlargement of time is merited.
13. The 1st respondent submitted that no plausible explanation has been given as to why the appeal was not filed within the stipulated time and taking into consideration the length of delay by the applicants to file the record of appeal, it is clear that the delay is inordinate, unreasonable and has not been sufficiently explained. Reliance was placed on *First American Bank of Kenya Limited versus Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC No 2255 of 2000 (2002) 1 EA 65.
14. The 1st respondent further submitted that if the instant application is allowed, he will be denied his right to access of justice since justice delayed is justice denied. The 1st respondent relied on the Supreme Court decision in Civil Application No 3 of 2016, [*County Executive of Kisumu versus County Government of Kisumu & 7 Others*](#).
15. The 1st respondent further submitted that the applicants are misleading this court as they contend that the reason for delay in filing the record of appeal is that there was no ruling notice whereas there is a notice dated March 2, 2022 that was issued by the Deputy Registrar. As such, the explanation is neither plausible nor sufficient and the applicants' are out to frustrate the respondents' quest for justice.
16. Further, that given the determination of issues as enumerated in favour of the respondent, he is entitled to costs with respect to these proceedings.
17. I have analysed and considered the application, replies thereof and the written submissions filed by applicants and the 1st respondent and the issue for determination is whether the application has merit.
18. Order 50 Rule 6 of the [*Civil Procedure Rules*](#) empowers the court to enlarge the time fixed for doing any act or taking any proceedings. For purposes of enlargement of time to file appeal in this case record of appeal, the other relevant provision is Section 79G of the [*Civil Procedure Act*](#) which 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 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.”

19. The applicants in this case therefore, must demonstrate “good and sufficient cause for not filing the appeal in time.” In the case of [*Thuita Mwangi versus Kenya Airways*](#) [2003] eKLR, the Court of Appeal while considering Rule 4 of the [*Court of Appeal Rules*](#) which was in pari materia with Section 79G of the [*Civil Procedure Act*](#), reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”



20. While the discretion of the court is unfettered, the applicants are obligated to adduce material upon which the court should exercise its discretion in their favour. Notably, every person is entitled as envisaged under Article 50 (1) of *the Constitution* to have a fair trial and which provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
21. The gist of this matter is that the applicants by a notice of motion dated January 18, 2021, sought stay of proceedings orders in CMCC No 138 of 2019. By a ruling delivered on March 16, 2022, Kullow J granted interim stay of proceedings and directed that the applicants file a record of appeal within 45 days. The contention herein arises from the delay in filing of the record of appeal which the applicants assert that it was not out of ignorance but that they became aware of these directions on August 1, 2022 vide email from the respondents’ advocates.
22. The applicants further contended that the ruling had initially been scheduled to be delivered on July 13, 2021 but was not ready and that the court directed that the same would be delivered on notice.
23. On the other hand, the 1st respondent contended that the applicants are indolent and the reason adduced is not sufficient and neither is it plausible.
24. I have perused the record in this file and I note that on March 16, 2021, the court slated the matter for a ruling on July 13, 2021. On the said July 13, 2021, the court stated that the ruling was not ready and deferred the same to September 1, 2021. From the said July 13, 2021, there were no further proceedings recorded as to the delivery of the said ruling. There is no copy of a ruling notice contained served upon the parties informing them as to the date of delivery of the ruling.
25. The 1st respondent annexed a copy of the said notice dated March 2, 2022 and a copy of the ruling which appears to have been extracted from the Kenya Law website. A question would also arise as to when the 1st respondent became aware of the said ruling notice and also when they obtained a copy of the said ruling from the Kenya Law website.
26. My analysis of the above is that the applicants’ cannot be faulted for having failed to comply with the directions of the court as to the filing of the record of appeal within the period stipulated. There was no evidence of service of the said ruling notice. It cannot be discerned where the said notice was displayed, whether it was sent via email, through postal address or even physically by a court process server.
27. Pursuant to Article 50 (1) of the *Constitution*, it follows that every person ought not to be shut out from accessing justice or having his day in court. Indeed, the right of a party to have expeditious disposal of his case must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.
28. From the court file, it is clear that the applicants filed a memorandum of appeal dated October 8, 2020 which was within the timelines provided for in law with the exception of the record of appeal.
29. The applicants have explained the delay in filing the record of appeal as they were not aware when the ruling was delivered to enable them comply with the court’s directions. The delay in filing the record of appeal was thus not deliberate and the applicants are not to blame for the long period it took them to comply with the directions of the court.



30. This court will therefore exercise its discretion in favour of the applicants. The applicants are hereby directed to file their record of appeal within 21 days from today. Mention on June 28, 2023 to confirm compliance and for further directions. Costs to abide the outcome of the appeal. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 6TH DAY OF JUNE, 2023.

MBOGO C G

JUDGE

6/6/2023

In the presence of:

CA:T.Chuma

