



**Changilwa v Kanangu (Environment and Land Appeal
E042 of 2021) [2023] KEELC 20785 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 20785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E042 OF 2021**

**LL NAIKUNI, J
JULY 12, 2023**

BETWEEN

MARY WANYAMA CHANGILWA APPELLANT

AND

NEWMAN PETER WANG'OMBE KANANGU RESPONDENT

RULING

I. Introduction

1. Before this Honorable Court for its determination are a tripartite pleadings by both the parties herein. They consist of two (2) Notice of Motion applications dated 25th July 2022 by the Appellant/ Applicant and another motion dated 3rd October 2022 by the Applicant/Appellant herein. Additionally, the Respondent herein has raised an objection through a Notice of preliminary objection dated 23rd September 2022 by the Respondent
2. For ease of reference, the Honorable Court will be dealing with each of these pleadings separately in order of filing and the dates thereof.

II. The Notice of Motion application dated 25th July 2022 by the Appellant/Applicant

3. The Notice of Motion application dated 25th July 2022 was filed by the Appellant/Applicant herein. It sought for the following orders reproduced herein verbatim:-
 - a. That the Court be pleased to amend it Ruling and order issued on 7th December 2021 to the extent that the Memorandum of Appeal referred in order (a) ii be amended to read 26th August 2010 as opposed to 26th August 2020 and the date of filing be amended to read 3rd September 2010 as opposed to 3rd September 2021.
 - b. That costs of this application abide the outcome of the appeal.



4. The application was based on the grounds, testimonial facts and averments of an eight (8) paragraphed Supporting Affidavit of Mary Wanyamasworn and dated on 25th July, 2022 together with three (3) annexures marked as 'MW – 1 to 3' annexed thereto. She averred that:-
 - a. She was the Appellant/Applicant herein.
 - b. Through the Ruling delivered on 7th December, 2021, this Honourable Court rendered a decision that gave various orders including reinstating the appeal which she had filed in the year 2010. Pursuant to that Ruling, the Court directed that the Record of Appeal be filed within a period of ninety (90) days .
 - c. Further to the above, the Court had previously directed the Deputy Registrar to assist the Appellant to procure an Advocate (albeit on Pro bono basis). These directives were never met and it was not until sometimes in July, 2022 that the Appellant managed to get a Counsel – Mr. Makaya Oweya who would be assisting her on pro bono basis.
 - d. In its Ruling delivered on 7th December, 2021, the Court had inadvertently referred to the memorandum of Appeal as dated 26th August, 2020 yet in actual sense the Memorandum of Appeal is dated 26th August, 2010. Similarly, the Court referred to the Memorandum of Appeal delivered as having been filed on 3rd September, 2021 yet the same was filed on 3rd September, 2010. Hence there was need to have these errors corrected for the record to be accurate. As such there will be need for the ruling as well as the attendant order be amended to reflect the accurate position. None of the parties herein stood to be prejudiced.
 - e. In a nutshell that the record of appeal was dated 26th August 2010 instead of 26th August 2010 in the Court's ruling delivered on 7th December 2021 and it would be a travesty for a Court of record not to reflect accurately , reasons whereby the Court should amend the ruling dated 7th December 2021 to reflect factual dates.

III. The Notice of Preliminary Objection dated 23rd September 2022 by the Respondent

5. The Respondent herein raised an objection by filing a Notice of Preliminary objection dated 23rd September 2022. He averred that; - He would object to the appeal filed as being incompetent having being filed out of time without seeking leave. It was filed on 3rd September 2010, and the ruling was delivered on 28th July 2020 reasons whereof the appeal should be struck out of time.

IV. The Notice of Motion application dated 3rd October 2022 by the Appellant/Applicant.

6. Additionally, the Appellant/Applicant vide a Notice of Motion application dated 3rd October 2022 sought the following prayers reproduced herein:-
 - a. That the Honorable court be pleased to extend the time for lodging the Memorandum of Appeal and by extension, the Court be pleased to deem the Memorandum of Appeal dated 26th August 2010 and filed in Court on 3rd September 2010 as properly filed.
 - b. That costs of this application abide the outcome of the appeal.
7. The application was supported by the 12 Paragraphed Supporting Affidavit of Mary Wanyama Changilwa. In a nutshell she deponed that:-
 - a. She is the Appellant/Applicant in this case and competent to swear this Affidavit and in support of the Notice of Motion attached hereto.



- b. This appeal was against a decision of the Magistrate Court ruling delivered on 28th July 2010. The ruling was a summary judgment which result to me not having an opportunity to be heard on merits.
- c. She instructed her then counsel to pursue an appeal. Her counsel proceeded and filed a Memorandum of Appeal dated 26th August 2010. Whereas the Memorandum of Appeal had been finalized as of 26th August 2010, her then Counsel delayed in filing it and ended up filing it on 3rd September 2010. Her then counsel never informed her that the Memorandum of Appeal had been filed out of time by three (3) days.
- d. Further to the above, part of the delay in filing the Memorandum of Appeal was because she was short of funds. Despite this, she worked hard and ensured that the at least the Memorandum of Appeal was filed. Again, she never knew that it was filed out of time as her Counsel at that time never communicated this to her.
- e. When she met her present Counsel, Mr. Makaya Oweya and handed him the file, he advised her that the records in the file were not proper. Specifically, he indicated as follows:
 - i). There was need to move to the court to have the dates of the Memorandum of Appeal be rectified.
 - ii). He also indicated that upon rectification of the dates by the court, there would be need to apply to the court to extend time to lodge an appeal and also have the Memorandum of Appeal be deemed as filed within time.
- f. In addition to the above, the counsel also noted that there was need to approach court and seek leave--to have the Memorandum of Appeal be admitted as filed out of time. However, this could only be done once the court had rectified the dates of the Memorandum of Appeal. Any action to the contrary would mean that the court, which is a court of record, would proceeding on inaccurate record. Justice could not be founded on inaccurate record. To regularize the record, it was paramount that this application be allowed.
- g. Although the ruling subject of this appeal was delivered on 28th July 2010, the Memorandum of Appeal was filed on 3rd September 2010. This was a delay of approximately five (5) days as the deadline to lodge the Memorandum of Appeal would have been on 28th August 2010 which date fell on a Saturday. Since 28th August 2010 was on a Saturday, the deadline for lodging the appeal would shift to 30th August 2010. As such, by filing the Memorandum of Appeal on 3rd September 2010, the Appellant delayed by only three(3)days.
- h. A delay of three (3) days was not inordinate. Furthermore, for over ten (10) years the Respondent had not raised any issue over the three day delay of filing the Memorandum of Appeal. It would defeat justice to deny her a hearing on merit over a three (3) days delay.
- i. As indicated, part of the delay was because she was sourcing for funds to enable her to proceed with the case. She therefore pleaded that poverty should not be a ground for which to lose her inalienable right to be heard.
- j. The court being a court of record, there was need for the record to be accurate and as such it was important that the ruling as well as the attendant order be amended to reflect the accurate position. None of the parties stood to suffer any prejudice.
- k. It was therefore only in the interests of Justice, Fairness, Equity, Constitutionalism, Principles of the Rules of Law and Natural Justice and Protection of Fundamental Rights and Freedoms



enshrined in the Constitution of Kenya, 2010 that this Application ought to be allowed as prayed.

V. Replying Affidavit dated 17th November 2022 in responses to the Notice of Motions application dated 25th July 2022 and 3rd October 2022

8. The Respondent opposed the Notice of application dated 3rd October 2022 vide the twenty-two (21) Paragraphed affidavit deponed by Newman Peter Mwang'ombe Kanangu sworn and dated on 17th November, 2022 together with twelve (12) annexures marked as 'NPMK – 1 to 12' annexed hereto. He deponed as follows:-
- a. He was the Respondent herein and therefore competent to swear this affidavit.
 - b. He had read the application by the Appellant dated 25th July 2022 and another one served on him Advocate though it was not dated and signed but filed on 3rd October 2022.
 - c. He stated that the applications were not only frivolous ,vexatious misconceived but were also an abuse of the court process.
 - d. The Appellant was an outright liar who had been taking this court in circles to appear like the victim while infact she was the one who was trying to obtain back property which she already sold to the Deponent as he could attest in the proceedings paragraphs of this affidavit.
 - e. On 26th May 2008, he purchased the house subject of this Appeal from the Appellants for the sum of Kenya Shillings Eight Hundred Thousand (Kshs, 800,000/-) and the sale agreement and banking slips for the balance were annexed and marked as “NPMK 1 & 2” respectively.
 - f. The sum of Kenya Shillings Six Hundred Thousand (Kshs, 600,000/-) was paid in cash upon signing of the agreement while the balance of Kenya Shillings Two Hundred Thousand (Kshs, 200,000/-) was deposited in Account No. 016-1031127 at Barclays Bank of Kenya Nkrumah Road owed by the Defendant's son called FAnuel Mkangula Changilwa and in the name of Ciesio Building and Construction. Annexed herein was the banking slip marked as “NPMK - 3”.
 - g. The Appellant never gave vacant possession as agreed and on 16th December2008 they entered into another agreement which her son and her agreed to refund the sum of Kenya Shillings Eight Hundred Thousand (Kshs, 800,000/-) but which they never did.
 - h. The Appellant through her then advocates Ananda & Company sent the refund of a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) via Cheques which on presentation to the bank the cheques were dishonored. Annexed hereto were the dishonored cheques and the bank advise marked as “NPMK - 5”.
 - i. All the foregoing culminated in himself into taking the following steps.
 - i). filing a suit No. 315 of 2009. On 20th September 2009, he filed an application for summary Judgement for vacant possession.
 - ii). On 28th July 2010 the court gave the Ruling in favour and issued orders of vacant possession. On the same date the court issued a Decree for Vacant possession. Annexed was the Decree marked as “NMPK - 9. On 12th August 2010 his Advocate applied for Warrants of Eviction.



- iii). On 26th August 2010, the court gave him warrants to the court bailiff to give vacant possession; and
- iv). On 4th October the bailiff in assistance with the Police evicted the Appellant and gave the Deponent vacant possession of the suit property.
- j. The Appellant had since 4th October 2010, been out of the premises for a period of now over 12 years and she had only revived this Appeal so as to vex the court and hoodwink the court grant her unwarranted orders.
- k. The Appeal herein was filed over 12 years ago. It was filed out of time and he urged the Court to strike it out.
- l. In view of the a foregoing averments, the appeal had no merits at all and it is actually the Appellant who was grossly oppressing him since she took his money which she wanted to keep and also keep the house.
- m. It was worthwhile to note that after he got the Decree in his favour in SRMCC No. 315 of 2009, he sold the suit property to one Lenadi Salim Msamanga and its no longer in his possession. Annexed was the sale agreement marked as “NPMK-12”.
- n. Further, it was worthwhile to note that the same house was subject to “Civil Suit No. 1366 of 2010 – Zubeida Issa Suleiman v Mary Changilwa Kidale, Newman Peter Mwang’ombe Kanangu & John Changilwa” Annexed are some of the pleadings to prove the same.
- o. It was clear that the Appellant is guilty of material non disclosure, misrepresentation and generally lack of candour.
- p. He was in opposition to the application for enlargement of time to file an appeal and any other application.

VI. Submissions.

- 9. On 24th October, 2022 while all the parties were present in Court it was agreed that the three (3) pleadings be dealt with at once and an omnibus Ruling be delivered accordingly. Thus, for expediency sake it was directed that the pleadings be disposed off by way of written submissions according with stringent timelines. Pursuant to that all parties obliged and court reserved a date for the delivery of this ruling on notice to the parties.

A. The Written Omnibus Submissions by the Appellant/ Applicant dated 14th April, 2021

- 10. On 14th November, 2022, the Learned Counsel for Applicant/Appellant, Messrs. the Law firm of Messrs. Makaya Oweya Advocates filed their written omnibus submissions on behalf of the Applicant/ Appellant dated 11th November, 2022. Mr. Mokaya Advocate commenced his submission by providing a detailed introduction and brief facts of the case. He held that the substratum of the case was that sale of property – a Swahili house erected on Plot No. 622/44 Kongowea, Maweni. The Appellant herein was the owner of the house and entered into a sale agreement with the Respondent. The agreed purchase price was a sum of Kenya Shillings Eight Thousand (Kshs. 800, 000.00/=). The Respondent paid the Appellant the sum of Kenya Shillings Six Hundred Thousand (Kshs. 600, 000.00/=) leaving a balance of Kenya Shillings Two Hundred Thousand (Kshs. 200, 000.00/=).
- 11. According to the Counsel the agreement never provided when the Respondent was to have taken possession of the suit property. It was therefore assumed that he was to take possession only after



making full payment of the purchase price. The Respondent later on alleged that he paid the aforesaid outstanding balance to the account of a company by the names Ciesco Building and Constructions. For record, the Appellant was not connected in any way to the company. Additionally, the Appellant as the owner of the house never instructed the Respondent to remit money into the account of the said company.

12. Afterwards, the Respondent filed a civil case in Mombasa CMCC No. 315 of 2009 and obtained a summary Judgement, The Judgement was entered despite of the glaring fact that there was bona fide (triable) issues worthy of plenary hearing. One of the main issues was whether the Respondent paid the full purchase price despite having deposited the sum of Kenya Shillings Two Hundred Thousand (Kshs. 200, 000.00/=) into a company's account without the knowledge of the Appellant. That summary Judgement was entered vide a Ruling delivered on 28th July, 2010. That was the Ruling subject for this appeal. Clearly, the Appellant was aggrieved by the said Ruling.
13. The Appellant therefore lodged an appeal through a Memorandum of Appeal dated 26th August, 2010 and filed in Court on 3rd September, 2010.
14. To canvass on the subject matter, the Learned Counsel framed three (3) issues for the consideration by this Honourable Court. These were:

Firstly, whether the Court should amend its ruling dated 7th December 2021 it was provided that the Court is empowered to review its own ruling and amend clerical or mathematical errors as supported by Sections 80, 99 and 100 of the *Civil Procedure Act*, Cap. 21 as read with Order 45 of the *Civil Procedure Rules*, 2010. He placed reliance onto the case of: "*Lucy Njoki Waitbaka v Tribunal appointed to investigate the conduct of Lucy Njoki Waitbaka & Another; Kenya Magistrates and Judges Association (Interested party)* [2019] eKLR where the Court noting that this Court was a Court of record which meant one that was required to keep record of its proceedings and the Court records were assumed to be accurate and could not be collaterally impeached.

15. Secondly, was on whether the Court should deem the Appeal as being properly on record. It was submitted that on a conceptual framework the Court was empowered to allow an appeal filed out of time as long as the Appellant gives satisfactory justifications as to why the delay was occasioned as provided by Article 259 (9), 79 (G) of the *Civil Procedure Act*, Section 95 of the *Civil Procedure* and the case of "*Kennedy Korir Sargo v KB Bank Limited & Another* [2021] eKLR. On the concept of the natural justice.
16. The Learned Counsel on the issue of the seeking for the enlargement of time to file the appeal out of time, he relied on legal rationale vested in the decision of: "*Silas Kanyolu Mwatba v Joseph Kavive James* [2021] eKLR which laid - down the parameters on the enlargement of time to lodge an appeal. These parameters could be summarized as follows:-
 - i. Whether there was inordinate delay;
 - ii. Whether there was an arguable appeal;
 - iii. The level of injustice to be suffered.
17. Applying these legal principles, the Learned Counsel contextually asserted that the Appellant/Applicant herein had met all parameters to be granted extension of time as the appeal had been filed with no inordinate delay, the Appellant/Applicant had raised bon fide issue in the Memorandum of appeal and there would be irredeemable injustice were the court not to grant extension of time.



18. In conclusion, the Learned Counsel submitted that the Appellant/Applicant had made a case for allowing the application dated 25th July, 2022 and 3rd August, 2022 and prayed that the same be allowed and the Preliminary Objection be dismissed.

VII. Analysis and Determination

19. I have gone through the filed pleadings herein being the Notice of Motion application dated 25th July 2022; Preliminary objection dated 23rd September and Notice of motion dated 3rd October 2022, the submissions, the numerous authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
20. To reach an informed, just, reasonable and equitable decision the Honourable Court has framed the following four (4) salient issues for determination. These are:-
- Whether the Preliminary objection dated 23rd September 2022 meets the threshold of an objection based on Law and facts.
 - Whether the Notice of Motion applications dated 3rd October 2022 and one dated 7th December 2021 by the by the Appellant/Applicant have any merit.
 - Whether the parties herein are entitled to the reliefs sought.
 - Who will bear the costs of the objection and the applications?

Issue No. a). Whether the Preliminary objection dated 23rd September 2022 meets the threshold of an objection based on Law and facts.

21. Under this sub-heading it is critical to first and fore most to deal on the objection raised by the Respondent before embarking on all the other issues on the subject matter. According to the Black Law Dictionary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous “Classicus locus” case of: “*Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited*. [1969] EA 696 where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

22. While still at the definition of objection, I wish to cite the case of “Attorney General & Another v Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-



- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
23. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Respondent herein in the Notice of Preliminary Objection dated 23rd September, 2022 not to allow the extension of filing the appeal out of time as the intended appeal is frivolous and incompetent and hence it should be struck out of time.
24. Further, the Respondent holds that the matter herein was instituted as a suit before trial Court being CMCC No. 315 of 2009 where judgement was preferred against the Applicant who filed appeal 189 of 2009 before the High Court. The same was dismissed for want of prosecution. She made attempts to reinstate it and matter was transferred to the Environment and Land Court.
25. Without any doubt, these were serious and pure issue of law. This court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issue is not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Respondent is properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider it and determine them accordingly.

Issue No. b). Whether the Notice of Motion applications dated 3rd October 2022 and one dated 7th December 2021 by the by the Appellant/Applicant have any merit.

26. Under this sub heading, the issues to be determined are whether the Ruling of this dated 7th December 2021 reflected accuracy of records and if not what were the remedies? The Appellant/Applicant in the Notice of Motion application prayed that the Court be pleased to amend it Ruling and order issued on 7th December 2021 to the extent that the Memorandum of Appeal referred in order (a) ii be amended to read 26th August 2010 as opposed to 26th August 2020 and the date of filing be amended to read 3rd September 2010 as opposed to 3rd September 2021.
27. Having perused the Court's ruling dated 7th December 2021, I make the observation, indeed that there was a clerical error in the ruling. Having made reference to the Memorandum of Appeal under order (a) ii to read 26th August 2020 as opposed to 26th August 2010 and the date of filing to read 3rd September 2021 as opposed to 3rd September 2020.
28. I wish to state that amendment of Judgments, orders and decrees is aptly provided for in law under the provision of Sections 99 and 100 of the *Civil Procedure Act* cap 21. The sections read thus respectively:-

Section 99:- "Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

and;



Section 100:- “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

29. I seek solace in the Court of Appeal case of: “*Leonard Mambo Kuria v Ann Wanjiru Mambo* (2017) eKLR also extensively discussed the provision of Sections 99 and 100 of the *Civil Procedure Act*. The Court opined thus:-

“The application of these two Sections [Sections 99 and 100 of the *Civil Procedure Act*, CAP 21] has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of ‘functus officio’-- the principle that once a decision has been given, it is (subject to any right of appeal) final and conclusive. It cannot be revoked or varied by the decision-maker. As the court stated in the case of *Jersey Evening Post Limited v Ai Thani* [2002] JLR 542 at 550: -“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”.

30. Having agreed with the observations by the Appellant/Applicant herein, that there was a clerical error in the ruling dated 7th December 2021, and given the Court powers to amend orders provided under the provision of Sections 99 and 100 of the *Civil Procedure Act* Cap 21 and acquiesce to the Applicants prayers to the extent of amending it to reflect the accurate dates. Thus, the orders sought there is allowed.

31. With regard to the extension of time to file the appeal out of time, there are several legal provisions that guide the Court on applications to file proceedings out of time. These include the provisions of Order 50 Rules 6 and 7 of the *Civil Procedure Rules*, 2010 and Section 79G of the *Civil Procedure Act* Cap 21 provides thus: -

Section 79G - “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.

The provision of Section 95 of the *Civil Procedure Act* Cap 21 provides thus: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.



32. The Courts have also extensively instances where the Court can extend filing of an appeal. The Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* provided thus: -

- “(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 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 of the extension is granted.
- (6) Whether the application has been brought without undue delay; and;
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

33. The Court of Appeal in the case of “*Thuita Mwangi v Kenya Airways Limited* (2003) eKLR, provided the following grounds to be considered by the Court when allowing or disallowing appeal to be filed out of time;

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.

34. The Court in the case of: “*Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others* [2015] eKLR, further opined on the issue. It provided thus: -

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this *Constitution*.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting the *Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and



while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

35. Now applying these principles of law to the instant case, I have noted that Appellant/Applicant was granted orders to reinstate the appeal herein on 7th December 2021 and was directed to prepare a record of appeal within 90 days and cause it to seek approval and directions by Court under provisions of Section 79B of the Civil Procedure Act Cap. 21 and Order 42 Rule 21 of the Civil Procedure Rules. The matter appeared in Court on various dates in 2022 and the Respondent raised issues on delay occasioned by the Appellant/Applicant in appointing and dismissing Advocates and the Court gave direction that all issues raised be canvassed by way of written submissions.
36. From the material on record, the Memorandum of Appeal dated 26th August 2010 was filed on 3rd September 2010, the memorandum ought to have been filed by 28th August 2010. Nonetheless, I concur that being that 28th August 2010 was a Saturday, the Appellant/Applicant delayed in filing the appeal by 5 days. In her affidavit Applicant gave reasons for the delay to be a lack of source of funds and her Lawyer at the time not informing her of the appropriate timelines to file the appeal. Based on the consideration of social justice, I find this grounds perfectly reasonable. However, following reinstatement of the appeal by the ruling dated 7th December 2021, the Appellant/Applicant was to file the record of appeal within 90 days. However, the record of appeal was filed on 5th August 2022, 3 months 28 days later. The Appellant/Applicant avers that reasons for delay was failure to appoint an Advocate that only happened in sometimes on July 2022. The other reason provided is the there was a mishap with the Court’s ruling dated 7th December 2021 which had the potential to affect record of appeal. In concurrence with the decision cited by the Learned Counsel for the Appellant/Applicant of “Lucy Njoki Waithaka (Supra) that this being a Court of records all the records have to be accurate and without any error but it should not be a reason for the extended delay in filing the appeal. Court The Respondent on the other hand argued that it had been 12 years from since the filing of the suit and the subject matter had already been disposed to another party and it was subject to other court proceedings.
37. Judicial notice will be taken that, indeed the Court has been overly lenient to the Appellant/Applicant having given her orders to reinstate the appeal after a period of 12 years. However, the reinstatement of the appeal was varied to the extent that the record of appeal be filed within days but the same was delayed with 98 days. The Appellant/Applicant averred that it was occasioned by inaccurate record and failure to appoint an Advocate. This is my opinion does not necessarily justify the delay. In any case the Court is to provide justice to both parties, and it has been 13 years since filing of the appeal, it is only just and fair that the Respondent enjoy the fruits of judgment. It goes without saying that litigation has to come to an end. Be that as it may, based on the legal principles founded under Article 25 (c); 47, 50 (1) & (2) and 159 (1) and (2) of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A of the Civil Procedure Act, 2010, Sections 3 and 13 of the Environment & Land Act, No. 19 of 2011 and Sections 101 of the Land Registration Act, No. 3 of 2012 and Section 150 of Land Act, No. 6 of 2012 on overruling objectives and the fact that I am persuaded by the contention by the Learned Counsel to the effect that the issues raised from the filed Memorandum of Appeal are arguable with some chances of succeeding. Furthermore, while allowing the application, it will not in any way prejudice the Respondent. Hence, it is primarily on that basis that the Preliminary objection dated 23rd September 2022 should not be sustained in the given circumstances. On the contrary, the Notice of Motion application dated 25th July, 2022 and 3rd October, 2022 are meritorious and hence allowed.



Issue No. c). Who bears costs of the objection and the applications

38. It is trite law that costs follow the event or are awarded under courts discretion. In the Supermarine Handling Services Limited v Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006) the Court stated inter alia, that:

“Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

39. In the instant case, taking the facts and the surrounding circumstances of this case, although the applications filed by the Appellant/Applicant have been successful, its just reasonable and fair that each party to bear its own costs.

IV. Conclusion & findings.

40. Ultimately, having elaborately caused analysis of the framed issues in this matter, the Honourable Court on preponderance of probabilities makes the following findings:-

- a. That the Preliminary objection dated 23rd September 2022 by the Respondent herein found to lack merit and hence be and is hereby disallowed.
- b. That Notice of Motion applications dated 25th July, 2022 and 3rd October, 2022 by the Appellant/Applicant be and are hereby allowed.
- c. That the Ruling and order issued on 7th December 2021 to the extent that the Memorandum of Appeal referred in order (a) ii be amended to read 26th August 2010 as opposed to 26th August 2020 and the date of filing be amended to read 3rd September 2010 as opposed to 3rd September 2021.
- d. That the Honorable court do hereby extend the time for lodging the Memorandum of Appeal and by extension, the Memorandum of Appeal dated 26th August 2010 and filed in Court on 3rd September 2010 to be deemed as properly filed under the provision of Section 79B & G of the Civil Procedures Act, Cap. 21 and Order 50 Rules 6 and 7 of the Civil Procedure Rules, 2010.
- e. That for expediency sake, the Appeal to be heard and disposed off within the next One Hundred & Eighty (180) days being on 19th February, 2024. There be mention for the direction on 5th October, 2023 for the disposal of the appeal under the provision of Order 42 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010.
- f. That each party to bear their own costs.

RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF JULY, 2023

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HON. JUSTICE MR. L.L. NAIKUNI, (JUDGE)

ENVIRONMENT & LAND COURT AT MOMBASA



Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Makaya Oweya Advocate for the Appellant/Applicant.
- c. Mr. B.W Kenzi Advocate for the Respondent

