



**Gathii v Karungo (Environment and Land Miscellaneous Application
E003 of 2023) [2023] KEELC 18817 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18817 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2023
LN GACHERU, J
JULY 6, 2023**

BETWEEN

KAHUNGA GATHII APPLICANT

AND

RUTH NJERI KARUNGO RESPONDENT

RULING

1. Vide an application dated 8th February 2023, the Applicant herein Kahunga Gathii, sought for the following orders:
 1. That the Court be pleased to grant leave to the Applicant to file an appeal out of time against the ruling and order of Hon. E. Nyagah (SPM), sitting at Murang'a Law Courts;
 2. That this Court be pleased to specify the time limit within which the appeal is to be filed;
 3. That this Court do give further or alternative orders in order to meet the ends of justice; and
 4. Costs of this application.
2. The application is premised on the grounds set out on its face and the Supporting Affidavit of Edna Gesare Oginda, the Applicant's advocate. She averred that the Applicant is desirous of Appealing out of time, the Orders of the lower Court issued on 1st September 2022, for the reason that the Applicant's former advocates Mr. E.N. Njue was admitted to hospital for treatment and therefore was unable to file the Appeal within 30 days as required by the rules.
3. She further averred that there was miscommunication between the Applicant, who is over 90 years old, and resides in Nakuru and his former advocate, and that it is a cardinal principle of justice that an Applicant should not be allowed to suffer for the acts or omissions of his counsel. She prayed that this application to file an Appeal out of time be allowed.



4. The Respondent Ruth Njeri Karungo opposed the application through a Replying Affidavit dated 16th February 2023, wherein she averred that the Applicant filed Kangema MCLE No. 17 of 2018, and a Judgement was delivered in the Respondent's favour declaring that she had the right to occupy Loc.9/Kanyenyaini/1531, (the suit property). That being dissatisfied, the Applicant preferred an Appeal being Murang'a ELC Appeal No. 6 of 2020, which was dismissed on 26th May 2021.
5. The Respondent further averred that following the dismissal of the Appeal, the Applicant cunningly filed another suit being Murang'a MCLE No. E56 of 2021, seeking similar orders which proceeded ex-parte.
6. The Respondent also averred that on 1st March 2022, the trial Court in Murang'a unaware of the previous suit at the High Court Ordered the removal of the Caution placed on the suit property. Lastly, the Respondent averred that her advocates filed an application dated 4th May 2022, seeking to strike out that suit, and the said application was allowed. It is that Ruling that the application seeks to appeal out of time.
7. To conclude, the Respondent averred that the Applicant has abused the Court process by filing multiplicity of suits, with no chances of success, and therefore the application for leave to file an appeal out of time ought to be denied.
8. The Application was canvassed by way of written submissions.
9. The Applicant through the Law Firm of Gesare Oginda & Co. Advocates, filed his written submissions in support of the application on 24th February 2023. It was submitted that the decision whether or not to grant leave to appeal out of time is an exercise of judicial discretion which is guided by Section 79G of the [Civil Procedure Act](#), which states:

“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.”

10. It was further submitted that an appeal may only be admitted out of time on the condition that the applicant satisfied the Court that he had a good and sufficient reason for not filing the Appeal on time. On this issue, the Applicant relied on the case of Edith Gichungu Koine v. Stephan Njagi Thoithi (2014) eKLR, where it was held as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many decisions of this court including, but not limited to, the period of delay, the reason for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance against others.”

11. The Applicant further submitted that decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Reliance was placed on the case of Kamlesh Mansukhalal Damki Patni v. DPP & 3 Others (2015) eKLR, wherein the Court of Appeal held that Judicial Officers are bound to adhere to national values and principles of governance whenever applying or interpreting the Constitution to ensure that the rule of law is upheld.



12. Lastly, the Applicant submitted that he had provided evidence of his previous advocate's hospital admission and stated that mistakes of a legal advisor may amount to sufficient cause as set out under Section 79G of the *Civil Procedure Act*. On this issue, the Applicant relied on the case of *Belinda Mural & 9 Others v. Amos Wainaina (1978) eKLR* as cited in *Shah H. Bharmal & Brothers v. Kumar (1961) EA 697*.
13. On her part, the Respondent through the Law Firm of S.N. Thuku & Associates, filed her written submissions dated 16th March 2023, opposing the application. It was submitted that Section 79G of the *Civil Procedure Act*, provides for the time for filing appeals from subordinate courts.
14. It was further submitted that the law does not set out the minimum or maximum period for delay, but that the delay should be explained as was held in the case of *Chege & Another v. Michubu & Another* in Misc. Civil Application E502 of 2021 (2022) eKLR, where the Court held;

“.....The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 others [2019] eKLR* addressed itself on the question of delay as follows;-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....”

15. In the circumstances of this matter, the delay has not been adequately explained. It is not enough to allege as the applicant did that his counsel had difficulty tracing him. What kind of difficulty, occasioned by what, and what efforts were made on both sides? In this age of instant electronic communication, no party can be taken seriously when he claims difficulty in communication with his counsel for over a year. A party seeking extension of time must not be seen to presume on the court's discretion. Further, it is trite that cases belong to the litigants and the onus was on the applicants to follow up with his counsel on the progress of his case. The court therefore agrees with the respondents that indeed the applicants have not demonstrated good and sufficient cause why they failed to file the memorandum of appeal within prescribed time.
16. The Court has carefully considered the instant Application and the Response thereto. The Court too has considered the respective rival written submissions and it finds the main issue for determination is;
 1. Whether the instant application is merited or not?
17. The legal provisions for allowing a party to file an appeal out of time are set out under Section 79G of the *Civil Procedure Act*, which states 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.”

18. In *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Nairobi Civil Application No. 251 of 1997*, the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

19. The principles that guide the court in exercising this discretion were well settled in Supreme Court Application No. 16 of 2014;- Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (Supra). These principles include:
 - a. 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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
20. It is not in doubt that the Ruling in Murang’a Chief Magistrate’s Court ELC Case No. E056 of 2021, was delivered on September 1, 2022. It is also not in doubt that the present application was filed on 8th February 2023. There is indeed a delay of four months from the stipulated time period of thirty days set under Section 79G of the *Civil Procedure Act*. The delay was explained by the Applicant to be due to the former advocate’s hospital admission after delivery of the ruling. Supporting documents were provided to corroborate the Applicant’s claim from Murang’a Level 5 Hospital for 3rd October 2022. He also included other medical documents dated prior to the ruling. However, there was no evidence of admission to hospital of the said Advocate.
21. The Applicant’s advocate further contended that there was miscommunication between her client who is elderly, and his former client.
22. The Respondent opposed the application on the grounds that the Applicant had filed two separate appeals against the same judgement without the Court’s knowledge of the same.
23. As to whether the Applicant is deserving of this equitable remedy, is a fact that must be established from the Applicant’s conduct towards filing of this application. The Court will determine whether the delay was inordinate, by examining the reasons for the delay, which was stated to be due to the Applicant’s advocate illness. The hospital card shows that the said Advocate had an outpatient booking for 3rd October 2022. However, there was no evidence of serious illness between October 3, 2022 to February 8, 2023, when the instant Application was filed.
24. However, this Court also notes the other instances of the Applicant’s improper conduct. The Applicant had previously filed a Plaint dated June 28, 2018, and a subsequent appeal, between the same parties on the issue of the removal of a caution lodged against the same suit property, which were both dismissed. This present application seeks leave to file an appeal out of time to a separate suit relating to



the removal of a caution on the suit property in a suit. The same was pointed out by trial Magistrate who found the matter to be res judicata.

25. Another issue for consideration relating to the Applicant's conduct is that there is no Memorandum of Appeal that this Court can look at to determine whether the appeal is merited or not. This Court appreciates the Applicant's right of appeal as was held in the case of Vishva Stone Suppliers Company Limited v RSR Stone [2006] limited [2020] eKLR, where the Court held;

"That default notwithstanding the principle of law set out above on this issue indicates clearly that in the absence of a draft memorandum of appeal the Court can gauge the arguability of an intended appeal from other supportive evidence."

26. However, the Court too has noted that the Applicant had filed multiple suits over the same subject matter, which is an abuse of the Court process.
27. The Respondent was the successful party and it is only fair that he be allowed to enjoy the fruits of his judgment, while the Applicant is keen to frustrate these efforts. To this end, the Court finds and holds that there would be prejudice occasioned upon the Respondent should leave to appeal out of time be granted.
28. For the above reasons, this Court exercises its discretion in favour of the Respondent herein.
29. Having carefully considered the instant Notice of Motion Application dated 8th February 2023, the Court finds it not merited and the same is dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

N/A – Applicant

Thuku for Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

6/7/2023

