



Rugiri v M’Mukiri (Suing as the legal representative of the Estate of M’Mukiri M’I Bunge Karigi alias M’Mukiri Ibunge) (Environment and Land Miscellaneous Application E004 of 2023) [2023] KEELC 18515 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023**

CK YANO, J

JULY 5, 2023

BETWEEN

GLADYS KINYA RUGIRI APPLICANT

AND

BENEDICT GUANTAI M’MUKIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M’MUKIRI M’I BUNGE KARIGI ALIAS M’MUKIRI IBUNGE) RESPONDENT

RULING

1. This ruling is in respect of a notice of motion dated 27th January 2023 brought pursuant to Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010, section 1B,3A,79G and 95 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and all other enabling provisions of the Law seeking for orders:
 - a. That this Honourable Court be pleased to grant leave to the applicant to file an appeal out of time against the Judgement of the Honourable Court J.Irura (Mrs) delivered on the 17th day of June 2022 between Benedict Guantai M’Mukiri (Suing as the legal representative of the Estate of M’Mukiri M’Ibunge Karigi alias M’Mukiri Ibunge and Gladys Kinya Rugiri.
 - b. That costs of this application be in the cause.
2. The application is based on the grounds;
 - i. That judgement herein was delivered on the 17th June 2022 in retrospect the consequence of which has seen the thirty days within which to file an appeal lapse.
 - ii. That the Appellant is dissatisfied and aggrieved by the said judgement in all respects and seek to file appeal out of time.



- iii. That the Appellant stands to suffer substantial and irreparable loss and damage if the judgement as read stands.
 - iv. That unless this application is allowed the Applicant's intended appeal will be rendered nugatory.
 - v. That the Applicant has a good arguable appeal which has high chances of success.
 - vi. That the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of cost if this application is allowed.
3. The application is supported by the affidavit of Brenda Karimi Gikundi sworn on 27th January, 2023.
 4. In the Supporting affidavit, the applicant's counsel states that she was engaged by the applicant to assist her to file an appeal for the judgement entered against her delivered on 17th June 2022 a copy of which has been annexed. That she proceeded to file a notice of appeal and stay of execution not fully aware of the proper procedure of filing an appeal from the Lower court to the High Court. That due to her inept of not being aware of the proper procedure she omitted and failed to file a Memorandum of Appeal before the High Court and she has annexed a copy of the draft Memorandum of Appeal.
 5. Counsel for the Applicant avers that she proceeded to file an application of stay before the Lower Court with the thought that she would file the memorandum of Appeal upon the hearing and determination of the application for stay. That she seeks the court's indulgence to allow her file the appeal out of time and not penalize her client for her mistakes.
 6. The counsel for the Applicant further avers that the Honourable court has the discretion to allow for an enlargement of time to file an appeal and asked that the court allows the request for the extension/enlargement of time to enable her file the appeal. The applicant's counsel further states that the respondent will not suffer any prejudice or any damage so great that is not capable of being compensated by way of costs.
 7. The counsel for the Applicant contends that on the other hand, her client stands to suffer great prejudice and irreparable harm/loss if no appeal is preferred from the decision of the Honourable court delivered on the 17th June 2022 and prayed that the application be allowed in the interests of justice.
 8. The respondent in opposing the application filed her replying affidavit dated 15th February 2023 wherein she states that the grounds in support of the application by the applicant are misconceived and based on falsehoods. That the trial court delivered the judgement on the matter on 17th June 2022 over seven months before the application was filed and that the Applicant was supposed to proffer an appeal within 30 days from 17th June 2022 which was not done, and that the application herein is an afterthought.
 9. The respondent states that the delay was intentional, inordinate and/or inexcusable on the part of the applicant as they have not shown any reason for the delay. That the averments by the counsel for the Applicant in her supporting Affidavit that her mistake of filing notice of Appeal instead of Memorandum of appeal should not be visited upon the client must fail for the following reasons;
 - a. The alleged filed notice of appeal has not been attached because it is a conjecture.
 - b. The mistake of the advocate in this case is not bona fide and has not been explained to the satisfaction of the Court.
 - c. That inaction on the part of its advocate is not sufficient reason and that was crystalized by the case of Dilpack Kenya Limited v William Muthama Kitonyi [2018]eKLR.



- d. That the allegations that the failure to file an appeal on account of mistake of counsel is unproven on a balance of probabilities.
 - e. The Applicant remains the owner of the suit and the prosecution thereof is his responsibility.
10. The respondent states that the mistake of the Applicant's counsel not to file an appeal on time can be prosecuted before the Advocates Disciplinary Tribunal as it does not amount to a bona fide mistake which the court can excuse. That the respondent shall suffer great prejudice if an extension of filing of the appeal is granted or the application is allowed. That the applicant has never filed a memorandum of Appeal to date neither has she attached a draft memorandum of Appeal.
 11. The respondent avers that the chances of success of the intended appeal as alleged has not been demonstrated and that the same will inescapably fail for the following reasons,
 - a. The court called for a topographical survey and considered the same in her judgement as evidenced at page 8 first paragraph of the judgement.
 - b. Nkuene/Taita/3308 and Nkuene/Taita/598 share a boundary as evident in the registry index map and as demonstrated by the county surveyor and that was captured at 3rd paragraph at page 5 of the judgement.
 - c. The two issues being the backbone of the appeal, and overwhelming evidence dislodging the position of the Applicant, the appeal will only be superfluous.
 12. The respondent states that the Applicant has not demonstrated to the court the extent of loss that she would incur should the judgement not be stayed. That the appellant has not demonstrated that she had any good and sufficient cause for not filing the appeal within time to be able to benefit under the proviso to section 79G of the [Civil Procedure Act](#).
 13. The respondent further states that he is advised by his advocates on record that enlargement of time is a matter of judicial discretion which is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.
 14. The respondent states that the appeal is mischievous, contemptuous and an abuse of and misuse of the judicial process and that the right of appeal ought to be balanced with the right of decree holder to enjoy the fruits of judgement.
 15. The respondent further avers that it is in the interest of justice that the application is denied and urged the court to look out the substance of the motion and other issues raised substantively for the interest of justice.
 16. The respondent states that the application herein is not merited and should be dismissed accordingly.
 17. The application was canvassed by way of written submission which both parties filed.
 18. The Applicant submitted that the instant appeal is premised on Section 79 G and 95 of the [Civil Procedure Act](#) which provides for filing of appeals from the subordinate courts and for enlargement of time respectively.
 19. The Applicant submitted that when considering an application such as the present one the court has unfettered discretion and therefore needs only to concern itself with whether a justifiable cause has been shown to warrant such exercise of discretion.



20. The Applicant relied on the principles laid down laid down by the Supreme Court of Kenya in the case of NICHOLAS KIPTOO Arap KORIR SALAT VS IEBC and 7 others 2014 eKLR namely: -

“The underlying principles a court should consider in the exercise of such discretion include:

- a. Extension of time is not a right of any 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 for the same 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 Respondent if the extension is granted.
- f. Whether the application has been brought without undue delay.

21. The applicant further submitted that the principles regarding applications for extension of time have followed a well beaten path and relied in the cases of Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No.Nai.255 of 1997 and Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading company limited (2015)eKLR.

22. The Applicant further submitted that she gave instructions to the advocate in due time and they filed an application for stay in the lower court dated 12th July 2022 and a notice of appeal dated 14th July 2022 but she inadvertently used the wrong procedure to go about the situation as she thought it was within time to file the memorandum of appeal since she had filed the Notice of Appeal until she learnt that was not the proper procedure as the procedure she was conversant with was an appeal from the High Court to the Court of Appeal which was totally different from the subordinate Court to the High Court. Counsel for the applicant submitted that in the interest of justice, her mistake should not be visited on the applicant herein and relied in the case of CFC Stanbic Limited versus John Mana Githaiga & another (2013) eKLR and the case of Patrick Maina Mwangi v Waweru Peter (2015)eKLR where the court cited Mwai v Murai No.4 (1982) KLR.

23. Further the Applicant relied on Article 159 (2) (d) of *the Constitution* the crux of which is that justice should be administered without undue regard to procedural technicalities and submitted that should the leave be allowed it will not in any way prejudice the respondent since he has not executed the judgement delivered on 17th June 2022.

24. In conclusion the Applicant submitted that the application be allowed and the mistakes of the advocate not be visited upon the applicant in pursuing the intended appeal.

25. The respondent submitted that Section 79 G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited.

26. The respondent submits that from the proviso of Section 79G, it is noteworthy that the phrase used is an appeal may be admitted out of time and that therefore means that an appeal may indeed be admitted out of time. However that the intended appeal ought to have already been filed before which is not the case herein. The respondent submitted and the Applicant has never filed a memorandum of Appeal



- today but only attached a draft memorandum of Appeal in the Supplementary Affidavit once the respondent raised it in the Replying Affidavit in a bid to salvage the sinking boat.
27. The respondent submitted that the present application is incompetent and ought to fail since the applicant failed to file a substantive appeal first and they relied on the case of Gerald M'limbine vs Joseph Kangangi (2008) eKLR.
 28. The Respondent further submitted that extension of time is an equitable remedy reserved for a deserving applicant and that since the applicant has failed to demonstrate a good and sufficient cause for not filing the appeal in time, the same ought not be granted and relied in the case of Edith Gichungu Koine vs Stephen Njagi Thoithi (2014) eKLR.
 29. The respondent submitted that the trial court delivered the judgement on the matter on 17th June 2022 and that the Applicant was supposed to proffer an appeal within 30 days from 17th June 2022 which she never did hence the application herein which he submitted is an afterthought. They further submitted that the delay is intentional, inordinate and/ or inexcusable on the part of the Applicant who has not shown any reason for the delay.
 30. The respondent further submitted that the mistake of Applicants counsel failure to file an appeal on time can be prosecuted before the Advocates Disciplinary Tribunal and does not amount to bona fide mistake which the court can excuse.
 31. The respondent submitted that he shall suffer great prejudice if an extension of filing of the appeal is granted or the application is allowed and that the chances of success of the intended appeal as alleged has not been demonstrated and that the same will inescapably fail.
 32. The respondent further contended that the Applicant has not demonstrated to the Court the extent of loss that she would incur should the judgement not be stayed and that the applicant has not demonstrated that she had any good and sufficient cause for not filing the appeal within time to be able to benefit under the proviso to Section 79 G of the Civil Procedure Act.
 33. The respondent submitted that the application dated 27th January 2023 is contrary to a just, expeditious, proportionate and affordable resolution of disputes before the court which principles the court is bound to uphold and urged the court to reach the conclusion that the Application is without any merit and that the Applicant is guilty of laches and proceed to explicitly dismiss the Application with costs to the Respondent.

Analysis and Determination

34. The issue for determination in respect of the application herein is to whether the court should grant the applicant leave to file an appeal out of time.
35. The application is in respect to extension of time to file an appeal out of time. The reason stated by the applicant's counsel is that she was engaged by the applicant to assist her to file an appeal against the judgement entered against her delivered on 17th June 2022. That she proceeded to file a notice of appeal and stay of execution not fully aware of the proper procedure of filing an appeal from the Lower court to the High Court. That due to her inept of not being aware of the proper procedure she omitted and failed to file a Memorandum of Appeal before the High Court and instead filed a notice of appeal which is applicable in respect of appeals from the High Court to the Court of appeal
36. To begin with counsel has admitted that she was inept in not being aware of the proper procedure and omitted to file a memorandum of Appeal. This leaves a lot to be desired since it is trite that ignorance of the Law is no defence. As they say an advocate's tool of trade is the law.



37. The statutory provisions that deal with the requisite period for filing of appeals from the subordinate courts to the High Court is section 79 G 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 the lower court may certify as having been requisite for the preparation and delivery to the Appellant 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.”

38. In *First American Bank of Kenya LTD –vs- Gulab P. Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 (2002) 1EA 65* the court set out the factors to be considered in deciding whether or not to grant such an application and these are:

- i. The explanation if any for the delay;
- ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the course of justice;
- iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.”

39. The court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension of time, the court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.

40. As already stated, the grant of the extension of time is discretionary. The court is entitled to take into the account the nature of the process against which the extension is sought and satisfy itself that there is reasonable basis to justify the orders sought. This was the holding in the case of *Republic v Public Administrative Review Board & Another (2019) eKLR*.

41. In the case of *Abdul Azizi Ngoma vs Mungao Mathayo (1976) Kenya LR 61,62*, the Court of Appeal held:

“We would like to state once again that this courts’ discretion to extend time under rule 4 only comes into existence after sufficient reason for extending time has been established and it is only then that other consideration such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

42. Similarly, in *Karny Zaharya & Another vrs. Shalom Levi. C.Appl.No.80 of 2018, Koome, JA* (as she then was) stated:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason (s) for the delay the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion: the conduct of the parties: the need to balance the interests of a party who has a decision in his favour against the interest of a party who has a constitutionally underpinned right of opportunity to fully agitate its dispute, against the need to ensure



timely resolution of disputes: the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.....”

43. Article 159 (2) (d) of *the Constitution* of Kenya 2010 also enjoins courts to determine cases without undue regard to technicalities. I must however point out that Article 159 of *the Constitution* is not a panacea for all legal problems.
44. Turning to the request by the applicant to allow her to exercise her now undoubted constitutionality, underpinned right of appeal in this case, the judgment was delivered by the lower court on 17th June 2022. The applicant was supposed to proffer an appeal within 30 days from that date. The only reason given by the applicant is that her advocate filed a notice of appeal instead of a memorandum of appeal. As already stated, ignorance of the law is no defence and the applicant’s advocate should know as much. I therefore find that the reason given is not plausible. Further, the application herein has been brought over seven months later. I find that the delay is inordinate and inexcusable. In my view, the application to file appeal out of time is an afterthought. Enlargement of time is a matter of judicial discretion which is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. This, in my view, is what the applicant herein is trying to do. The court notes that the reason as stated by the applicant is not justified and the delay is inordinate. No doubt, the respondent will be greatly prejudiced if this application is allowed.
45. In the result, I find that the notice of motion dated 27th January, 2023 is without merit and the same is dismissed with costs to the respondent.
46. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF JULY 2023

IN THE PRESENCE OF:

Court Assistant – V. Kiragu

No appearance for applicant

No appearance for respondent

C.K YANO

JUDGE

RULING

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