



**Mutua v Mwangangi (Environment and Land Miscellaneous Application  
E031 of 2023) [2023] KEELC 20492 (KLR) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20492 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E031 OF 2023  
CA OCHIENG, J  
OCTOBER 9, 2023**

**BETWEEN**

**PASCHALIA MUTUA ..... APPELLANT**

**AND**

**SEBASTIAN SIMON MWANGANGI ..... RESPONDENT**

**RULING**

1. The Application before this court for determination is the Applicant's Notice of Motion dated the 23<sup>rd</sup> March, 2023 where she seeks the following orders:
  - a. Spent
  - b. That leave be granted to the firm of B.M Mung'ata & Co. Advocates to come on record for the Applicant.
  - c. That this Honourable Court be pleased to grant the Applicant leave to Appeal out of time against the Judgment delivered by Hon. M.A Otindo on 14<sup>th</sup> February, 2023.
  - d. That this Honourable Court be pleased to admit the Memorandum of Appeal annexed to this Application as duly filed upon payment of the requisite court filing fees.
  - e. That costs of this Application be in the cause.
2. The Application is based on grounds on the face of it together with the Supporting Affidavit of Anne M. Munyao Advocate where she deposes that their client the Applicant herein, had instructed them to lodge an Appeal against the whole of the decision in ELC No. 128 of 2019 delivered on 14<sup>th</sup> February, 2023. She explains that they prepared an Application for stay of execution and annexed a draft Memorandum of Appeal but their clerk inadvertently failed to file the said Memorandum of Appeal within the stipulated time. Further, that the Memorandum of Appeal was nine (9) days late. She sought for leave of court to file the said Memorandum of Appeal out of time and explained that



failure to file it on time, was not deliberate or intentional. She reiterates that mistake of counsel should not be visited upon an innocent litigant. She insists that the intended Appeal raises triable issues and they had already requested for typed proceedings. Further, that this court has jurisdiction to grant the orders sought.

3. The Respondent filed a Replying Affidavit sworn by one Sebastian Simon Mwangangi where he deposes that the instant Application is not merited since the Applicant was guilty of laches and had not satisfactorily demonstrated vigilance and diligence on their part. He argues that the grounds set in the instant Application and the facts stated in the Supporting Affidavit do not warrant the grant of orders sought. He avers that the Applicant has not met the threshold required, of good and sufficient cause for not filing the Appeal on time. Further, that the reasons given were shambolic. He contends that the clerk who had allegedly failed to file the Memorandum of Appeal had not sworn an affidavit to confirm the said allegations and filing the instant Application including the intended Appeal was geared towards denying him the fruits of his Judgment.
4. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits as well as the rivaling submissions, the following are the issues for determination:
  - a. Whether the firm of messrs B M Mungata & Company Advocates should come on record for the Applicant instead of the firm of messrs Evans Muli & Company Advocates.
  - b. Whether the Applicant should be granted leave to file the Memorandum of Appeal out of time.
6. The Applicant in her submissions reiterated her averments as per the Supporting Affidavit, relied on Order 9 Rule 9 of the [Civil Procedure Rules](#) and contended that she has complied with its provisions. She cited the provisions of Article 159 of [the Constitution](#) and insisted that the Court should not give undue regard to technicalities. She confirmed that the delay of nine (9) days was inadvertent on the part of the clerk, owing to the fact that a draft Memorandum of Appeal had already been filed together with the application for stay. She further reiterated that there were sufficient reasons advanced for the delay of nine (9) days which was not inordinate and the draft Memorandum of Appeal showed her readiness to prosecute the Appeal. Further, that no prejudice would be suffered by the Respondent which cannot be compensated by costs. To buttress her averments, she relied on the following decisions: [Ngitimbe Hudson Nyanumba v Thomas Ongondo](#) (2018) eKLR; [S.K Tarwadi v Veronica Mueblemann](#) [2019] eKLR; [Belinda Murai & Others V Amos Wainaina](#) (1978); [Itute Ngui & Another V Isumail Mwakavi Mwendwa](#) Civil Application No. Nai. 166 of 1997; [APA Insurance Limited V Michael Kinyanjui Muturi](#) (2016) eKLR and [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others](#) [2014] eKLR.
7. The Respondent in his submissions relied on the averments in his Replying Affidavit and stated that the firm of messrs B.M Mungata & Company Advocates were not properly on record since the provisions of Order 9 Rule 9 of the Civil Procedure Rule had not been adhered to, as they had not been granted leave to represent the Applicant post Judgment. He insisted that there were no sufficient grounds to warrant leave to Appeal out of time as the reasons advanced were shambolic. To support his arguments, he relied on the following decisions: [James Ndonyu Njogu V Muriuki Macharia](#) (2020) eKLR; [Lalji Bhimji Shangani Builders & Contractors Vs City Council of Nairobi](#) (2012) eKLR; [Monica Moraa vs Kenindia Assurance Co. Ltd](#) (2010) eKLR; [Mombasa County Government V Kenya Ferry Services & Another](#) (2019) eKLR and [Wangechi Gitonga & 3 Others vs IEBC and 17 others](#).



8. On Change of an Advocate after Judgment, Order 9 Rule 9 of the [Civil Procedure Rules](#) provides thus:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

9. In this instance the firm of messrs B M Mungata & Company Advocates has sought to replace the firm of messrs Evans Muli & Company Advocates that were previously on record for the Applicant. The Respondent has vehemently opposed this prayer. As per the provisions of Order 9 Rule 9(a) of the [Civil Procedure Rules](#), a law firm seeking to come on record for a party, post Judgment, is expected to seek leave of court. I note this is what the firm of messrs B.M. Mungata & Company Advocates have sought, and I will allow them to come on record for the Applicant.

10. As to whether the Applicant should be granted leave to file the Memorandum of Appeal out of time.

11. The legal provisions governing extension of time to lodge an Appeal to this Court is governed by 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.”

12. The wording is clear in that good and sufficient cause is required before such time is extended. From the averments in the Supporting Affidavit, it is clear the Applicant, at the time of filing this Application, was late to file the Memorandum of Appeal by nine (9) days. The Applicant explained that the clerk inadvertently forgot to file the Memorandum of Appeal and upon noticing this, her counsel acted immediately and filed the instant Application.

13. The Court of Appeal in [Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi](#) (Civil Application E032 of 2022) [2023] KECA 381 (KLR) while dealing with an Application for extension of time to file an Appeal stated that:

The delay cannot therefore be said to be inordinate in the circumstances. In my view, the explanation tendered by the applicant is plausible and sufficient considering the delay period was only 43 days. Additionally, I note that the delay occasioned was as a fault of the advocate in the conduct of the matter and the applicant cannot be blamed for the delay. Without evidence to the contrary, I am unable to find carelessness in the actions of the applicant hence the explanation offered for the delay is sufficient.”

14. The Supreme Court in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR laid down the principles that govern the exercise of discretion in Applications for extension of time and held that:

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. A party who seeks for extension of time



has the burden of laying a basis to the satisfaction of the court. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

1. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
2. Whether there will be any prejudice suffered by the respondents if the extension is granted;
3. Whether the application has been brought without undue delay; and
4. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

15. From the explanation in the Supporting Affidavit, I am of the view that that the same is plausible since there seems to have been human error as the Applicant’s Advocates’ Clerk inadvertently failed to file the Memorandum of Appeal at the point of filing the Application for Stay of Execution. Further, the instant Application has been brought without inordinate delay after the said error was detected. Filing an Appeal is a litigant’s Constitutional right and where sufficient cause has been demonstrated, I opine that the Court will not block the litigant from the seat of justice. Further, I find that the Respondent has not demonstrated what prejudice he stands to suffer if time was extended to enable the Applicant file a Memorandum of Appeal out of time.
16. Based on the facts before me while relying on the legal provisions I have cited above as well as the decisions quoted, I will grant the Applicant the benefit of doubt and extend time for her to file the Memorandum of Appeal out of time.
17. It is against the foregoing that I find the Notice of Motion Application dated the 23<sup>rd</sup> March 2023 merited and will allow it. I will proceed to make the follow final Orders:
  - a. The Applicant be and is hereby granted leave of fourteen (14) days to file and serve the Memorandum of Appeal.
  - b. The Costs of this Application is awarded to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9<sup>TH</sup> DAY OF OCTOBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

