



Musau & another v Muindi; Kilonzo & another (Interested Parties) (Environment & Land Case 30 of 2013) [2023] KEELC 20447 (KLR) (3 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 30 OF 2013
CA OCHIENG, J
OCTOBER 3, 2023**

BETWEEN

MARGARET KALONDU MUSAU 1ST PLAINTIFF

JOHN MUOKI MUSAU 2ND PLAINTIFF

AND

JOHNSON MUSAU MUINDI DEFENDANT

AND

KAVANDI KILONZO INTERESTED PARTY

JOHN MUKUHA NYOTA INTERESTED PARTY

RULING

1. What is before Court for determination is the Interested Parties' Notice of Motion Application dated the 8th November, 2022 where they seek the following Orders:
 1. Spent.
 2. That this Honourable Court be pleased to extend time for the Interested Parties to file their Notice of Appeal in this case.
 3. That the costs of the Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 1st Interested Party Kavandi Kilonzo where she deposes that Judgment was delivered on 19th September, 2022 but the Interested Parties were not aware and only did so when their Advocates were served with a Notice of Appeal by the Defendant on 29th September, 2022. She avers that her Advocates were also not aware of the Judgment date. Further, that upon perusing the said Judgment, they are desirous of appealing to the Court of Appeal. She confirms that the Notice of Appeal ought to have been filed



within fourteen (14) days from the date of the Judgment and they hence seek extension to file the same. She reiterates that the delay in filing the Notice of Appeal was caused by their lack of information on when Judgment was delivered.

3. The Plaintiffs opposed the instant Application and filed a Replying Affidavit sworn by 1st Plaintiff Margaret Kalondu Musau where she confirms that Judgment was delivered on 19th September, 2022. She contends that the Interested Parties admit they were served with the Defendant's Notice of Appeal on 29th September, 2022 which was ten (10) days after delivery of Judgment. Further, that the time for filing the said Notice of Appeal had not lapsed by the time the Interested Parties were served with the Defendant's Notice of Appeal. She avers that the Applicants have failed to demonstrate what steps or effort they undertook to obtain a copy of the Judgment or even follow up on the outcome of the case. She argues that the instant Application has been brought after a glaring period of inordinate delay. Further, no sufficient good cause and/or reasons have been adduced to warrant the Notice of Appeal to be filed out of time. She reiterates that the Applicants have been deliberately remained evasive as to the date they became aware of the date Judgment was delivered.
4. The instant 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 and rivalling submissions, the only issue for determination is whether the Interested Parties should be granted leave to file the Notice of Appeal against the Judgment delivered on 19th September, 2022, out of time.
6. The Interested Parties in their submissions reiterated their averments as per the Supporting Affidavit and contended that they have made the conditions required for the grant of an order of extension of time to file a Notice of Appeal, out of time. They submit that the delay in filing of the Notice of Appeal was occasioned by their lack of information on the date of Judgment and lack of access to the contents of the said Judgment in time. They argue that the delay is excusable and the intended Appeal will enable them ventilate their grievances. Further, that this Court has jurisdiction to extend time to enable them lodge a Notice of Appeal, out of time. To support their arguments, they relied on the following decisions: *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR; *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR; *Kamlesh Mansukhalal Pattni v Director of Public Prosecution & 3 Others* [2015] eKLR; *Father Fautus Ndenyere & Another v Lucy Waitihira Karanja & Another* [2021] eKLR and *Clemensia Nyanchoka Kinaro v Joyce Nyansiaboka Onchomba* [2021] eKLR.
7. The Plaintiffs in their submissions reiterated their averments as per the Replying Affidavit and insist that the Applicants have failed to satisfactorily discharge the burden placed on them to warrant extension of time since no sufficient reasons have been given as to why the Notice of Appeal was not filed yet they became aware of the Judgment on 29th September, 2022. They insist that they will be prejudiced if the Interested Parties are granted leave to file a Notice of Appeal out of time, since they will not be able to enjoy the fruits of their Judgment. To support their averments, they have relied on the following decisions: *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Appeal No. Nai 255 of 1997 (unreported)); *Pullin Harakchand Shab v Southern Credit Banking Corporation Limited* [2016] eKLR; *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* Supreme Court Application No. 16 of 2014 [2014] eKLR; *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR.



8. On lodging a Notice of Appeal, Rule 75 (1) and (2) of the [*Court of Appeal Rules Appellate Jurisdiction Act*](#) provides as follows:

- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

9. While Order 50 Rule 6 of the [*Civil Procedure Rules*](#) stipulates that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

10. On extension of time to file Notice of Appeal, Munyao J in the case of [*Loise Chemutai Ngurule & Another v Winfred Leshwari Kimung'en & 2 Others*](#) [2015] eKLR observed that:

It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of [*Simon Towett Martim v Jotham Muiruri Kibaru*](#), Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004) eKLR. In the matter, it was held that Rule 4 of the [*Court of Appeal Rules*](#) grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kamaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time. With respect I disagree with the above decision. Section 7 of the [*Appellate Jurisdiction Act*](#), CAP 9, is drawn as follows:-

Section 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the [*Constitution*](#) of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the [*Court of Appeal Rules*](#) also gives the Court of Appeal



power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows:-

Rule 4: Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the [Court of Appeal Rules](#) which provides as follows:-

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

The matter indeed arose in the case of [Kenya Airports Authority & Another vs Timothy Nduvi Mutungi](#), Court of Appeal, Civil Application No. NAI 165 of 2013 (UR 113/2013) (2014) eKLR. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point:-

“The application of 10th December, 2012, was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the [Appellate Jurisdiction Act](#)) which provides:-(Section 7 of the [Appellate Jurisdiction Act](#) set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined...”

11. The Court of Appeal in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, [1999] 2 EA 231, laid down the parameters in extension of time and stated thus:

“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 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 reason 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.”

12. See also the decisions in [Vishva Stone Suppliers Company Limited v RSR Stone \[2006\] Limited](#) [2020] eKLR and [Clemensia Nyanchoka Kinaro Vs Joyce Nyansiaboka Onchomba](#) [2021] eKLR.

13. In the instant case, Judgment was entered in favour of the Plaintiffs as against the Defendant and the Interested Parties. The Interested Parties seek to Appeal against the said Judgment and explain that they were not aware of the date of delivery of the impugned Judgment but only did so, when they were served with the Defendant’s Notice of Appeal on 29th September, 2022. I note the Judgment was delivered on 19th September, 2022 in the presence of the Defendant’s Counsel but in the absence of Plaintiffs and Interested Parties. The Interested Parties have stated in their submissions



that after receiving the Defendant's Notice of Appeal, they took time to obtain a copy of the Judgment to peruse it. I note the instant Application was filed 8th November, 2022 and the time within which to lodge Notice of Appeal lapsed on 3rd October, 2022. The Plaintiffs have vehemently opposed the instant Application insisting that the Applicants have not provided any proper explanation and they will be prejudiced if the orders sought are granted. Since the Applicants were not present during the delivery of the Judgment on 19th September, 2022, noting that they sought leave on 8th November, I find that the delay was not inordinate as claimed. I further find that the explanation granted is plausible since they needed time to obtain a copy of the Judgment, study it before filing the Notice of Appeal.

14. Based on the facts as presented while relying on the legal provisions I have cited as well as the decisions quoted, I find that the Interested Parties are indeed entitled to leave to lodge the Notice of Appeal out of time and I will allow them to do so within fourteen (14) days from the date hereof.
15. It is against the foregoing that I find the Notice of Motion Application dated the 8th November, 2022 merited and will allow it.
16. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

