



**Ndungu v Pulei & another (Environment and Land Appeal
50 of 2022) [2023] KEELC 20575 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 50 OF 2022
LC KOMINGOI, J
OCTOBER 5, 2023**

BETWEEN

LILIAN WAMBUI NDUNGU APPELLANT

AND

JOHN SILAS PULEI 1ST DEFENDANT

COUNTY GOVERNMENT OF KAJIADO 2ND DEFENDANT

RULING

1. This is the Notice of Motion dated December 7, 2022 brought under:

(Under Section 1A, 1B, 3, 3A, 79G and 95 of the *Civil Procedure Act* (Cap.21) laws of Kenya, Order 50 Rule 6 of the *Civil Procedure Rules, 2010* and all other enabling provisions of law).
2. It seeks Orders;
 1. Spent.
 2. That this Honourable Court be pleased to enlarge time and grant leave to the Applicant to file a memorandum of appeal and/or Record of Appeal out of time.
 3. That this Honourable Court be pleased on enlargement of time to grant the Applicant 14 days within which to file and serve the record of appeal.
 4. That the costs of the application to abide the outcome of the appeal.
3. The grounds are in the file of the application and are set out in paragraphs 1 to 9.
4. The application is supported by the affidavit of Lilian Wambui Ndungu, the Applicant herein, sworn on December 7, 2022.



5. The Application is opposed. There is a Replying Affidavit sworn by Gerald Muchiri, Advocate for the Respondent, sworn on May 12, 2023.
6. It appears the 2nd Respondent did not put in any response.
7. On April 20, 2023 the court with the consent of the parties directed that that the Notice of Motion be canvassed by way of written submissions.

The Applicant's submissions.

8. They are dated May 22, 2023. They raise one issue for determination as to whether this application is merited.
9. Counsel submitted that this application is anchored on Section 79G of the [Civil Procedure Act](#). He has put forward the cases of [Charles N. Ngugi Vs. ASL Credit Limited](#) (2022) eKLR; [Alexander Vincent Mabonga \(Suing as the legal representative of John Wekesa Tulula \(Deceased\) Vs. Hilda Wanjiru Tulula & another](#) (2020) eKLR; [Markson Karani Muchunku Vs. Joseph Ngari Gituku](#) (2021) eKLR.
10. Counsel also submitted that the Applicant has explained the circumstances which led to the delay in filing Appeal out of time.
He prays that the Application be allowed with no orders as to costs.

The 1st Respondent's Submissions.

11. They are dated May 10, 2023. Counsel submitted that there is no proof that the Applicant gave instructions to the firm of Ngarega Waiyaki & Co Advocates to file an appeal.
12. Further that Order 45 rule 2 of the [Civil Procedure Rule](#) envisages a situation where the review is to be chosen in lieu of an Appeal.
He has put forward the cases of [Mary Wambui Njuguna Vs. William Ole Nabala & 9 Others](#) (2018)eKLR ; [Miriam Wanja Muchiri Vs. Emmah Wangechi Macharia & Another](#) (2016)eKLR; [Francis Origo & Others Vs. Jacob Kumali Mungala](#) (2003)eKLR
13. Counsel further submitted that the Applicant having exhausted the remedy of review cannot appeal to this court concerning the judgement. He prays that the application be dismissed for being an abuse of the court process with costs.

The 2nd Respondent's submissions.

14. They are dated June 13, 2023. They raise one issue for determination;
That is whether this Application is merited. Counsel submitted that there is no plausible explanation for the delay in filing the intended appeal as the applicant participated in the application for review filed on 29th July 2022. Further that she has not submitted any proof of instructions to her counsel to file the appeal.



15. It is also submitted that the Applicant has failed to demonstrate good and sufficient cause for not filing appeal out of time. She has put forward the case of *Mombasa County Government Vs. Kenya Ferry Services Limited & Another* (2019)eKLR.
16. Counsel further submitted that the Application be found to be unmerited and be dismissed with costs.
17. I have considered the Notice of Motion, the Affidavit in support and the responses thereto. I have also considered the written submissions and the authorities cited. The issue for determination is whether this Application is merited.
18. It is the Applicant's case that she instructed her previous counsel to lodge an appeal against the judgement of the lower court. That the said counsel failed to do so hence the delay.
19. It is not in dispute that by a Notice of Motion dated July 29, 2022 the Applicant through the firm of Ngarega Waiyaki & Co. Advocates sought a review of the said Judgement in the Lower Court. She swore an affidavit in support of the application claiming her previous counsel presented the wrong particulars of the suit property. She denied signing the documents in support of her claim.
20. I have gone through the proceedings in the Lower Court. On March 29, 2022, the Applicant testified and stated that Plot B34 was hers. She also relied on the documents in support. This is a litigant who is always accusing her Advocates of all manner of mistakes. She is very economical with the truth.
21. Order 45 rule 1 of the Civil Procedure Rules provides that;

“(1) Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at 119 CAP. 21 Civil Procedure [Subsidiary] the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

Rule 2 provides that;

“(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.

22. I have gone through the Applicant's documents in support of the Notice of Motion herein and I do not find any proof of instructions to the firm of Ngarega Waiyaki & Co. Advocates to lodge an appeal and not an application for review.



In the case of *Mary Wambui Njuguna Vs. William Ole Nabala & 9 Others* (2018)eKLR the Court of Appeal stated thus;

“we agree with the conclusion by the learned judge that it was not open for the appellant to pursue an appeal and at the same time review of the same orders. The appeal could only lie on the outcome of the application for review”.

Similarly in *Chairman Board of Governors Highway Secondary School Vs. William Nimosi Moi* (2007)eKLR it was stated;

“that even where an appeal had been filed before an application for review, once the review application was determined the appeal stood lapsed, as the two remedies cannot be pursued either concurrently or sequentially”.

23. I am satisfied that the Applicant chose to pursue a review of the judgement and not an appeal.
24. I also find that the Applicant has failed to demonstrate a good and sufficient cause for not filing an appeal on time. As stated earlier, there is no proof that she instructed her previous counsel to lodge an appeal.

In the case of *Mombasa County Government Vs. Kenya Ferry Services & Another* (2019) eKLR the Supreme Court of Kenya stated;

“.....It is clear that discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant”.

25. For these reasons I find no merit in this application and the same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Muriithi for Mr. Nzaku for the Applicant present.

Mr. Muchiri for Mr. Wangira for the 1st Respondent present.

Ms. Muliro for the 2nd Respondent.

Court Assistant – Mutisya.

