



**Wang'ombe & 2 others (As officials of the African Independent Pentecostal Church of Kenya) v Mwangi & 2 others (Suing as officials of the Specialized Healing Miracle Centre) & 4 others (Environment and Land Appeal E083 of 2022) [2023] KEELC 21473 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21473 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E083 OF 2022  
OA ANGOTE, J  
NOVEMBER 9, 2023**

**BETWEEN**

**FREDRICK WANG'OMBE ..... 1<sup>ST</sup> APPELLANT  
CHARLES CYRUS NJUGUNA ..... 2<sup>ND</sup> APPELLANT  
PAUL KAMAU MWANGI ..... 3<sup>RD</sup> APPELLANT  
AS OFFICIALS OF THE AFRICAN INDEPENDENT PENTECOSTAL CHURCH  
OF KENYA**

**AND**

**ELIJAH NJIRU MWANGI, ABSALUM NAMEMIA ADEWA, RHODAH N  
KARIUKI (SUING AS OFFICIALS OF THE SPECIALIZED HEALING MIRACLE  
CENTRE) ..... 1<sup>ST</sup> RESPONDENT  
CITY COUNCIL OF NAIROBI NOW NAIROBI CITY  
COUNTY ..... 2<sup>ND</sup> RESPONDENT  
GEORGE KINUTHIA ..... 3<sup>RD</sup> RESPONDENT  
DAVID KIMANI ..... 4<sup>TH</sup> RESPONDENT  
ANSELMO RUIGA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the Appellants' Notice of Motion dated 23<sup>rd</sup> September 2022 and brought under Sections 1, 1A, 3, 3A & 63 of the [Civil Procedure Act](#), Order 42 Rule 6(1), (2) &



(7) of the Civil Procedure Rules 2010 and Sections 3 & 13 of the Environment and Land Court Act. The Appellants are seeking for orders that:

- a. The Court be pleased to grant leave to the Appellants to file and serve their Memorandum of Appeal out of time against the undated judgement of Hon. P. Gesora in Nairobi CMCC No. 194 of 2011 and Decree dated 10<sup>th</sup> September 2020 (but never served on the Appellants) under such terms as the Court will direct and the Memorandum of Appeal be deemed duly served on the Respondents.
  - b. Upon grant of prayer 2 above, the Record of Appeal be filed and served upon the Respondents within such time as the Court shall direct.
  - c. Costs of the application be in the appeal.
2. The application is based on several grounds and supported by an affidavit sworn by Paul Kamau Mwangi, the Chairman of Kayole AIPCA, the 3<sup>rd</sup> Appellant, who deponed that the suit property is registered in the name of Africa Independent Pentecostal Church of Kenya.
  3. The 3<sup>rd</sup> Appellant deponed that they were served with process and thereafter instructed their advocate to lodge a defence in the suit in the lower Court; that the matter was partially heard by Hon. Obulutsa and then by Hon. Gesora and finally by Hon. Obura who found that the court did not have jurisdiction to hear environment and land matters.
  4. Consequently, it was deponed, the parties were to make submissions before the Chief Magistrate before the close of the case. However, it was deponed, the case did not progress from that point and there was no communication from the Court on the same.
  5. It was deponed by the 3<sup>rd</sup> Appellant that on or about 21<sup>st</sup> September 2022, he received a call from City Hall Lands Department; that the caller was enquiring whether he was in possession of the Decree in the suit and the was also informed that the Appellants' records file could not be traced by the 2<sup>nd</sup> Respondent.
  6. According to the 3<sup>rd</sup> Appellant, he followed up on the matter with his advocate who noted that the matter had been dormant and that there had been no communication of a Judgement, Decree or notice to execute from the Plaintiffs' Advocate or the Court.
  7. However, it was deponed, when the Appellants' advocate contacted the Plaintiffs' advocate, he was informed that there was a three-page undated Judgement in the matter and a Decree that was never served on the Appellants.
  8. According to the 3<sup>rd</sup> Appellant, he questioned how the judgement could have been delivered by Hon. Gesora who was stationed in Nairobi in 2017 -2018 but had since left the station and was based in Kisumu when the judgement was purportedly delivered in the absence of the parties.
  9. It was deponed that the judgement did not comply with the provisions of Order 21 of the Civil Procedure Rules because it did not indicate the place of delivery; it was undated, it was not delivered within the mandatory 60 days, and it was not delivered in open Court.
  10. The deponent stated that the Decree, just like the judgement was a nullity because the Plaintiffs in the lower Court did not produce certified documents of title to the properties they were claiming and that it referred to one Defendant while there were several Defendants in the suit.



11. With regard to not filing their Memorandum of Appeal on time, the deponent averred that it was through no fault of the Appellants as they had no notice of the Judgement and that the same was delivered in the absence of the parties.
12. The 3<sup>rd</sup> Appellant invited the Court to take judicial notice of the fact that the matter was last mentioned in late 2019 when the Covid-19 lockdown measures were in place and that even after the lock down measures were lifted on 21<sup>st</sup> March 2022, the impugned judgement was never served on the Appellants.
13. In asking the Court to grant the plea for stay of execution pending appeal, the deponent averred that the formal request for Judgement made on 22<sup>nd</sup> September 2022 will take time to be acted upon and that failure to allow the stay of execution will render the Appeal a mere academic exercise and lead to the loss of the subject suit property, which is currently occupied by the Appellants.
14. The 1<sup>st</sup> Respondent did not file a replying affidavit but filed grounds of opposition in which he averred that the entire application is *res judicata* and similar to one dated 21<sup>st</sup> October 2022 in CMCC No. 194 of 2011 and that the Appellants are guilty of material non-disclosure and hence undeserving of the orders sought.

### **Submissions**

15. The Appellants submitted that substantive justice should not be trumped by prescriptions of procedure; that the court has jurisdiction to allow the filing of an appeal out of time and that they had met the principles for grant of leave to file their appeal out of time.
16. It was submitted that the Appellants had given reasons for the delay in filing the Appeal; that the delay was not intentional; and, that their Memorandum of Appeal demonstrates a meritorious case.
17. The 2<sup>nd</sup> Respondent submitted that the issues in question in the current application were similar to those raised in an application made in CMCC No. 194 of 2011 and that the latter application was dismissed with costs.
18. It was submitted that since the Appellants never prayed for stay of execution in CMCC No. 194 of 2011, the 2<sup>nd</sup> Respondent went ahead and executed the decree and that the judgement was delivered on 17<sup>th</sup> June 2020 and the decree was extracted on 10<sup>th</sup> September 2020 and executed.
19. The 1<sup>st</sup> Respondent submitted that the issue of filing an appeal out of time is one of discretion and that the Appellants were guilty of inordinate delay in filing the appeal as the Judgement was delivered on 26<sup>th</sup> June 2020 while the instant application was filed in September, 2022.
20. The 1<sup>st</sup> Respondent submitted that the Appellants had failed to demonstrate sufficient cause for not filing the appeal on time and should therefore not be granted the orders sought and that there is no evidence that they followed up the judgement with the registry.
21. It was submitted that since the 1<sup>st</sup> Respondent has already executed the decree arising from the impugned judgement and is enjoying the fruits of the same, allowing the appeal will occasion him great prejudice.
22. In conclusion the 1<sup>st</sup> Respondent submitted that the Appellants had failed to show that they have fulfilled the conditions for grant of extension of time to file an appeal out of time and that the Court should therefore not exercise discretion in their favour.



## Analysis and Determination

23. Based on the foregoing, the following one issue arises for determination: Whether the Appellants should be allowed to file their Appeal out of time. Section 79G of the [Civil Procedure Act](#) provides 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.”

24. Section 95 of the [Civil Procedure Act](#) provides that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

25. On the principles to be applied for extension of time, the Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] eKLR stated as follows:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

26. The Court of Appeal in the case of [Paul Wanjobi Mathenge v Duncan Gichane Mathenge](#) [2013] eKLR stated as follows:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the



respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi*- Civil Application No. Nai. 26 of 2004, this Court held:-

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi -v- Kenya Airways Ltd.* [2003] KLR 486 in which this Court stated:-“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself 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.”

27. Having established that the Court has discretionary jurisdiction to allow appeals to be filed out of time, I will now determine whether such discretion should be exercised in the Appellants’ favour.
28. The copy of the judgement that is part of the Appellants’ annexures shows a hand written date that is not fully legible. It states that the judgement was delivered in the absence of the parties on “17<sup>th</sup> June.” The year is not legible.
29. The decree on record shows that the judgement was delivered on 17<sup>th</sup> June 2020. The 1<sup>st</sup> Respondent submitted that the judgement was delivered on 26<sup>th</sup> June 2020 and therefore the filing of this application on 23<sup>rd</sup> September, 2022 amounted to an inordinate delay.
30. The Appellants have stated that the delay was not inordinate because they were not aware of the judgement date nor of the existence of the judgement until an official from the 2<sup>nd</sup> Respondent contacted one of the Appellants about the same on 21<sup>st</sup> September 2022.
31. The Appellants stated that they acted swiftly following that call and filed the current application. The reasons for the delay according to the Appellants is that they were not served with the notice for judgement nor with the judgement or the decree. Further, they state that the matter was last mentioned in 2019 when Covid lockdown measures were in place.
32. The Respondents have called into question this explanation, firstly, by stating that the Covid lockdown measures came into play in 2020 and not 2019 and that the Appellants’ advocate was at liberty to follow upon the matter with the registry after Court hearings went virtual.
33. In view of the foregoing, I am of the considered view that although the subordinate Court had a duty to inform the Appellants about the Judgment, that did not mean that the Appellants and their advocate could fold their hands and do nothing.
34. There is no evidence on record showing that the Appellants or their advocate wrote to the lower Court seeking to find out the progress of the matter. As per the overriding objective of the *Civil Procedure*



*Act*, and having entered appearance in the suit, they had a duty to follow up with the Court and assist it in the just and expeditious delivery of justice.

35. The Appellants failed to play their part in fulfilling this duty. Additionally, the claim that Covid-19 lockdown measures were in place in late 2019, which prevented them from accessing the court for information is not true as the lockdown was first announced in March 2020.
36. In view of the foregoing I find that the delay in filing the current application was inordinate and the reasons thereof were not explained satisfactorily.
37. The application is therefore dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Kinyanjui for 2<sup>nd</sup> and 3<sup>rd</sup> Appellants/Applicants

Mr. Mugo for 1<sup>st</sup> Appellant

Mr. Njugi for 1<sup>st</sup> Respondent

Mr Ashurima of 5<sup>th</sup> Respondent

Court Assistant - Tracy

