



**Wambua v Sikaku (Environment and Land Miscellaneous Application
E015 of 2023) [2023] KEELC 21192 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E015 OF 2023
CA OCHIENG, J
NOVEMBER 2, 2023**

BETWEEN

JONES MAKAU WAMBUA APPLICANT

AND

MICHAEL NDONYE SIKAKU RESPONDENT

(Being an application for leave to file an appeal out of time against the Judgment and Decree of Hon. C. N. Ondieki Principal Magistrate in Machakos Civil Suit No. 814 of 2015)

RULING

1. What is before Court for determination is the Applicant's Notice of Motion Application dated the 17th February, 2023 where he seeks the following Orders:
 1. Spent.
 2. That pending the hearing of Prayer No. 3 here below, this Court be pleased to extend the stay of execution issued on 14th day of November, 2023 (virtually) until the hearing and determination of the intended Appeal.
 3. That without prejudice to the foregoing, this Honourable Court be pleased to grant leave to the Applicant to file an Appeal out of time of the Judgment and Decree of Hon. C. N. Ondieki Principal Magistrate in Machakos Civil Suit No. 814 of 2015 and if this order is granted the draft Appeal be deemed as filed.
 4. That the costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Jones Makau Wambua where he deposes that he was the Defendant in Machakos Civil Suit No. 814 of 2015 where Judgment was delivered on 14th November, 2022 when both advocates for the Plaintiff



including Defendant were present virtually but he was not aware of the said date. He confirms that he did not receive his Advocates letter dated the 16th December, 2022 which had been sent through his postal address until the month of January, 2023. He explains that he sought to get certified copies of the Judgment and proceedings and it was not until the 8th February, 2023 when the same was released to him by the Machakos Civil Registry. Further, that it was thereafter that he instructed his current advocate to pursue an Appeal on his behalf. He believes that the intended Appeal has great chances of success. He reiterates that he had not filed the Memorandum of Appeal on time because he was unaware of the Judgment as the same had not been communicated to him before the expiry of thirty (30) days. Further, he was not able to understand the context of the Judgment which contained complex issues. He reaffirms that the intended Appeal is arguable and unless the same is heard, he will suffer twice as the refund of the purchase price was conveyed to the Local Administration which fact the Respondent is aware of.

3. The Respondent opposed the instant Application by filing Grounds of Opposition dated the 28th February, 2023 and Replying Affidavit. He contended that the said Application is incompetent, misconceived, bad in law and the orders sought are incapable of being granted. Further, that the Application is an afterthought and an abuse of the court process since no sufficient explanation has been offered for the unreasonable and/or inordinate delay. He states that the blame purportedly being placed on the Applicant's erstwhile Advocates is frivolous, vexatious and made in bad faith. Further, that no order has been issued in line with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. He insists that he shall suffer prejudice if the orders sought are granted as he purchased the disputed land from the Applicant.
4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the Applicant's Notice of Motion dated the 17th February, 2023, including the respective Affidavits, Grounds of Opposition and rivaling submissions, the following are the issues for determination: Whether the firm of messrs R M Matata & Company Advocates are properly on record for the Applicant. Whether the Applicant should be granted leave to file an Appeal out of time.
6. The Applicant in his submissions reiterated his averments as per the Supporting Affidavit and contended that the instant Application does not amount to an abuse of the Court process and the delay to file the Memorandum of Appeal was inadvertent. He argued that the order of stay of execution should issue as his family would suffer substantial loss since the purchase price had been surrendered to the local administration. Further, that a right to Appeal is a Constitutional right and if the orders are not granted, the Appeal would be rendered nugatory. He reiterates that he has demonstrated sufficient cause for extension of time to file the intended Appeal as he received the notice of delivery of the Judgment late. To support his arguments, he relied on the following decisions: *Kiama Wangai V John N Mugami & Another* (2012) eKLR; *James Wangalwa & another vs Agnes Naliaka Cheseto* (2013) eKLR and *Richard Muthusi V Patrick Gituma Ngomo & Another* (2017) eKLR.
7. The Respondent in his submissions insists that the firm of R M Matata & Company Advocates are not properly on record in this matter and made reference to the provisions of Order 9 Rule 9 of the Civil Procedure Rules. He insists that the instant Application cannot be allowed since it was filed by an Advocate who is not properly on record. Further, that the reasons given for the delay of four (4) months is not plausible. To buttress his averments, he relied on the following decisions: *S K Tarwadi V Veronica Mueblemann* (2019) eKLR and *Edith Gichungu Koine Vs Stephen Njagi Thoithi* (2014) eKLR.



8. As to whether the firm of messrs R M Matata & Company Advocates are properly on record for the Applicant. I note in the lower court matter, until the delivery of Judgment, the Applicant was represented by the firm of messrs Mulu & Company Advocates. The instant Application has been filed by the firm of messrs R M Matata & Company Advocates. The Applicant has not explained how he replaced the erstwhile advocate with the current one. On Change of Advocate post Judgment, Order 9 Rule 9 of the Civil Procedure Rules provides that:
 9. 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.”
 10. I note despite the Respondent raising the issue that the Applicant’s Counsel was not properly on record in his Repling Affidavit, the said Law firm never sought leave to rectify this anomaly. Further, there is no Court Order or consent filed between the firm of messrs Mulu & Company Advocates and R M Matata & Company Advocates to confirm Change of Advocate.
 11. In the case of *S.K. Tarwadi v Veronica Mueblemann* [2019] eKLR the Learned while dealing with issue of Change of Advocate post Judgment, held that:

In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
 12. The excuse by the Applicant that his advocate was in a hurry to ask for extension of time in order to comply with the conditions in the ruling of 30th June, 2017 and could therefore not comply with the requirements of Order 9 Rule 9 CPR is therefore without merit. The Applicant’s new advocate was allowed by Rule 10 to apply for extension of time to comply with the conditions of the trial court and at the same time comply with the requirements of Rule 9. Even after the anomaly was drawn to the Applicant through the ruling of 13th February, 2018, he has neglected to make amends. He continues to act in total disregard of the rules and expect the court to act in support of such impunity. That will not happen. Had he moved to redress the failure to comply with Rule 9, I would have exercised discretion in his favour for it is the duty of courts to dispense substantive justice. He has not taken any action. I will thus proceed to strike out the instant application for being incompetent. Costs are awarded to the Respondent.”
 13. Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the decision quoted, I find that the firm of messrs R M Matata & Company Advocates are not properly on record in this matter since they did not seek leave of Court to come on record for the Applicant nor sign a Consent with the erstwhile Advocates. I further find that the firm of R M Matata & Company, hence lacks audience in this matter.



14. In light of my findings above, I find that the instant Notice of Motion Application as filed is incompetent and will not proceed to deal with the issue whether the Applicant is entitled to leave to file the Appeal out of time or not.
15. In the circumstances, I will find the Notice of Motion Application dated the 17th February, 2023 incompetent and will proceed to strike it out with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE

