



Gatemo ((Suing as the Legal Representative of the Estate of Joseph Muguna (Deceased)) v M'Rwito & 10 others (Environment & Land Case 70 of 2012) [2022] KEELC 164 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 70 OF 2012**

**CK NZILI, J
MAY 5, 2022**

BETWEEN

**GEORGE GATEMBO PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH MUGUNA (DECEASED))**

AND

**ELIJA MUTEKI M'RWITO 1ST DEFENDANT
M'MUGAMBI M'MARETA 2ND DEFENDANT
HENRY KIAMBI 3RD DEFENDANT
JAPHET GAKURU M'ABURIA 4TH DEFENDANT
SHEDRACK KIRUKI M'LAARIA 5TH DEFENDANT
M'KIRERA M'ANGARE 6TH DEFENDANT
RUFA M'ARIGO 7TH DEFENDANT
FRANCIS M'IKIUGU M'MUTHURI 8TH DEFENDANT
JOSPHAT MURIUKI KIURA 9TH DEFENDANT
FREDRICK KIOGORA GITONGA 10TH DEFENDANT
GEOFFREY KOOME MBAYA 11TH DEFENDANT**

RULING

1. By an application dated 11.3.2022, the court is asked under Order 49 Rule 7 (2) *Civil Procedure Rules*, to extend by three days the time within which the applicant is to file the memorandum of appeal Under



- Order 49 Rule 7(3) Civil Procedure Rules, the deputy registrar to supply a full set of pleadings and exhibits the court to hear the 5th defendant's appeal Under Order 49 Rule 7(C) [Civil Procedure Rules](#) and lastly, the deputy registrar to supply the 5th defendant with a copy of the abstract of title regarding Land Registration Ntima/Igoki/2209.
2. The application is supported by an affidavit of Dr. G.K Kuria S.C sworn on the even date. The grounds are that, under Rule 85 [Court of Appeal Rules](#), if an appellant is unable to file an appeal within 60 days, he has to file the same within 60 days after obtaining from the High court the proceedings. That the record of appeal has to contain a certificate of delay explaining the time required to supply the proceedings. The 5th defendant had 60 days from 8.7.2022 to file the record of appeal. That the Deputy Registrar on 1.3.2022 declined to supply a certificate of delay made to him in writing. That the decision of the deputy registrar is appealable to the judge under Order 48 Rule 7 [Civil Procedure Rules](#). That it is the interest of justice to grant the orders sought.
 3. In the supporting affidavit Senior Counsel Dr. Kamau Kuria explains the history of the matter and that states on 8.2.2022 he was supplied with an incomplete set of proceedings, pleadings and exhibits hence could not file a memorandum of appeal without a certificate of delay which was yet to be signed given the one issued was with regard to suit 4th, 6th, 9th and 10th defendants.
 4. The application was opposed through a replying affidavit signed by George Gatembo the plaintiff on 21.3.2022, on the basis that a decision by a Deputy Registrar could not be appealed against by way of an application but through a memorandum of appeal in line with Order 49 Rule 7 (2) [Civil Procedure Rules](#). Secondly, it was averred there was no proper application for an extension of time before the court for consideration. Third ground was that the applicant was looking for a scapegoat so to speak as his time to file a record of appeal had run out. Fourth ground was that the court was functus officio and it was only the Court of Appeal which could determine an application for extension of time.
 5. Order 49 [Civil Procedure Rules](#) deals with special powers of registrar. The applicant's complaints are that the Deputy Registrar had refused to supply complete proceedings and exhibits and secondly, issue to sign a certificate of delay.
 6. In written submissions dated 27.3.2022, the applicant relies on the application and a memorandum of appeal dated 11.3.2022. As at the time the application was filed, there was no filed and or served memorandum of appeal. The same was the position at the time the replying affidavit was filed by the respondent hence the reason an objection was raised as paragraph 3 (d) of the replying affidavit. That notwithstanding, prayer no. 3 of the chamber summons dated 11.3.2022 seeks for an extension of time to file a memorandum of appeal attached as annexure G.K.K "4" to the supporting affidavit in line with Order 49 Rule 7 (2) Civil Procedure Rules.
 7. Order 49 Rule 7(3) [Civil Procedure Rules](#) provides that an appeal against a decision of the Deputy Registrar shall be filed within 7 days of the decision of the Registrar through a memorandum of appeal.
 8. In this case the applicant submitted the delay took place on 1.3.2022 and the application was made on 14.3.2022. The delay in filing the appeal was said to have been occasioned by inadvertence mistakes of counsel and partly by the failure of the registry to have a functioning email system. Reliance was placed on [Belinda Murai & others vs Amos Wainaina](#) Civil Appeal no. 9 of 1998 and [Hassan Nyanje Charo vs Khatib Mwashetani and 3 others](#) (2014) eKLR.
 9. Further, the applicant urged the court to find his rights under Articles 27, 40, 48 and 232 (1) of [the Constitution](#), compromised by the inaction of the Deputy Registrar in failing to reply to correspondence, on impartiality, efficiency and service delivery. Reliance was placed on [Republic vs](#)



Commissioner of Cooperatives ex parte Kirinyaga Tea Growers Coop Savings and Credit Society Ltd (1999) 1 EACA 245, on reasonableness in the exercise of a statutory power.

10. It was submitted at paragraph 33B of the proceedings that the Deputy Registrar gave reasons for the refusal following which the memorandum of appeal and this application was filed.
11. Further, it was submitted the remarks by the Deputy Registrar showed he did not read the entire file allegedly to say the certificate of delay previously issued to the other defendants would suffice.
12. The applicant submitted litigants of the Republic of Kenya were entitled to better services. The applicant also submitted that since the refusal took place on 1.3.2022, the chamber summons and the memorandum of appeal under order 49 rule 7 (2) *Civil Procedure Rules* should have been filed on 8.3.2022 hence prayed an for extension of six days based on the reasons that it was impossible to file online pleadings in Meru Registry, unlike in other registries in Kenya since the applicant had to physically travel to Meru and file manually.
13. There is no dispute that the court delivered its judgment on 26.10.2019. The record indicates parties were in court regarding post judgment applications dated 4.11.2019 by 4th, 6th, 9th, 10th & 11th defendants. Application dated 25.11.2019 by 5th defendant for stay and application dated 22.1.2020 by the 2nd defendant legal representative.
14. As regards those applications, parties appeared in court on 4.11.2019, 11.11.2019, 25.11.2019, 16.1.2020, 23.1.2020, 5.2.2020, 29.10.2020, 26.1.2021, 9.3.2021, 17.3.2021 and eventually a ruling was rendered on 26.5.2021 in the presence of Mr. Ndung'u advocate for the 5th defendant.
15. In all the above appearances, I do not see anywhere the 5th defendant raised any complaints at all with regard to delay or the alleged infringement of his rights on the issues raised in the submissions.
16. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* (2014), the court held submissions however forceful could replace pleadings.
17. I also note the competence of the law firm of M/s Kamau Kuria and Co. Advocates as appearing for the 5th defendant was raised vide a notice of preliminary objection dated 9.3.2021 and which was yet to be determined.
18. Looking at the entire file, I do not see any application by the said law firm regularizing their appearance in line with Order 9 Rule 9 *Civil Procedure Rules* given that the written submissions to the three applications alluded to above leading to the ruling delivered on 26.5.2021 were dated 15.2.2021 and filed by the firm of AG Riungu & Co. Advocates on behalf of the 5th defendant, on 16.2.2021.
19. In my view, the firm of A.G Riungu & Co. Advocates appears to be the one properly on record for the 5th defendant. They are also the ones who paid for the proceedings and if there has been inordinate delay as alleged or at all, there was no indication that they have been denied the same.
20. Further, the said law firm is based in Meru town and the court has not seen any complaint that they have been denied any proceedings or exhibits which in any event have been ready for collection by any party since the certification by the Deputy Registrar on 25.8.2021.
21. Having gone through the file, it is also notable the proceedings were ready as at 24.8.2021. The certificate of delay issued on 31.8.2021 was in line with the court record, save that it did not indicate the name of the 5th defendant and the date of his request for proceedings.



22. Regarding the draft by the 5th defendant I have indicated above the list of the defendants were able to collect their proceedings as soon as they were certified in August 2021. The applicant cannot possibly visit the delay in not collecting their set upon the court registry.
23. Further, the issues raised over the competency, impartiality and or breach of national values and principles of public service are contrary to what is on the court record. The 5th defendant has deliberately failed to explain why between August 2021 and March 2022, he did not collect the proceedings and the exhibits. He cannot therefore heap blame on the Deputy Registrar to try to explain out his lack of action in collecting the proceedings and judgment, or time or at all.
24. The Deputy Registrar in essence was being asked to give non-existent reasons of delay all through the period the 5th defendant failed to diligently come and collect the proceedings and judgment which have been ready.
25. I find no merits in the application. The same is hereby struck out for being filed by a law firm lacking capacity to file it in the first instance and secondly for lacking merits.
26. The 5th defendant is at liberty to collect a certificate of delay through the firm of A.G Riungu Advocates as at the date the proceedings were certified by the Deputy Registrar.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 5TH DAY OF MAY, 2022

In presence of:

C/A: Kananu

Ndung'u for Kamau Kuria for applicant

Mrs. Muia for the respondent

HON. C.K. NZILI

ELC JUDGE

