



REPUBLIC OF KENYA



**Wanjohi & another v City Council of Nairobi & another (Environment and Land Appeal 089 of 2021) [2022] KEELC 3394 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3394 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 089 OF 2021**

**LC KOMINGOI, J**

**MAY 5, 2022**

**BETWEEN**

**JOSEPH MWANGI WANJOHI ..... 1<sup>ST</sup> APPELLANT**

**NANCY NYAMBURA MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CITY COUNCIL OF NAIROBI ..... 1<sup>ST</sup> RESPONDENT**

**PAUL JOHN KIMANI ..... 2<sup>ND</sup> RESPONDENT**

*(Arising from the judgment of Honourable LL Gicheha, Chief Magistrate in Milimani CMCC No 9266 of 2001 delivered on July 30, 2021.)*

**RULING**

1. This is the notice of motion dated November 12, 2021 brought under orders 42 rule 6 and order 51 rule 1 of the *Civil procedure Rules*, sections 1A, 1B, 3A, 75 and 79G of the *Civil Procedure Act* and all other enabling provisions of law.
2. It seeks orders:-
  1. Spent.
  2. That leave be granted to the applicant to file appeal out of time against the judgment of the Honourable LL Gicheha, Chief Magistrate in Milimani CMCC No 9266 of 2001 delivered on July 30, 2021 and the appeal filed contemporaneously with this application be deemed as filed within such extended time.
  3. That this honourable court do order as stay of execution of the judgment and decree and all other consequential proceedings and or orders issued and or emanating form the judgment of



the honourable LL Gicheha, Chief Magistrate in Milimani CMCC No 9266 of 2001 delivered on the July 30, 2021 herein pending the hearing and final determination of the appeal herein.

4. That pending the hearing of this application interpartes, interim orders be made in terms of prayer 3 herein above to ensure that this application and the appeal are not rendered nugatory.
5. That the costs of this application is provided for.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 9.
4. The application is supported by the affidavit of Nancy Nyambura Mwangi, the 2<sup>nd</sup> appellant/applicant sworn on the November 12, 2021.
5. The application is opposed. There is a replying affidavit sworn by Paul John Kimani, the 2<sup>nd</sup> respondent herein on the December 2, 2021.
6. On the February 7, 2022 the court with the consent parties directed that the notice of motion be canvassed by way of written submissions.
7. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.
8. It is the appellants/applicants' case that they were not aware of the judgment in question. They have explained the sequence leading to the discovery of the said judgment. That they were not present during the delivery of the same neither were they notified.
9. The 2<sup>nd</sup> respondent on the other hand contends that the appellants and their advocates were aware of the judgment delivered on July 30, 2021.
10. I have considered the rival positions. It is the appellants word against the 2<sup>nd</sup> respondent's. I do not have the benefit of going through the lower court file as the same has not been availed for the obvious reason that the appeal is yet to be filed. In the case of *Dilpack Kenya Limited v William Muthama Kitoh* [2018] eKLR Justice GV Odunga observed that:-

“In an application for extension of time, where the court being asked to exercise discretion, there must be some material before the court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule that where there is no explanation, there shall be no indulgence”
11. Article 50 of the Constitution guarantees any party the right to be heard.
12. I exercise the discretion in favour of the appellants and I allow them leave to file an appeal out of time.
13. I have considered the requirements set out in order 42 rule 6 of the Civil Procedure Rules, I find that none of them has been met by the appellants. The suit on the lower court was filed in 2001. I decline to grant any orders of stay of execution pending the hearing of the intended appeal.
14. Accordingly, I grant orders in terms of prayer No 2. The draft memorandum of appeal is deemed to be duly filed upon payment of the requisite fees.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2022.**



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**L KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the appellants

No appearance for the 1<sup>st</sup> respondents

Paul John Kimani the 2<sup>nd</sup> respondent in person.

Steve - Court Assistant

