



**Kenya Wildlife Services v Mbea (Civil Appeal E024 of 2023)
[2025] KEHC 1959 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E024 OF 2023
LW GITARI, J
FEBRUARY 7, 2025**

BETWEEN

KENYA WILDLIFE SERVICES APPELLANT

AND

ISAIAH MUTUGI MBEA RESPONDENT

RULING

1. Pending before this court is a Notice of Motion which is indicated and filed in court on 8/11/2023 seeking orders that:
 1. That leave be granted to the applicant to appeal out of time against a ruling in Marimanti P.M.CC No.16/2022 on 31/7/2023.
 2. That the court be pleased to enlarge the time within which the applicant should have appealed and the appeal herein be deemed has been filed out of time.
 3. That there be stay of proceedings in Marimanti P.M.CC No16/2022 pending the hearing and determination of this application and the intended appeal.
 4. That costs be in the cause.
2. It is based on the grounds on the face of the motion. The applicant is mainly contending that the impugned ruling came up on 31/7/2023 without notice to her. That failure to appeal on time was not willful but due to the fact that the ruling was rendered without notice to the applicant whose advocates subsequently inadvertently filed the appeal therein.

It is the appellant's contention that he was dissatisfied with the lower court's ruling and is desirous of appealing against it. That the intended appeal is arguable and has good chances of success as demonstrated by the grounds set out in the Memorandum of Appeal filed herein. That failure to appeal



was not deliberate and/or in-excusable. That the applicant should not be punished for the mistake of counsel but rather be granted leave to appeal ad he appeal be deemed as property filed.

3. The appeal is supported by the affidavit sworn by Wanjiru Christine.
4. The appeal was opposed by the respondent vide affidavit sworn by the respondent Isaiah Mutugi Mbea sworn on 19/10/2023. His intention is that the appeal is not properly before this court as it was filed out of time and offends section 75(1) (h) of the *Civil Procedure Act*, Order 43 Rule 1(2) &(3) and Section 79(G) *Civil Procedure Act*. That court lacks jurisdiction to entertain the appeal and the appeal is incompetent. That the appeal has failed to target the substantive suit i.e, Meru Chief Magistrate’s Civil Application No.54/2022 whereby Section 76 of the *Civil Procedure Act* anticipates that the appeal shall refer the perceived error, defect or irregularity in the order appealed from. That the appeal is misguided and an abuse of Court process and ought to be struck out. That the ruling of this court dated 31/10/2023.
5. The application was canvassed by way or written submissions.

Applicant’s Submissons:

6. The applicant relies on Section 79G of the *Civil Procedure Act* which provides that-

“ Every appeal from a sub-ordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time that the lower court may certify as having been requisite for the preparation and delivery to the appelland of a copy of the decree or order:

Provided that the appeal may be admitted out of time if the appeal satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
7. The applicant further submits that the mistake of the advocate should not be visited upon the applicant. That the applicant seeks to regularize the mistake as the appeal was filed out of time urges the court to tamper justice with mercy and deem the appeal as properly filed as opposed to expunging it. That the respondent will suffer any prejudice.
8. Respondent’s Submissions The respondent has raised three issues for determination as follows:
 - i. Jurisdiction
 - ii. Whether the application has merits.
 - iii. Who should bear the costs of the application.

Jurisdiction:

9. The respondent submits that the application offends the doctrine of res judicata set out under Section 7 of the *Civil Procedure Act*.
10. The respondent contends that the applicant had filed a similar application dated 22/9/2023 which orders which was dismissed vide ruling of this court dated 31/10/2023. That he ruling resolved the Memorandum of Appeal and the appelland ceased to be an appelland. That the application offends the rule of res-judicata. That the application is vexatious, malafides and a scheme to delay the progression of the primary suit as the applicant is seeking to reinstate the memorandum of appeal without seeking



a review of the ruling. The respondent relies on *Uhuru Highway Development Limited –v- Central Bank of Kenya & 2 Others* where it was held that-

“With respect, a party cannot be allowed to have a second bite to the cherry.”

11. He submits that the applicant was seeking to have a second bite at the cherry without following the proper procedure. The respondent further relies on Article 159(2) (a) of *the Constitution* of Kenya 2010, which enjoins the court to do justice to all irrespective of status and Article 10 to promote the rule of law. He prays that the appeal be dismissed.

2) That the application is incompetent:

12. It is submitted that the applicant approached this out without leave to appeal the ruling dated 31/8/2023 and cannot come back to court to seek similar orders. He relies on the High Court decision in the case of *Sisilia Nyakoe & Another –v-AG & 4 Others* (2021) eKLR and submits that prayer No.1&2 are sought by a person who has no locus standi at first instance rendering the application illegal and a violation of the Rule of Law and should be struck out. That the application should have taken the route of review or appeal rather than filing the present application.

3) Costs

13. The respondent submits that the application is incompetent ‘ab intio’ and can only be struck off. That the application was a waste of time and resources and put unnecessary financial burden on the respondent who should be compensated by an award of costs pursuant to Section 27 of the *Civil Procedure Act*. The respondent prays that the application be dismissed with costs.

Analysis and Determination:

14. I have considered the application, the replying affidavit sworn by the respondent and the submissions. The issues which arise for determination are:

1. Whether the court should grant leave to the applicant to file appeal out of time.

15. Leave to appeal out of time is provided under Section 79G of the Civil Procedure Rules which provides for filing of decree or order which a party seeks to appeal against and provides as follows:

“Where no certified copy order appealed against is filed with memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”

16. These proceedings concern filing of a memorandum of appeal out of time. The applicant has filed a Memorandum of Appeal against the ruling of the learned magistrate in *Marimanti PMCC No.16/2022* delivered on 31/7/2022. The applicant has not attached the impugned ruling to the memorandum appeal. Failure to attach the said ruling is not procedural flow but goes to the substance of the present application under Section 79G of the *Civil Procedure Act* time for filing an appeal against the Judgment of the Sub-ordinate Court to the High Court is 30 days. The ruling was delivered on 31/8/2023. The appellant filed the memorandum of appeal on 11/10/2023. The appeal was filed out of time without leave of the court. The appellant conceded that the appeal was filed out of time. The applicant had not filed an application seeking leave to extend time vide a ruling if this court dated 31/10/2023, the application dated 22/9/2023 was struck out as there was no appeal pending and the memorandum of appeal was filed out of time.



17. The applicant then filed this application for leave to appeal out time. The issue of extension of time is an equitable remedy, reserved for deserving applicant.

18. In *Mombasa County Government –v- Kenya Ferry Services and Another* (2019) eKLR, Supreme Court it was held that-

Concerning extension of time this court has already set the guiding principle in *Nick Salat* case as follows:

“it is clear that 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 “we derive the following as underlying principles that a court should consider in exercising such discretion.

1. Extension of time is not a right to a party, it is an equitable remedy that is only available to a deserving party at the discretion of the court.
2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.
4. Where there is a reasonable cause for delay the same should be expressed to the satisfaction of the court.
5. Whether there will be any prejudice suffered by the respondents if extension is granted.
6. Whether application has been brought without undue delay and
7. Whether in certain cases like election petitions, public interests should be a consideration for extending time.”

19. The Court of Appeal gave some factors that the court can consider when deciding whether to extend time.

20. In *Thuita Mwangi –v- Kenya Airways Ltd* (2003) eKLR the Court of Appeal stated that

The period delay; the reason for delay, the arguability of appeal.

21. The degree of prejudice which could be suffered by the respondent if the extension is granted. The importance of compliance with time limits to the particular litigation or issue the effect if any on the administration of justice or the public interest of any is involved” are some of the factors the court should consider.

22. In this case the appellant stated that the ruling was delivered on 31/7/2023 as per paragraph (2) of the affidavit of Wanjiru T. Christine sworn on 7/11/2023. He was served with a notice dated 21/9/2023 indicating that the hearing would be on 7/12/2023. The Judgment was delivered without notice on 31/7/2023. The memorandum of appeal was filed on 29/9/2023.

23. I find that the delay was inordinate as the applicant did not enquire whether the ruling was delivered or not. The appellant has not given a good reason for the delay in filing the appeal. The memorandum of appeal is incompetent as the impugned ruling has not been attached. The respondent has also deposed that leave to file suit out of time was granted in Meru Chief Magistrate’s Court Civil Application



No.54/2022. This is not in dispute. The applicant has deponed that the application was seeking to have the suit dismissed for being filed out of time. Since the respondent depones that he had obtained extension of time to file suit out of time the respondent is likely to be prejudiced if the proceedings are stayed. It also means that the appeal is not well founded.

Conclusion:

24. The application lacks merits and is dismissed.
25. Costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF FEBRUARY 2025

L.W. GITARI

JUDGE

