



Kimani v Gachie & 2 others (Environment and Land Miscellaneous Application E026 of 2024) [2025] KEELC 3865 (KLR) (14 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E026 OF 2024**

JA MOGENI, J

MAY 14, 2025

BETWEEN

JANET N. B KIMANI PLAINTIFF

AND

FREDA NYAMBURA GACHIE 1ST DEFENDANT

LEONARD NGANGA GACHIE 2ND DEFENDANT

NYAKINYUA INVESTMENT LTD 3RD DEFENDANT

RULING

1. The Miscellaneous Application was filed through the Notice of Motion dated 27/05/2024, brought under Sections 79G and 3A of the *Civil Procedure Act* (Cap. 21), Order 51 Rule 1 of the Civil Procedure Rules (2010), and all other enabling provisions of the law the Applicant has sought the following orders;
 1. That this Honorable Court be pleased to allow the Applicant herein to file her intended appeal out of time.
 2. That the costs of this Application be costs in the cause.
2. The Application is based on the grounds on the face of the Application and supported by the Affidavit of Paul K. Kamata who states that he is an Advocate of High Court of Kenya practicing under the style of Kamata & Company Advocates and that he has the conduct of the matter on behalf of the intended Appellant and that he has acted for her throughout the lower Court and is well versed with the matters and thus competent to swear the Affidavit. The grounds advanced include the following among others:
 - a. That the Judgment sought to be appealed against was delivered on the 6th day of April 2023.



- b. That on 11th day of April 2023 the Advocates for the intended Appellant wrote to the Court and applied for the proceedings in their letter dated 11th April 2023 in which they also requested to be supplied with the invoice in respect of the requisite Court charges so that they could pay the same to facilitate typing of the said proceedings and they sent the said letter through the Email address of Thika Chief Magistrate’s Court.
 - c. That the Court never sent the said Advocates the said invoice, and despite reminders and phone calls the same was never sent and the said Advocates had to send somebody to Court on the 12th day of May when he was told to pay a sum of Kesh 1,000 which they immediately paid.
 - d. That thereafter the intended Appellant instructed her Advocates to file an Application for her, seeking review of the Judgment in issue which seemed a quicker option for her, the Notice of Motion dated the 9th day of June 2023 was filed on the 13th day of June 2023.
 - e. That the said Application was later heard and the Ruling was eventually delivered on 7th day of December 2023.
 - f. That since the said Ruling was not in favour of the Applicant, she instructed her Advocates to proceed with the appeal against the Judgment delivered in respect of the Originating Summons, which was what the Magistrate who delivered the said Ruling advised and her Advocates proceeded and pursued the issue of the proceedings, which eventually were released to them on 17th April 2024.
 - g. That together with the said proceedings a Certificate of Delay was given to the Applicant’s Advocates who discovered that the Decree had also not been prepared for them and they had to apply for one and hence the delay in filing the Application hereof.
3. The Application is supported by an Affidavit sworn on even date by the Applicant, to which one letter dated 11/04/2023 bespeaking proceedings and a Certificate of Delay dated 17/04/2024 were attached, as well as the Decree from the impugned Judgment. The Applicant explained that the delay in lodging the Appeal within time was occasioned by the delay in obtaining the certified copies of the proceedings which were requested for on 11/04/2023 but the same were availed on 17/04/2024. The Applicant further deponed that he has obtained on behalf of the intended Appellant the typed proceedings and a Certificate of Delay to enable the intended Appellant file the Appeal.
 4. The Application is unopposed. The Court issued directions on filing of submissions on 21/11/2024. The Applicant was granted leave to file a Supplementary Affidavit together with submissions on 03/02/2025.
 5. I have considered the submissions filed by the Applicant dated 17/02/2025 together with the Supporting Affidavit.
 6. The issue for determination is crystalized as: whether to grant leave for an appeal to be filed out of time.
 7. Section 79 G 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.” (Emphasis added).



8. Further, Section 95 of the *Civil Procedure Act* provides as follows:

“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.”

9. The Applicant has explained that she did not appeal against the learned Magistrate’s Ruling of 6/04/2023 since her Advocates had applied for the proceedings vide a letter dated 11/04/2023 and that she did not receive a response. They also sought for an invoice to pay for the said proceedings which they never received until when they sent somebody to the Court on 12/05/2023 when they paid for the typed proceedings.

10. That the intended Appellant instructed her Advocates to file an Application seeking review of the Judgment and vide Notice of Motion dated 9/06/2023 they filed for review. A Ruling was delivered on 7/12/2023 dismissing the review. The intended Appellant then instructed her Advocates to now appeal the decision of the Magistrate delivered on 06/04/2023 after the review was dismissed.

11. I note the Applicant did not file their Appeal and opted to seek for review of the Judgement which Application for review was dismissed. The Applicant now seeks to pursue another avenue to lodge an Appeal against the Judgement.

12. On matters of review, I will refer to Section 80 of the *Civil Procedure Act* which provides that: -

“Any person who considers himself aggrieved –

- (a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of Judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

13. This Section read together with Order 45 (2) of the Civil Procedure Rules which provides that:-

“A party who is not appealing from a Decree or Order may apply for a review of Judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the Appellant, or when, being Respondent, he can present to the Appellate Court the case on which he applies for review.”

14. From the above provisions it is that a party cannot apply for Review and Appeal from the same Decree or Order as is the case in this suit.

15. The Applicant has already exhausted the option of review and therefore the room for appeal against the impugned Judgment is not available for her.

16. I will rely on the provisions of the law cited above as well as the case of Serephen Nyasani Menge v Rispah Onsase [2018] eKLR where the learned Judge held that:

“In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the Applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her



luck with an appeal. The Applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant Application constitutes an abuse of the process of the Court and the same must surely fail. The Applicant had her day in Court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the Applicant, the end came when she applied for review and appealed the decision made on the review Application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The Applicant invoked the provisions of the law and the procedure thereto and the Court rendered itself on the basis of the law and the evidence.”

17. In the instant case the review of the Judgment was unsuccessful and the Applicant is not challenging the review decision but the impugned Judgment which is under review. The Applicant had her day in Court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the Applicant, the end came when she applied for review. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The Applicant invoked the provisions of the law and the procedure thereto and the Court rendered itself on the basis of the law and the evidence.
18. I find that the Applicant seeks to abuse the process of the Court. The Applicant who is the Lawyer of the intended Appellant has clearly stated that he applied for a review and this operates against the Applicant as she could not apply for a Review and at the same time appeal against the same order. I take cognizance of the fact that the Applicant who is the Advocate for the Appellant must therefore have exercised her options consciously.
19. The Court is of course alive to the principle laid down by the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission (I.E.B.C) And Others 2014 E K.L.R that the power to extend time is not a right but an equitable remedy available only to deserving parties at the Court’s discretion. Considering all the above, I am not persuaded that this is a proper case in which to exercise my discretion in favour of the Applicant. I will hence decline to allow the prayer for enlargement of time to lodge an Appeal as sought.
20. The upshot is that I find no merit in the Applicant’s Application dated 27/05/2024 and the same is ordered dismissed with no order as to costs since the Respondents did not participate.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 14TH DAY OF MAY 2025 .

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MOGENI J

JUDGE

In the presence of:-

Mr. Kamata for the Plaintiff/Applicant

No appearance for the 1st, 2nd and 3rd Defendants/Respondents

Mr. Melita - Court Assistant

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MOGENI J



JUDGE

