



**Namukana v Barasa & 4 others (Environment and Land Miscellaneous Application 3 of 2023) [2025] KEELC 337 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 3 OF 2023  
FO NYAGAKA, J  
JANUARY 16, 2025**

**BETWEEN**

**ALBERT NAMUKANA ..... APPLICANT**

**AND**

**BENEDICT BARASA ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC SANJA WABWI ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR TRANS-NZOIA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY SURVEYOR, TRANS-NZOIA COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion dated 16/05/2023. He brought it under Order 42 Rule 6 and Order 50 of the *Civil Procedure Act* (sic) and all other enabling provisions of the law. He served the following orders:
  1. ...spent.
  2. That this honorable Court be pleased to grant the applicant leave to file an appeal out of time against the judgment delivered by Honorable S. K. Mutai on 5<sup>th</sup> December 2022.
  3. ...spent.
  4. There be stay of execution of the judgment in Kitale CMCC No. 71 of 2018 pending the hearing and determination of the intended appeal herein.
  5. That the applicant be granted leave to file his appeal out of time against the judgment in Kitale CMCC No. 71 of 2018.



6. spent
7. Costs of this application be provided for.
2. The application was based on eight (8) grounds being that the Applicant who was the Plaintiff in the Kitale CMCC No. 71 of 2018 acted in person in the matter wherein judgment was entered against him on 05/12/2022. Upon the entry of the judgment, he fell sick and was unable to lodge his appeal in a timely manner. Having been dissatisfied with the trial court's judgment he sought leave of the court to file an appeal against the judgment out of time. If the Respondents were permitted to proceed with execution against him, he would suffer repairable damage hence the execution process ought to be stayed pending the hearing and determination of the instant application and the intended appeal. The applicant had good grounds of appeal with high chances of success as evidenced by the draft memorandum of appeal. He had already obtained proceedings in the matter for appeal purposes. The Respondents had started taking steps towards executing the decree by filing their bill of costs and listing it for assessment. The application was made in good faith.
3. The application was supported by the affidavit of the Applicant sworn on 14/05/2023. Largely, he repeated to the contents of the grounds, save that he added that sometime in the year 2018, he filed suit against the Respondents in Kitale CMC 71 of 2018 over a land dispute. The Respondents filed their defenses, and the matter proceeded to full hearing. Judgment was entered against him on 05/12/2022. He became sick and ran out of time in lodging an appeal against the judgment. He annexed and marked as AN 1 copies of treatment notes to evidence the illness. He also annexed and marked AN 2, a draft copy of the Draft Memorandum of Appeal which he argued demonstrated good grounds of appeal with high chances of success. He also annexed the copy of the proceedings and marked them as AN 3.
4. The Application was opposed through a Replying Affidavit sworn in by the 1<sup>st</sup> Respondent on 19/06/2023 and another by the 2<sup>nd</sup> Respondent, sworn on 15/06/2023. The 1<sup>st</sup> Respondent replied through the deposition by stating that the Applicant was present in court on 05/05/2023 when judgment was delivered. He was informed of the 30 days right of appeal if any party was aggrieved by the decision, yet he did not appeal until after six months when he brought the instant application. The applicant was not hospitalized since the treatment chits (annexed to his Affidavit) did not show the illness he suffered from. Therefore, one could not tell how seriously sick he was. In any event Kitale CMCC No. 71 of 2018 was dismissed because it lacked merit. That the application was frivolous, vexatious and waste of the court's time and should be dismissed.
5. The second Respondent deposed that the applicant was present in court when judgment was delivered in the lower court matter. He was informed of his right of appeal which was to be exercised within 30 days. The application was an afterthought and a way of denying the Respondents their change of recovery of costs and the enjoyment of the fruits of the judgment. The medical chits attached to the supporting Affidavit showed that he was an outpatient. Without a medical report, one could not tell how ill he was or the extent to which he was incapacitated. He repeated the contents as of the deposition by the 1<sup>st</sup> Respondent. He prayed that the application be dismissed.
6. The Applicant filed a Supplementary Affidavit which he swore on 30/06/2023. He deposed that the Respondents had not annexed any documents to controvert his illness. He added that he did not dispute the date of judgment or the 30 days right of appeal given to him upon delivery thereof. The application is not an afterthought as the treatment notes marked as AN 1 showed that he suffered chest complications on 01/12/2022 which was even before the judgment. Further, the fact that he was treated as an outpatient did not mean that he was not sick to the extent of being required to show that he was incapacitated, hence that requirement was unreasonable. Further, he acted in person due to lack



of finance to hire a lawyer and it was the reason why he could not hire an Advocate to lodge the appeal on his behalf. The appeal had high chances of success.

7. The application was disposed of by way of written submissions. The applicant summarized the application and gave six (6) issues for determination. The first one was whether there was a judgment which was delivered against the applicant. To this he answered in the affirmative, stating that it was delivered on 05/12/2022. The second one was whether there was delay in lodging the appeal. On this he argued that he had run out of time to appeal and the reason for the delay was that he was sick. He referred to the treatment sheets from Bondeni Health Clinic. It was dated 01/12/2022. He contended that the application was not an afterthought. He relied on the case of *Milcah J. Mutwol v Fraca Servcom* [2014] eKLR wherein the Applicant was granted leave to appeal, because of illness. He added that Section 79G of the *Civil Procedure Act* under Order 50 Rule 6 the Civil Procedure Rules provided an avenue for an applicant such as him to file an application for leave for purposes of lodging an appeal out of time. Further, the application was not incompetent. The third issue was whether there was proof of illness, which he submitted that he had done through the copies of the treatment sheets annexed.
8. Further, he stated that the intended Appeal raised serious tribal issues with high chances of success as evidenced by the Draft Memorandum of Appeal annexed as AN 2. He had obtained proceedings for the purposes of the appeal. He stated that the Land Registration had raised serious issues which were not considered by the court. He argued that an order of leave was therefore appropriate. No prejudice would be occasioned to the Respondents if the leave was granted. He relied on the case of *Moughal v. Mwai* (Miscellaneous Application E035 of 2021) [2022] KEH 10583 KLR 26 April 2022) (Ruling).
9. The first respondent filed his written submissions dated 19/06/2023. He began by summarizing the Application and the Respondents' responses. He argued that it took the applicant exactly 6 months to file the instant application hence, it was an afterthought and a cunning way of denying the Respondents chance to recover their costs and enjoy the fruits of their judgment. He relied on the case of *Mugo & Others v. Wanjiru & Another* [1970] (sic), and the decision of *Thuita Mwangi v. Kenya Airways Limited* [2003] eKLR which gives the conditions the court ought to consider in granting or refusing an extension of time. He added that the reason of sickness was not sufficiently proven as the treatment annexed did not explain the period within which the applicant was sick and how it hindered him from pursuing the appeal. In any event, the Applicant was not admitted in hospital.
10. The 2<sup>nd</sup> Respondent filed an exactly similar set of written submissions to those of the 1<sup>st</sup> Respondent save that his were dated 15/06/2023. (If the submissions were a written examination undertaken by the parties, both the Respondents would have scored zero for reason of one copying from the other. Similarly, even the Replying Affidavits took a similar pattern). Therefore, these courts shall not need to repeat the contents they are of.

## Determination

11. This Court has carefully considered the Application, the grounds and two affidavits of the Applicant in support and the ones opposition to it, the parties' submissions as well as the law. It found three issues for determination. These were:
  - a. Whether the failure to appeal in time had been sufficiently explained.
  - b. Whether the to appeal can be granted in the circumstances.
  - c. Who to bear the costs of this Application
12. This Court analyzes the issues in sequence. The first issue is Whether the failure to appeal in time had been sufficiently explained. The Applicant based his Application on wrong provisions of the law and



even added a meaningless phrase, “all enabling provisions of law.” It is my view that the phrase “all enabling provisions of law” is a meaningless because it was not explained which other provision of law enabled the application than the ones the applicant cited though wrong too. If there are enabling provisions of law to be relied on, nothing would be easier than to cite them for analysis and comparison. The Applicant should have relied on Section 79G of the *Civil Procedure Act* as read with Order 50 Rule 6 of the Civil Procedure Rules, 2010. Be that as it may, since Article 159(2)(d) of *the Constitution* of Kenya 2010 obliges the courts to determine matters basing their decisions on substance rather than technicalities. I am prepared to excuse the error. Furthermore, Order 50 Rule 10 of the Civil Procedure Rules provides that:

- “(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
- (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

13. If this Court were to take time discussing how irrelevant the application of the provisions cited by the Applicant is to this case would be a waste of time. Thus, this Court extends the grace to its discretion to cover the failure by the applicant to cite the proper provisions. I now proceed to determine the application using the conventional method of Issue, Rule, Application and Conclusion (IRAC).

14. The Issue herein is simple although two-fold. The first limb is whether the prayer for leave is merited since the applicant already ran out of time to appeal. He replicated the orders sought in paragraphs 2 and 5 of the prayers sought. I will combine them. The second one which is in prayer 4 is whether to grant stay of execution pending the hearing and determination of the intended appeal is dependent on the success of the first prayer. Thus, if the first prayer fails, this Court shall not need to consider second limb. If it succeeds then the court will still consider whether it is merited and pronounce itself accordingly.

15. The Rule of law in issue is Section 79G of the *Civil Procedure Act* and Order 51 Rule 6 of the Civil Procedure Rules, 2010. Section 79G provides that:

“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.”

16. Order 50 Rule 6 of the Civil Procedure Rules provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:



Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

17. Thus, while it is provided for in the law as quoted above and as the court already stated, the power to grant leave for a party to appeal out of time is discretionary. The discretion is wide but must be exercised judiciously. This means that it ought to be exercised on a case by case basis by considering the circumstances the party seeking its exercise places before the Court. Extension of time or leave to file a document or pleading out of time (where it has lapsed) or enlargement of time (to do an act) are phrases which are often used interchangeably in many courts. It does no harm in viewing them loosely that way as long the idea is that the discretion of the court is sought to have time granted to cover the shortcomings of a party. The specific provisions of law do not give a raft of factors a Court is to consider in exercising the discretion. However, in the *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others* [2016] eKLR my learned sister Aburili J. gave a summary of such factors. They may not have been an exhaustive laundry list but they at least give a framework to guide as a start. She stated that they “include:
- i. Whether there has been indolence or unexplained delay on the part of the applicant.
  - ii. Whether the applicant is guilty of abuse of the court process.
  - iii. Whether the enlargement will prejudice the defendant.
  - iv. Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case.
  - v. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy.
  - vi. Whether it is just and fair to enlarge time in the circumstances of the case.”
18. That compares well with the view by the learned judge in *Barclays Bank of Kenya Limited v Patrick Njuguna Kubai* [2014] eKLR where she stated as follows:

“Courts have wide and unfettered discretion to enlarge time to allow parties to do certain acts where time limitations have been given and to proceed to determine matters without undue regard to technicalities as provided for in Article 159 (2) (d) of *the Constitution* of Kenya, 2010. However, courts have to be careful when balancing this discretion by considering the consequences of certain acts which are not done within the stipulated period in particular where there are express and clear provisions of the law regarding those time lines.”

19. I now use the discretion granted to me to determine the merits of the application based on the facts I have before me vis-à-vis the law. I will not follow each of the factors stated above. In any event a party does not have to satisfy each one of them in order to avail himself of the prayer of enlargement of time or for an order of leave to appeal out of time. In passing, however, it is worth noting that Section 59 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya, provides as follows:-

“Where in a written law time is prescribed for doing an act or taking proceedings, and power is given to a court or other authority to extend that time, then unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”



20. The provision is to the effect that a party is at liberty to move the Court for enlargement or extension of time to do an act where time is prescribed by statute or Court, even if the time has or has not elapsed. All that the Court needs to do is to consider the circumstances of the Application vis-à-vis the requirements to be fulfilled.
21. Turning to the Application or Analysis of the law and facts, in the instant Application, first, Applicant argued that he did not file the appeal in time because he fell ill soon after the delivery of the judgment. He was present in Court when the judgment was delivered and was explained to the 30 days' right of appeal. He did not appeal until after six months when he brought the instant application. He annexed copies of documents purporting to be treatment chits from the hospitals he had been attending. The Respondents who opposed the application were present in court at the time of delivery of the judgment. They too heard of the right of appeal being explained. They argued that the reason given by the Applicant was not sufficient. It was an afterthought.
22. A perusal of the treatment chits shows that the applicant was unwell even before the judgment was delivered. He was treated by way of prescriptions of medicines but was not admitted in hospital at any one given time. This was the trend even after the judgment was delivered. There is no explanation by an independent medical expert to show that the patient who was treated as an outpatient was so ill that he could not attend to his other business such as merely filing an appeal as was not done. I am not convinced that the illness that did not prevent the applicant from attending court at the time of delivery of judgment made him not to make any move for over six months. In my view the delay was not sufficiently explained, even though the period of less than six (6) months may appear to be short. Even when there is a delay of a day which is not sufficiently explained, the Court may not exercise discretion to extend time just because the duration is short. There has to be a reasonable explanation given to the Court's satisfaction after which it will consider whether the period of delay is short or unreasonably long.
23. In regard to the prejudice to be occasioned by failure to enlarge time, the case of Board of Trustees of African Independent Pentecostal Church of Africa Church (cited above) gave two contending factors to be considered, namely, Whether the enlargement will prejudice the defendant, and, Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case. This requires a delicate balancing of the entire case. In the instant case, the Applicant through counsel participated in the proceedings towards taxation of party and party costs. This was even before the time of lodging notice of appeal expired.
24. Lastly, despite the fact that the Applicant raised the fact that the draft memorandum of appeal annexed demonstrated that he had an arguable appeal to file, I have carefully read the Draft. I see no "serious" issue raised. In any event for an appeal to be considered worth of making a court exercise its discretion it should only contain grounds that show that the appeal will be arguable. An arguable appeal is not one that must necessarily succeed if it goes to hearing on merits. However, the grounds the applicant presented in the instant application do not come close to being arguable. In the circumstances, I find that the Applicant has failed to satisfy the Court on the requirements for the grant of the prayers sought.

### **c. Who to bear the costs of this Application**

25. The upshot is that this court cannot grant the orders prayed for. Consequently, the applicant's application dated 16/05/2023 lacks merit and is hereby dismissed. As the payment of costs the law on applications for extension of time and awards of costs is fairly straightforward: the mover of the



application meets the costs. In the instant case even though he should have met the costs if he succeeded, he lost. He shall bear the costs.

26. To clear any doubt, this Court directs that any interim orders of stay issued earlier in favour of the Applicant should be and are hereby vacated. The file is closed subject to payment of the costs ordered herein.

27. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIA THE ELECTRONIC MAIL ON THIS 16<sup>TH</sup> DAY OF JANUARY, 2025.**

**HON. DR. IUR F. NYAGAKA**

**JUDGE**

