



REPUBLIC OF KENYA



**Kagoro v Zomolo (Environment and Land Appeal E033 of 2023)  
[2024] KEELC 312 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 312 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E033 OF 2023  
NA MATHEKA, J  
JANUARY 31, 2024**

**BETWEEN**

**MARGET KAGORO ..... APPLICANT**

**AND**

**ANTONY MUHUBU ZOMOLO ..... RESPONDENT**

**RULING**

1. The application is dated 17<sup>th</sup> October 2023 and is brought under Section 1A,1B,3 and 3A Section 79G and 95 of the [Civil Procedure Act](#), Order 42 Rule 6 (1 & 2) Order 51 rule 10 seeking the following orders;
  1. This matter be certified urgent and service be dispensed with in the first instance.
  2. Pending the Hearing and determination of this Application inter parties, this Honourable Court be pleased to stay execution in Mombasa Chief Magistrates Court Civil Suit No 80B of 2022 *Antony Muhubu Zomolo v Margaret Kagoro*.
  3. Pending the Hearing and determination of the intended Appeal, this Honourable Court be pleased to stay the execution in Mombasa Chief Magistrates Court Civil Suit No 80B of 2022 *Antony Muhubu Zomolo v Margaret Kagoro*.
  4. Applicant be granted leave to appeal out of time against the whole judgment & decree of the learned trial Magistrate in Mombasa Chief Magistrates Court Civil Suit No 80B of 2022 *Antony Muhubu Zomolo v Margaret Kagoro* delivered on the 18<sup>th</sup> May 2023 without notice to the Applicant.
  5. The Memorandum of Appeal annexed hereto be deemed as dully filed and served.
  6. Costs of this Application be awarded to the Applicant.



2. It is based on the grounds that sometimes on the 18<sup>th</sup> May 2023 the learned trial court delivered a judgment in the absence of the parties herein and without notice. The finding of the learned trial Magistrate was that there be an Order for permanent injunction to issue through the Defendant and any other person acting on her behalf or claiming interest through her from trespassing encroaching, constructing houses or dealing with Plot No MN/11/9195 (Original No 9128/68) Mombasa and vacant possession by demolishing any structures on the Plot and eviction thereof.
3. The Applicant having been aggrieved by the judgment and ruling of the learned trial Magistrate is desirous lodging an appeal against the entire judgment & decree of the Magistrates Court. The Counsel for the Applicant was not aware of the delivery of the judgment and its outcome until the Applicant was served with a copy of the Decree issued on the 29<sup>th</sup> September 2023. The record shows that even counsel for the Plaintiff was not present. Infact none of the parties or their legal representatives were present at the time of delivery of judgment on 18<sup>th</sup> May 2023. The Decree herein was issued on 29<sup>th</sup> September 2023. Thirty (30) days have not lapsed since the issuance of the Decree herein. By the time of discovery of delivery of the judgment. Time within which to lodge the Appeal had run out meanwhile the Respondent has extracted a copy of the Decree and may commence execution at any moment. The Applicant is simply asking for leave to lodge an Appeal against the findings of the learned trial Magistrate. It is thus necessary for this court to grant Orders of Stay of execution in Mombasa Chief Magistrates Court Civil Suit No 80B of 2022 *Antony Mububu Zomolo v Kaoro* and leave to appeal out of time. In the unlikely event that this Application is not allowed the entire appeal would be rendered nugatory. The intended Appeal raises very many triable issues.
4. This court has considered the application and submissions therein. Section 79G of the [Civil Procedure Act](#) is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the [Civil Procedure Act](#) 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.”
5. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of town. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others v Wanjiru & Another* (1970) EA 482 the court stated as follows;

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”



6. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in Edith Gichungu Koine v Stephen Njagi Thoitbi (2014) eKLR thus;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

7. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. This application is for the extension of time to appeal against the judgment herein was delivered on 18<sup>th</sup> May 2023 in the Chief Magistrates Court. This application was dated 17<sup>th</sup> October 2023.

In Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2013) eKLR the court held as follows;

- “(1) Extension of time is not a right of 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 for 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) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

8. I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that the Counsel for the Applicant was not aware of the delivery of the judgment and its outcome until the Applicant was served with a copy of the Decree issued on the 29<sup>th</sup> September 2023. This excuse is casual and unacceptable. The draft memorandum of appeal states inter alia that the trial magistrate erred in fact and law by failing to take into account the Appellants arguments, submissions and authorities. I find that the applicant does not have an arguable appeal. Judgement was entered on 18<sup>th</sup> May 2023 while this application was filed on the 23<sup>rd</sup> October 2023. I find that the applicant is guilty of inordinate delay and this application is an afterthought. I find this application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**



**JUDGE**

