



REPUBLIC OF KENYA



**Choge v Choge (Miscellaneous Application E011 of 2023)  
[2024] KEELC 209 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 209 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
MISCELLANEOUS APPLICATION E011 OF 2023  
MC OUNDO, J  
JANUARY 25, 2024**

**BETWEEN**

**FRED KIPKIRUI CHOGE ..... APPLICANT**

**AND**

**SAMMY CHOGE ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 14<sup>th</sup> December 2022 brought under the provisions of Sections 3, 3A and 79G of the Civil Procedure Act, Orders 42 and 51 of the Civil Procedure Rules, Article 159 of the Constitution and all other enabling provisions of law, the Applicant herein sought that he be allowed to file his Appeal out of time.
2. That Application is supported by the grounds set on its face as well as on the supporting affidavit of an equal date to the effect that judgment was entered against him on 10<sup>th</sup> August, 2022 without notice to the parties. That aggrieved by the said judgement, he intends to appeal against it as per a prepared a Draft Memorandum of Appeal which raised numerous triable issues.
3. He deponed that the delay in filling the instant application and the intended appeal was not intentional as he was not aware of the date that the impugned judgement was delivered. That he would suffer irreparable harm and loss if the instant application was not allowed because he would be unjustly deprived of his land before exhausting all judicial avenues in determining his rights. That he was ready and willing to abide by any conditions that would be set by the court and no prejudice would be suffered by the Respondent since he would have an opportunity to defend the appeal. He sought for an opportunity to exhaust all the avenues availed in the Constitution.
4. In response, the Respondent had filed a Preliminary Objection dated 18<sup>th</sup> April 2023 to which he stated that the Plaintiff/Applicant's Advocate did not seek the court's leave to come on record after judgment had been delivered on 10<sup>th</sup> August, 2022 which was in violation of the mandatory requirements under



- order 9 rule 9 of the *Civil Procedure Rules*. That the appearance of the Plaintiff/Applicant's Advocate was irregular and unlawful and should be struck out.
5. Together with the Preliminary Objection, the Respondent also filed a Replying Affidavit (of an equal date) where he deponed that the Applicant's Application dated 14<sup>th</sup> December, 2022 was fatally defective and frivolous as Order 42 Rule 6(2) of the *Civil Procedure Rules* upon which the Application was premised, was misplaced and incapable of being granted, there having been no appeal filed by the Applicant. That leave was not automatic and having failed to show that there was an Appeal with chances of success, the instant application failed automatically.
  6. That it was not enough for the Applicant to merely state that he would suffer loss, but he ought to have proved specifically, the details and particulars of the loss. That no pecuniary or tangible loss was shown to the satisfaction of the Court and stay should not be granted.
  7. That the parties herein had all along participated in the court proceedings and were well aware of the pending judgement after the hearing. That the Applicant, herein having been the Plaintiff in the lower court, he ought to have been aware of the judgement date so as to notify the Respondent instead of expecting to be notified of the same.
  8. That the Applicant had not shown sufficient cause and reason for him to be allowed to appeal out of time since the instant application was filed after the lapse of almost 4 months from the date of the impugned judgement. That the Applicant's application was made in bad faith so as to deny the Respondent the fruits of his rightfully obtained judgement. That subsequently, both the Applicant's Application and the intended Appeal lacked merit, were misleading, brought in bad faith and ought to be dismissed with costs.
  9. In a rejoinder, the Applicant via his Replying Affidavit dated 19<sup>th</sup> July, 2023 deponed that his Advocate on record M/S Obondo Koko & Co. Advocate s had obtained and filed the consent for change of Advocate annexed as FKC-1 (a) before filing the instant Application. That Order 9 Rule 9 of the *Civil Procedure Rules* allowed a consent to be filed in such circumstances and that the allegations of endorsement by the Court was a mere administrative issue and could not invalidate the instant application as the same fell under Article 159 of the *Constitution* which technicality was curable. That the Preliminary Objection herein did not meet the standards provided by the law hence the same should be dismissed with costs and the application be heard on merit.
  10. Despite the court's directive that the Application dated 14<sup>th</sup> December, 2022 as well as the Preliminary Objection therein be canvassed by way of written submissions, by the time of writing this Ruling, none of the parties herein had complied.

### **Determination**

11. I have considered the Applicant's application herein, the Respondent's replying affidavit and Grounds opposition. In his application dated 14<sup>th</sup> December 2022 the Applicant herein sought that he be allowed to file his Appeal out of time, judgment having been entered against him on 10<sup>th</sup> August 2022 without notice to the parties.
12. In response to the said application the Respondent in his Replying Affidavit and Grounds of Opposition both dated 18<sup>th</sup> April 2023, the had stated that the Application was fatally defective and frivolous firstly for having been filed by a stranger to the proceedings in contravention to the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* and secondly that there had not been any appeal filed by the Applicant. In rejoinder the Applicant had stated that there having been consent between the



- incoming Advocate and the outgoing Advocate he had complied with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* and therefore the Respondent's Grounds of Opposition were mute.
13. On the 27<sup>th</sup> April 2023, parties took directions to dispose of the application through the filing of written submissions to be filed and exchanged within 21 days respectively. There was no compliance.
  14. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that parties who fail to file their submissions on an application as ordered by the court are deemed as parties who have failed to prosecute their application and therefor that application is liable for dismissal. The filing of submissions having been ordered, the failure by the parties herein as Applicants (both in the main application and Grounds of Opposition herein) to exercise the leave granted to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on their part in the prosecution of the matter.
  15. The Court of Appeal in *Rowlands Ndegwa and 4 Others v. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai v. Attorney General & 3 Others* [2016] eKLR, observed as follows:

“With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity...”
  16. The mode of hearing of both the Application and Preliminary Objection having been accepted by the parties, and there having been no compliance to prosecute the same, I am persuaded to dismiss both the main motion dated the 14<sup>th</sup> December 2022 and the Preliminary Objection dated the 18<sup>th</sup> April 2023, which I now do, with no costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

