



Mwandaa (Suing as the Legal Representative & Administrator of the Estate of Irene Samba Mwandaa) v Kizidio (Environment and Land Miscellaneous Application E002 of 2023) [2024] KEELC 396 (KLR) (Environment and Land) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 396 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023
LL NAIKUNI, J
JANUARY 24, 2024**

BETWEEN

DORICAH MWAKE MWANDAA (SUING AS THE LEGAL REPRESENTATIVE & ADMINISTRATOR OF THE ESTATE OF IRENE SAMBA MWANDAA) APPELLANT

AND

LUCIANALUCIANA KIZIDIO INTENDED RESPONDENT

RULING

I. Introduction

1. Before the Honourable Court for its determination was the Notice of motion application dated 5th October, 2023. It was instituted by the Intended Appellant/Applicant herein - Dricah Mwake Mwandaa (Suing as the legal representative & administrator of the Estate of Irene Samba Mwandaa). n
2. The application was brought under the provision of Sections 1A, 1B, 3A, 75 and 95 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 50 Rule 6 of the *Civil Procedure Rules* 2010, and all other enabling provisions of Law.
3. Upon serving it, on 25th October, 2023 the Intended Respondent filed a four Paragraphed (5) Grounds of Opposition dated 20th October, 2023. The Honourable Court shall be dealing with it at a later stage of this Ruling herein below.

II. The Intended Appellant/Applicant's case

4. The Intended Appellant/Applicant sought for the following orders:-



- a). Spent..
 - b). The Honourable Court be pleased to grant leave to the Applicant to file appeal against the judgement of the Honourable Court delivered on 11th May, 2023 in Voi MELC No. E015 of 2021 by Hon. A.M. Obura (Mrs)-CM, out of time.
 - c). The annexed draft Memorandum of appeal be deemed as duly filed.
5. The application was based on the grounds, testimonial facts and the averments made out under the 17 Paragraphed Supporting Affidavit of Doricah Mwake Mwandaabearing the national identity card numbers 4434059, a resident of Mwakingali in Voi in Taita Taveta County within the Republic of Kenya and two (2) annexures marked as “DMM – 1 to 2 annexed hereto. She averred as follows:-
- a). She was the Intended Appellant/Applicant herein hence competent to swear this affidavit.
 - b). The trial Court on 11th May, 2023 delivered a Judgement dismissing her suit and partially allowing the Respondents Counter - Claim against her.
 - c). Upon going through the Judgement, the Deponent felt that clarification was needed since there were unfilled gaps. Hence, she filed an application for review of the Judgement before the trial court on 29th May, 2023 seeking for clarification of the Judgement on some aspect of the court's Judgment.
 - d). It was important to first seek the clarification on such aspects as to her, a clarification on the applicability of the trial court's judgment would have put to rest the issues at hand.
 - e). The application for review was responded to and opposed by the Respondent via a Replying Affidavit filed in court on 31st May, 2023.
 - f). On 28th August, 2023, the trial court rendered its ruling on the application for review and disallowed her application with costs to the Respondent.
 - g). The Thirty (30) days period for lodging an Appeal lapsed as the Deponent was waiting for the outcome of the application for review because, a clarification of the said aspects of the trial court's Judgment was to determine my next step.
 - h). After the delivery of the ruling for the application for review, she started sourcing for funds to enable me continue the legal representation in the intended appeal.
 - i). It was due to such factors that the stated period of Thirty (30) days within which she was to file the appeal lapsed.
 - j). The delay in source for funds to continue obtaining the services of an advocate and to await the outcome of the application for review was not deliberate.
 - k). The intended Appeal raised substantial issues for determination with high chances of success. She annexed hereto and marked 'DMM-2' was a draft Memorandum of Appeal.
 - l). Unless the Orders sought were granted, the Respondent would proceed and execute the Judgement to her detriment and the intended appeal would be rendered nugatory.
 - m). It would be proper and just and in the interest of justice that this application be allowed.
 - n). The Respondent would not suffer any prejudice if the application was allowed as any which might be suffered, could adequately be compensated by damages.



- o). The Appellant was apprehensive that if leave to file the appeal out of time was not granted, she would not be able to challenge the Judgement as by law provided having been dissatisfied with it on several fronts which were not clarified as sought.
- p). She made this affidavit in support of the application to seek leave to file appeal out of time.

III. The Grounds of Opposition by the Intended Respondent

- 6. On 25th October, 2023, while opposing the Notice of Motion Application dated 5th October 2023, the Intended Respondent through the Law firm of Messrs. Mwazighe & Company Advocates filed a four (4) Paragraphed Grounds of Opposition dated 20th October, 2023. The grounds were as follows:-
 - a. That the Application was incompetent and an abuse of the court process as it violates mandatory provisions of the law.
 - b. That by the fact that the Applicant chose to review the decision of the court and failed, she could not Appeal after the review was declined.
 - c. That there was no proper and sufficient cause and reasons that have been demonstrated by the Applicant for not filing an Appeal within the prescribed time by the law.
 - d. That the spirit and the letter of this application was very bad in law and therefore ought to be dismissed with costs at the very first instance.

IV. Submissions.

- 6. On 27th October, 2023 while all parties were present in Court, direction were granted by consensus that the application dated 5th October, 2023 by the Intended Appellant/Applicant be disposed off by way of written submissions. Pursuant to that all parties fully complied. Hence a ruling was reserved for delivery on 24th January, 2024 accordingly.

A. The Written Submission by the Intended Appellant/Applicant's on the application dated 5th October, 2023

- 8. On 20th November, 2023, the Learned Counsel for the Intended Appellant/Applicant being the Law firm of Messrs. Mutinda & Wambura Nthiga Company Advocates filed their written submissions dated 17th November, 2023. Mr. Mutinda Advocate commenced his submissions by providing the Court with a brief background of the matter. He stated that the application by the Intended Appellant/Applicant dated 5th November 2023 was instituted by way of a Notice of Motion and supported by a supporting affidavit of the Applicant Doricah Mwake Mwandaa. In it the Applicant sought the following orders to wit:-
 - a. Spent
 - b. The Honourable Court be pleased to grant leave to the Applicant to file appeal against the Judgment of the Honourable Court delivered on 11/05/2023 in Voi MELC No. E15 of 2021 by Hon. A.M. Obura (Mrs)-CM Out of time.
 - c. The Annexed draft Memorandum of Appeal be deemed as duly filed.
- 9. The Learned Counsel raised three (3) issues to be considered by this Court while drawing its decision on the subject matter. These were firstly whether the applicant should be granted leave to appeal out of time? On this one he averred that it was factually stated that upon delivery of the Judgment by the trial



court on 11th May, 2023, the Applicant herein having gone through the said Judgment, opted to make an application for review seeking clarification on some aspects of the said Judgment. That application was dismissed and therefore, no clarification as sought, was made leading up to this present application. Whereas it had been submitted that this application was incompetent as the Applicant could not prefer an appeal once a review was exhausted Under Section 80 and Order 45. He submitted that there was no express bar in the rules to a party who had attempted to review a decision from subsequently appealing against the same. In fact, the provision of Section 3A of the Civil Procedure Act, Cap. 21 empowered the court to make orders as was necessary for the ends of justice to be met.

10. To buttress his point, the Learned Counsel cited the the Court of Appeal's case of:- "*Kisya Investments Limited v Attorney General and Another* Civil Appeal No. 31 of 1995 which held that a party who had filed a notice of appeal could not apply for review but if application for review was filed first, the party was not prevented from filing appeal subsequently even if a review was pending. He urged the Court to note that the Applicant herein filed an application for review seeking clarification on the findings made by the trial court and not to alter the Judgment as issued. Even if the application was one for review, it was not meant to alter the Judgment in favour of the Applicant but to only explain the applicability of the said decision on the ground being the issue in dispute was trespass to land. His view was that the applicant could not at the time, exercise the right to appeal and review at the same time but rather seek first a clarification on such issues which to the applicant's mind would have settled the issues herein.
11. Secondly, the other issue for consideration was that, this Court was clothed with both the constitutional and legal mandate to grant the prayers sought by allowing the filing of the appeal out of time to ensure that the ends of justice are met. Judicial discretion gives court flexibility to provide a definition according to the specifics of a case, for ends of justice and to prevent the abuse of the court process. See "*Rufus Murithi Nyaga v Juliet Wanja Ileri* [2018] eKLR where Muchemi, J endorsed the dicta in "*Nicholas Kiptco Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014]eKLR.
12. The applicant herein filed this application on 16th October, 2023 after delivery of the Ruling on the application for review on 28th August, 2023. The period of delay between the date of filing and the date of delivery of the ruling had been sufficiently explained by the applicant herein and as such, there was no inordinate delay in making this present application. Additionally, according to the Counsel, the annexed draft Memorandum of Appeal marked as "DMM – 2", raised substantial and arguable issues with high chances of success. A snippet of such issues was that the applicant attacked the findings of the trial court on the issue of ownership and revocation of her title deed based on the evidence on record, which demonstrated that she was indeed the legal and registered owner and no ground of fraud and/or misrepresentation had been proved to warrant the finding on revocation.
13. Lastly, the third issue raised by the Learned Counsel in his submission was that would the Intended Respondent suffer any prejudice. He submitted that indeed no prejudice would be suffered by the Intended Respondent with the grant of the orders sought herein as she would still be afforded an opportunity to be heard and in the event any prejudice was to be suffered, the same could be adequately compensated by an award of costs which had already been awarded twice by the trial court.
14. In conclusion, the Learned Counsel opined that it had been clearly demonstrated that the Intended Appellant/Applicant herein was not forum shopping as the reasons for review had been explained and why the Applicant sought for the clarification. She could not have sought for the review and at the same time, have an appeal filed. Furthermore, it had been as well demonstrated that there had been no inordinate delay in filing this application and any delay that was occasioned had been sufficiently explained. He urged Court to allow the application.



B.The Written Submissions by the Intended Respondent

15. On 26th October, 2023, the Learned Counsel for the Intended Respondent being the Law firm of Messrs. Mwzighe & Company Advocates while opposing the application filed their written submissions dated 25th October, 2023. Mr. Mwzighe Advocate rehashed the orders upon which the Intended Appellant/Applicant had sought as per the filed pleadings herein. The Learned Counsel raised two (2) issues to be considered while court will be making its determination. These are as follows, Firstly, whether the Intended Appellant/Applicant was entitled to the reliefs sought.
16. On this issue, the Learned Counsel recounted that the Applicant was before this court seeking for a leave to file an appeal out of time. She has clearly to court that when the judgement was delivered, she applied for review of the same which application was dismissed. It was after the review application was dismissed that she opted to file this current Applicant seeking leave to appeal out of time. The reliefs sought by the Applicant was not capable of being granted. One could not opt to review a decision then if the review failed, seek leave to appeal against the same decision. The Applicant when the Judgement was dismissed, she opted to review thus relinquishing her rights to appeal. This principle was succinctly captured under Section 80 of the Civil Procedure Act, which stipulates that an aggrieved party may apply for a review of Judgment in cases where an appeal is allowed but not preferred or when no appeal is allowed by the Act. He submitted that the very essence of the provision of Section 80 was to create a clear and unequivocal choice for the aggrieved party: opt for a review or pursue an appeal, but not both concurrently.
17. Furthermore, he argued that the provision of Order 45 of the *Civil Procedure Rules* elaborated on the conditions that must be met by an applicant seeking a review, and it reiterates the restrictions laid out in Section 80(a) and (b). This reinforces the understanding that the options of a review and an appeal are mutually exclusive and cannot co-exist. The provision of Order 45, Rule 2 of the *Civil Procedure Rules* further underscores this point by stating that a party who was not appealing from a decree or order may apply for a review of Judgment, with the exception being when the ground of the appeal was common to both the applicant and the Appellant, or when the Respondent can present the same case to the appellate court that they seek to review. To support his point, the Counsel relied on the case of:- "*Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR, the court in dismissing an application for leave of filing an appeal out of time by an applicant who had exhausted the review of a Judgement at the trial court.
18. Therefore, the Counsel averred that the Applicant could not now come to court seeking for court's leave to file an appeal out of time. That discretion was not applicable for the applicant by now. The court should frown upon the Applicant's Application and the same should suffer the fate of dismissal. He held that the Applicant wanted to have the second bite of the cherry. She was now in a fishing expedition for solution to her problem. She had decided to seek a remedy of her review which failed and now wanted to appeal over the same Judgement. This amounted to abuse of the court process and the court should not entertain such practice. Litigation must come to an end. If the law provides a remedy to a problem and a party exercises that remedy, then he/she was barred from trying to look for another remedy to sort out a problem which is not applicable. The Applicant chose to violate her own right of appealing which gave her a wide avenue of seeking the reliefs she was seeking. Initially the Applicant was of the view that she needed clarification from the judgement of the Honourable court.
19. The court declined and said that its judgement was proper and it needs no clarification and the applicant failed to meet the conditions set under order 45 of the *Civil Procedure Rules*. The applicant had now shifted goal posts as she was now purporting to say that the judgement of the trial court was



not proper and the same should be set aside and/or varied. The law never provided for such and the Applicant was stopped from doing so.

20. The second issue for consideration was who was to bear the cost of this application. He submitted that the Rule of the thumb was that costs follow events. He cited the provision of Section 27 of the Civil Procedure Act, Cap. 21 and the case of “Republic v [Rosemary Wairimu Munene, Ex-Parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd](#) Judicial Review application no 6 of 2014, the court held as follows regarding Section 27 of the [Civil Procedure Act](#): -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case’

21. The trouble taken in prosecuting or defending the case does not imply distress, woes or suffering out lawful and legitimate steps taken by the parties in the pursuit of the remedy as was held in case of “[Haraf Traders Limited v Narok County Government](#) [2022] eKLR. As highlighted in the case above, the costs are expenses that one incurs in the course of litigation. In this case, the Applicant had dragged the Respondent before this court with no proper reasons. The same should be dismissed with costs. The applicant should bear the costs of this Application.

V. Analysis & Determination.

22. I have keenly considered the application dated 5th October, 2023 by the Intended Appellant/Applicant, the replies by the Respondent, the written submissions, the myriad authorities cited by all the parties herein the provision of the [Constitution](#) of Kenya, 2010 and the statutes. In order for the Honourable Court to arrive at an informed, reasonable and fair decision, it has crystalized the subject matter into the following three (3) salient issues for determination. These are:-
- a. Whether the Notice of motion application dated 5th October, 2023 by the Intended Appellant/Applicant has merit.
 - b. Whether the parties herein are entitled to the reliefs sought.
 - c. Who will bear the costs of the application.

Issue No. a). Whether the Notice of motion application dated 5th October, 2023 by the Intended Appellant/Applicant has merit.

23. Fundamentally, under this Sub – heading, the Honourable Court deduces that there are two (2) main substratum raised from the filed application dated 5th October, 2023 by the Intended Appellant/Applicant. These are:- Firstly, whether the applicant is entitled to both a review and prefer an appeal emanating from the same decree and /or order. Secondly, whether the Intended Respondent should be granted leave and/or extension of time to file the appeal against the Judgement of the trial Court out of time. The Honourable Court will first of all deal with these two (2) legal issues before applying them to the facts of the case. The issue of review of Court decisions and preferring of an appeal are well founded and governed under the provision of Section 80 (1) of the [Civil Procedure Act](#), Cap. 21; Orders 40 and 42 of the [Civil Procedure Rules](#), 2010.



24. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“ 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 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.”

25. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:

“ 1(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay.”

26. Additionally, I refer to the case of:- “*Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR” it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

27. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this *Act*;



- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
- f. The review is by the Court which passed the decree or made the order without unreasonable delay.
28. Previously, I did decide in the case of: “*Sese (Suing as the Administrator of the Estate of the Late Shali Sese) v Karezi & 8 others* (Environment and Land Constitutional Petition 32 of 2020) [2023] KEELC 17427 (KLR)” held that:-
- “The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible.”
29. Discussing the scope of the review, the Supreme Court of India in the case of “*Ajit Kumar Rath v State of Orisa*, 9 Supreme Court Cases 596 at Page 608.” had this to say:-
- “The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule...”
30. In the case of “*Nyamongo & Nyamongo v Kogo* [2001] EA 170” discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-
- “An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.....”
31. The principle was succinctly captured under Section 80 of the *Civil Procedure Act*, which stipulates that an aggrieved party may apply for a review of Judgment in cases where an appeal is allowed but not



preferred or when no appeal is allowed by the Act. He submitted that the very essence of the provision of Section 80 was to create a clear and unequivocal choice for the aggrieved party: opt for a review or pursue an appeal, but not both concurrently.

32. Furthermore, he argued that the provision of Order 45 of the Civil Procedure Rules elaborated on the conditions that must be met by an applicant seeking a review, and it reiterates the restrictions laid out in Section 80(a) and (b). This reinforces the understanding that the options of a review and an appeal are mutually exclusive and cannot co-exist. The provision of Order 45, Rule 2 of the Civil Procedure Rules further underscores this point by stating that a party who was not appealing from a decree or order may apply for a review of Judgment, with the exception being when the ground of the appeal was common to both the applicant and the Appellant, or when the Respondent can present the same case to the appellate court that they seek to review. I have referred to the case relied on by the Learned Counsel for the Intended Respondent:- “Serephen Nyasani Menge (*supra*) where the court in dismissing an application for leave of filing an appeal out of time by an applicant who had exhausted the review of a Judgement at the trial court, held that:-

.....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”.

33. Clearly, the law envisages on one making a decision from the onset either to seek an review or prefer an appeal but not have both of them as that would be travesty of Justice.
34. With regard to seeking leave to prefer an appeal of a Judgement from a lower Court out of time is provided for under the provision of Section 79G of the Civil Procedure Act, Cap 21. It provides as follows:-

“Every appeal from a Sub – ordinate Court to the High Court shall be filed within a period of thirty (30) 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)

35. Additionally, the provision of Section 95 of the Civil procedure Act, holds that:-

“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”

36. The requirement for filing of an appeal have been stated herein clearly. Extension of time to file an appeal out of time is at the discretion of the Court. In exercising that discretion the Court of Appeal in the case of “Thuita Mwangi v Kenya Airways Limited [2003] eKLR stated that these legal aspects are to be considered:-

- a. The period of delay;
- b. The arguability of the appeal;
- c. The degree of the prejudice which could be suffered by the if Respondent the extension is granted;



- d. The importance of the compliance with the time limits to the particular litigation or issue; and
- e. The effect if any on administration of justice or public interest if any is involved;

In addition, the case of:- "*County Executive of Kisumu v County of Kisumu and 8 Others*, Civil Application No. 3 of 2016 where the Supreme Court held that:-

“Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time the whole period of delay should be stated and explained to the satisfaction of the Court”

IssueNo. b). Whether the parties herein are entitled to the reliefs sought.

37. Under this Sub – heading, the Honourable Court now wishes to apply the afore stated principles in the instant case. From the facts and the pleadings filed, the Judgement of the trial Court was delivered in favour of the Respondent on 11th May, 2023. According to the Applicant, she opted to review seeking some clarification on some aspects of the decision vis a vis the issue of trespass and not necessarily challenging the trial Courts decision. To me what the Respondent did was to make an application for review and whether it was for seeking clarification on it or not is immaterial. In essence, the moment the Applicant submitted herself for review of the decision of the trial Court I fully concur with the Learned Counsel for the Intended Respondent she thus relinquishing her rights to appeal. Further, on 28th August, 2023 the trial Court rendered its Ruling on the application for review. Eventually, on 16th October, 2023 the Intended Appellant/Applicant decided to prefer an appeal through the filed Memorandum of Appeal annexed herein and marked as the “DMM – 2”. This was a period of five (5) months and two (2) days from the date of the delivery of the Judgement and fourty four (44) days from the date of the ruling by the trial Court.
38. The law demands that the Applicant is under a duty to satisfactorily explain such a delay. I am reminded of the legal ratio in the Court of Appeal case of “*United Insurance Company of Kenya Limited – Versus v Ramzan Abdul Dhanji* – Civil Application No. 179 of 1998” where the Court stated:
- “The Law is not that a party must be heard in every litigation. The Law is that parties must be given reasonable opportunity of being heard and once that is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”
- From the records, the Intended Appellant/Applicant has explained the delay for lodging the appeal beyond the statutory period of thirty (30) days period on grounds that she was waiting for the outcome of the application for review because, a clarification of the said aspects of the trial court’s Judgment was to determine her next step. After the delivery of the ruling for the application for review, she started sourcing for funds to enable her continue the legal representation in the intended appeal. It was due to such factors that the stated period of Thirty (30) days within which she was to file the appeal lapsed.
39. Be that as it may, the Honourable Court is not persuaded at all by the reasons given herein. To me, this delay has been not only unreasonable, inordinate, unjustified but an afterthought. Further, I have had an opportunity of looking at the filed Memorandum of Appeal and clearly the appeal is not arguable at all and to allow the application will only be to prejudice the rights of the Respondent from enjoying the fruits of the Judgement. For all these reasons, the Court holds that the application must not succeed.



IssueNo. c). Who will bear the costs of the application.

40. As already stated out clearly by the Learned Counsel for the Intended Respondent, the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of any legal action or proceedings in litigation. Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that costs follow the event. By event it means the result or outcome of the legal action.
41. In the instant case, the application by the Intended Appellant/Applicant has failed to be successful. Thus, the Intended Respondent are entitled to costs of the application.

VI. Conclusion & Findings

41. Consequently, after causing an indepth analysis of the framed issues herein, the Honorable Court in preponderance of Probabilities and balance of convenience makes to following orders. These are:-
- a. That the Notice of Motion application dated 5th October, 2023 be and is hereby found to be unmeritorious and hence disallowed with costs.
 - b. That the costs of the application to be awarded to the Intended Respondent.

It Is So Ordered Accordingly

RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF JANUARY, 2024

.....
HON. MR. JUSTICE L.L. NAIKUNI (JUDGE),
ENVIRONMENT & LAND COURT AT
VOI

Ruling delivered in the presence of:

- a. M/s. Mary Ngoira, the Court Assistant.**
- b. M/s. Kerubo Advocate holding brief for Mr. Mutinda Advocate for the Intended Appellant/ Applicant**
- c. Mr. Mwadotto Advocate holding brief for Mr. Mwazighe Advocate for the Intended Respondent.**

