



**Kirimi v Laban (Miscellaneous Application E020 of 2023)  
[2024] KEELC 3682 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 3682 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
MISCELLANEOUS APPLICATION E020 OF 2023**

**CK YANO, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**TABITHA GACHERI KIRIMI ..... APPLICANT**

**AND**

**PAULINE MUTHONI LABAN ..... RESPONDENT**

**RULING**

1. This ruling relates to a notice of motion application dated 10<sup>th</sup> November, 2023 by the Applicant. The application is brought under Section 79 G of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution and seeks for orders that the Honourable court be pleased to grant leave to the applicant to appeal out of time against the judgement of Hon. T.M Mwangi - SPM delivered on 10<sup>th</sup> August 2023 in Meru CM ELC No. 138 of 2019; Tabitha Gacheri Kirimi v Pauline Muthoni Laban and that costs be provided for.
2. The application is premised on the grounds thereon and supported by the affidavit of Tabitha Gacheri Kirimi, the applicant. The applicant avers that she instituted ELC Suit No.138 of 2019 in the lower court seeking a declaration that the transfer of title no. 23980/57 from Moses Kirimi Mbogori to the respondent was illegal and null and void for lack of spousal consent as she had contributed in the purchase of the property and was not involved in the sale and subsequent transfer to the respondent. That the trial magistrate via a judgement delivered on 10<sup>th</sup> August 2023 dismissed her claim and went on to refer to the respondent as a co-wife despite noting that she had purchased the suit property from the applicant's late husband. A copy of the judgement marked TG-1 has been annexed. That being aggrieved by the decision she has now duly instructed her advocates on record to pursue the appeal to its logical conclusion.
3. The applicant avers that the delay in filing the appeal on time was occasioned by the fact that she did not sufficiently instruct her advocate on record on time and that she is a widow who is faced with myriad



challenges of catering for expenses of her family and hardship in raising fees owing to hostile economic situation affecting her business.

4. The Applicant is beseeching the court to exercise its discretion and grant her leave to appeal out of time as the delay was inadvertent and not excessive. That she is advised by her advocate on record that the appeal is arguable as the trial magistrate misdirected himself and erred in Law and fact by failing to find that she had provided evidence to demonstrate direct and indirect contribution in acquisition and development of title no. 23980/57 and that the sale transaction to the respondent was void for lack of spousal consent.
5. The Applicant states that she is advised by her counsel that the trial magistrate considered extraneous issues that were not under consideration, such as that the respondent was a co-wife which decision shall have ramification in the Succession proceedings in Meru High Court Succession Cause No.22 of 2019 that is yet to make a determination on whether the respondent is a wife of the late Moses Kirimi Mbogori or not. The applicant has annexed a copy of Succession proceedings marked TG-3.
6. The applicant further states that the respondent has now transcended into an energized pursuit claiming that she is wife of the deceased based on the decision of the trial court that was sitting as an ELC Court and not as a Succession Court and will highly be prejudiced if the court does not re-evaluate the facts and law and consider her intended appeal on merit.
7. The application is opposed by the respondent through a replying affidavit sworn on 27<sup>th</sup> November, 2023 in which she depones inter alia, that she has been advised by her advocates on record that set timelines for filing an appeal should be respected and the same should not be taken for granted. That in the application the applicant has not given any good or sufficient cause for the delay in filing the appeal within the time provided under section 79 G of the Civil Procedure Act which she is relying on and that the applicant should not hide behind Article 159 (2) (d) of the Constitution as Section 79 G of the Civil Procedure Act is clear on filing of appeals from subordinate courts.
8. The respondent states that the application is an afterthought and an abuse and misuse of the judicial process and that she shall suffer great prejudice if an extension of filing of the appeal is granted or the application is allowed. That the intended appeal sole purpose is delaying justice and preventing her from enjoying her property.
9. The respondent further contends that the intended appeal is mischievous, contemptuous and an abuse of and misuse of the judicial process. That the Applicant is a beneficiary of the estate of the deceased Moses Kirimi Mbogoria where she collects monthly rent from various properties among them Meru Municipality Block II/283, Meru Municipality Block II/284 and Meru Municipality Block II/647 hence she cannot claim that she did not have money to instruct an advocate to file the appeal on time and by so saying she is deliberately misleading the court.
10. The respondent avers that there is a case pending in the Environment and Land Court Meru in ELC no 6 of 2018 which involves the same parties and the same subject matter and argued that the applicant can raise any unsolved issues in that suit. That the grounds for the intended appeal have been well analyzed and addressed by the trial court and concluded fully.
11. The respondent states that she is advised by her advocate on record that litigation must come to an end and the successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.
12. The respondent avers that she was not awarded costs by the trial court and she is struggling to pay her counsel hence the applicant should not be allowed to further litigation. That the application and prayers sought are unmeritorious and ought to be dismissed with costs to the respondent.



13. The Applicant filed a supplementary affidavit dated 4<sup>th</sup> December 2023 wherein she avers that it is clear from the respondent's response that no prejudice shall be occasioned upon her on grant of orders sought herein. That the trial matter was disallowed and there are no fruits of judgement to be enjoyed by the respondent.
14. The applicant avers that the delay in filing the appeal within the stipulated timeframe was not deliberate but was occasioned by an act beyond her control owing to the hostile economic situation affecting her businesses and states that she has now instructed her advocates and are ready to file the appeal immediately upon being granted leave.
15. The applicant states that she is not the sole beneficiary and no properties have been distributed by the Succession Court and the allegation that she has financial means as alleged by the respondent is far-fetched. The applicant denied that she was a party to the proceedings in ELC No. 6 of 2018 and the subject matter is different and avers that her claim herein is lack of spousal consent in sale and transfer of the suit parcel to the respondent having contributed in acquisition of the property.
16. The application was heard by way of written submissions. The Applicant Submission were filed on 8<sup>th</sup> January 2023 by the firm of Okubasu & Munene Advocates while the respondent filed hers dated 18/1/2024 through the firm of Daniel Anyoka Moturi & Co. Advocates.

### **Analysis and Determination**

17. I have considered the application, the response and the submissions made. My mandate to intervene has been invoked substantively under Section 79 G of the [Civil Procedure Act](#) which provides:

“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.”

18. The principles that guides the court in the exercise of its mandate under the said section are set out in the case of [Nicholas Kiptoo Arap Korir Salat –v- Independent Electoral & Boundaries Commission & 7 Others \(Supra\)](#), in which the Supreme Court stated;

“..... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.....

“...we derive the following as the underlying principles that a court should consider in exercising such discretion:

- a. 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.
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.



- c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis.
  - d. Whether there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
  - e. Whether there will be any prejudice suffered by the respondent if the extension is granted.”
19. Therefore, the factors to consider in exercising discretion are that, I am supposed to take into consideration the length of the delay, reason for the delay, possibly, the arguability of the intended appeal and any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
20. Starting with the period of delay, it is evident from the record that the impugned judgment was delivered on 10<sup>th</sup> August 2023. The application under consideration which seeks the court’s intervention was filed on 10<sup>th</sup> November, 2023, being a period of about two (2) months from the time the appeal ought to have been filed. It is my opinion that the delay is not inordinate.
21. The next factor falling for consideration is the explanation that the applicant has proffered for the failure to file the appeal timeously. The reason given by the applicant is attributed to the delay to financial constraints since she is a widow and therefore making her the bread winner for the family. She explained that she was facing a myriad of challenges in providing for the whole family. I find the reason for the delay well explained and is a reasonable excuse.
22. Concerning the extension of time, this Court has already set the guiding principles in the [Nick Salat Case \(supra\)](#) as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant”.
23. On the chances of the appeal succeeding, I have perused the memorandum of appeal herein. The applicant intends to challenge the entire decision of the Trial Court. In Law, an arguable appeal/ intended appeal is one that need not succeed but one that is not frivolous and warrants the court’s interrogation on the one hand and the court’s invitation to the opposite party to respond thereto. In my view the issues raised in the intended appeal are not frivolous and are arguable.
24. The respondent submitted that she will suffer prejudice if the application is granted as that would result in the respondent not enjoying the fruits of her judgement during the pendency of the Appeal. In my view, the respondent can adequately be compensated in form of costs and interest in the event the intended appeal will be in her favour.
25. On the totality of the above assessment and reasoning, I am satisfied that the applicant has satisfied the prerequisite for granting of a relief under Section 79 G of the [Civil Procedure Act](#).
26. Consequently, I find merit in this application and the same is allowed in the following terms:-
  - a. Leave is hereby granted to the applicant to file appeal out of time.
  - b. The appeal shall be filed and served within 14 days from the date of this ruling.



c. Costs of the application shall abide the outcome of the intended appeal.

27. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**Hon. C. YANO**

**ELC - JUDGE**

In the presence of

Court Assistants: Tupet & Bernice

Omari holding brief for Anyonka for Respondent

Mwirigi Batista for Applicant.

