



**Ombanyi v Motuka (Environment and Land Miscellaneous Application
2 of 2023) [2024] KEELC 671 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 2 OF 2023**

M SILA, J

FEBRUARY 15, 2024

BETWEEN

TOM OMBANYI APPELLANT

AND

DAVID AMENYA MOTUKA RESPONDENT

RULING

(Application to file an appeal out of time; need to demonstrate good and sufficient cause for such an application to be allowed; court not persuaded that good and sufficient cause has been demonstrated; application dismissed)

1. The application before me is that dated 28 July 2023 being an application seeking leave to file an appeal to this court, from a decision of the Magistrates' Court, out of time. The applicant avers that he was not aware of the judgment date and he was not made aware of the delivery of the judgment. He contends that he was not served with the date when the judgment was to be delivered and only became aware of it when a notice was served on him to show cause why he should not pay the taxed costs. He avers that the time to file appeal has now lapsed. Although in his supporting affidavit he avers that he has annexed a copy of the judgment, no such copy was annexed. He has however annexed the notice to show cause and a draft Memorandum of Appeal.
2. The respondent has filed a Replying Affidavit to oppose the application. He deposes that the applicant is not being sincere by claiming not to have been aware of the judgment when he in fact appeared before the trial Magistrate for failing to pay the taxed costs. He avers that the applicant has not given a plausible explanation as to why he delayed to prefer the appeal. He continues to aver that the applicant was found to have been in wrongful occupation of his property by virtue of a report filed by the County Surveyor and that his counsel conceded that there was no issue remaining for trial.



3. No supplementary affidavit was filed by the applicant to challenge the averments in the replying affidavit.
4. In his submissions, Mr. Sagwe, learned counsel for the applicant, submitted that the judgment was delivered on 26 July 2022 and that the applicant and respondent were negotiating an out of court settlement only for the applicant to find out that the respondent wanted to execute. He submitted that the appellant was not the owner of the land in issue but had only leased it from one George Siro. He added that the applicant and his counsel were not notified of the delivery of the judgment.
5. No submissions were made by Mr. Ogari, learned counsel for the respondent.
6. I have considered the application and I see a lot of problems with it. But before I get to these, let me set out the law regarding the filing of appeals to this court from decisions of the Magistrates' Courts.
7. The time for filing appeals to this court is set out in Section 79G of the *Civil Procedure Act*, Cap 21, Laws of Kenya, which provides as follows :-

79G. Time for filing appeals from subordinate courts

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.

8. It will be observed from the above that an appeal is supposed to be filed within 30 days of the decision though the appellant may benefit from time taken to prepare copies of the decree or order. It will also be seen that the court has discretion to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal out of time.
9. In our case, the applicant admits that he is out of time. But has he provided good and sufficient cause for not filing his appeal within time ? I am afraid that I am not persuaded.
10. . From his affidavit, the sole reason given is that he was not aware of the delivery of the judgment and he was not notified of when the judgment would be delivered. This contention has absolutely no support whatsoever. One would expect that the applicant would annex copies of the proceedings to show the series of events that led to the delivery of the judgment. One would also expect that the judgment itself would be annexed so that the court can appreciate exactly what it is that is sought to be appealed from. But neither the proceedings nor the judgment were annexed by the applicant. I wonder how the applicant wants this court to believe that he was not notified of the judgment and I wonder how the applicant wants this court to appreciate that he has good grounds for appeal so that this court can exercise its discretion in his favour.
11. In his submissions, Mr. Sagwe, made a claim that judgment was delivered on 26 July 2022. That is an issue that ought to have been in the supporting affidavit to the application supported by the annexed judgment and not raised from the bar during submissions. Indeed, I have nothing before me to show that judgment was delivered on 26 July 2022. But even assuming that judgment was delivered on 26 July 2022, I observe that this application was filed on 28 July 2023, which is more than a year later. The applicant does not say how he went about his business for one year. Wasn't he following up on his case for this period of one year ? In his reply, the respondent deposed that the applicant was being insincere in his contention that he was not aware of the judgment and stated that he even appeared to show cause



for non payment of costs. This has not been rebutted by any supplementary affidavit. In my opinion, and assuming that judgment was indeed delivered on 26 July 2022, no explanation has been offered as to why the applicant had to wait for more than one year to make this application. In essence, the applicant has failed to demonstrate good and sufficient cause for not filing the appeal within time.

12. There is no merit in this application and it is hereby dismissed with costs.

13. Orders accordingly.

DATED AND DELIVERED THIS 15 DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. Sagwe for the applicant

Mr. Kimaiyo for the respondent

Court Assistant – Lawrence Chomba

