



Misik & another v Kipkosgei (Sued as the Administrator Ad Litem and Legal Representative of the Estate of the Late Raphael Malakwen Kipkeles alias Malakwen Kipkeles) (Environment and Land Miscellaneous Application E002 of 2023) [2024] KEELC 1452 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1452 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023
MN MWANYALE, J
MARCH 19, 2024

BETWEEN

JULIUS MISIK 1ST APPLICANT
WYCLIFFE K. MISIK 2ND APPLICANT

AND

ALEXANDER KIPKOSGEI (SUED AS THE ADMINISTRATOR AD LITEM AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE RAPHAEL MALAKWEN KIPKELES ALIAS MALAKWEN KIPKELES) RESPONDENT

RULING

1. *Vide* the Notice of Motion dated 13th October 2023, the Applicants seek orders for leave to file an Appeal out of time against the judgment of Hon. S. M. Mokua (Chief Magistrate) delivered on 4th August 2018, in Kapsabet Chief Magistrate Court Environment and Land Case No. 80 of 2018 and the costs of the application.
2. The application is grounded on grounds that there is a judgment delivered in Kapsabet CM environment and Land Case No. 80/ 2018 on 4/8/2023.
3. That an appeal ought to have been filed under the provisions of Section 79 (i) of the [Civil Procedure Act](#) within 30 days which was not filed and the period had lapsed, as the Advocate on record did not inform the Applicants of the outcome of the judgment promptly and timely, so as to file the Appeal against the judgment.
4. That the intended appeal raises valid and triable issues with a very high chances of success, and the Applicants would suffer great prejudice if this application is not allowed.



5. The application is supported by Supporting Affidavit deponed by Julius Misik and Wycliffe Misik, where they reiterate the grounds and have annexed the impugned judgment, a chief's letter showing list of beneficiaries, draft copy of the Memorandum of Appeal.
6. In opposition to the application, the Respondent filed a Replying Affidavit, Alexander Kipkosgei having been substituted for the original Respondent Cosmas Kiprugut Rono who had been sued as the Administrator of the Estate of Raphel Malakwen Kipkeles.
7. In the response, the Respondent states that an Appeal from the Subordinate Court to High Court ought to be filed under within 30 days as per Section 79 (9) of the Civil Procedure Act.
8. That the Applicant ought to explain the delay in filing the Appeal and the Court must be guiding the principles set out under Section 95 of the Civil Procedure Act.
9. That the reasons outlined in the Applicants affidavit are not sufficient to persuade Court to extend time.
10. That there is a delay of 76 days which was inexcusable and unjustifiable as there was laxity on part of the Applicants.
11. For the above reasons the Respondent urged the Court to dismiss the application.
12. Parties were directed to argue their application orally and it was the Applicant's submissions that; the appeal was not filed timeously, as the was a delay of 49 days which was not inordinate and placed reliance on the decision in the case of Veronicah Gathoni Mwangi v Samuel Ngure & another 2016 eKLR, where it was held a delay of less than 3 months when explained is not inordinate.
13. The Applicant further submits that in granting an extension, the Court ought to look at the period of delay, reason for delay arguability of Appeal, degree of prejudice to be suffered, importance of compliance with time limits and its effects on administration of justice.
14. It is the Applicants submission that the delay was for 49 days, and the reasons for the delay being the mistake of Counsel is a substantial reason as was held in the case of Belinda Murrall and 9 others v Amos Wainana 1978 eKLR. as well as case of Herman Singh and others v Mistry 1971 E. A. 122, where it was held that mistake of Counsel was adequate reasons and 2 months is not inordinate delay.
15. On arguability of the Appeal, the Applicant submits that an arguable appeal need not be that which needs to succeed but one which warrants Court intention. that the effect of public interest is that each party while approaching the seat of justice need to be heard.
16. In her submissions in opposition to the Application, Miss Aketch Learned Counsel placed reliance on the affidavit of Alexander Kipkosgei and submitted that the discretion of the Court to allow and application for leave under Section 95 of the Civil Procedure Act could only be exercised once an Applicant had shown reasonable cause.
17. It was her submission that no reasonable or sufficient cause had been shown in the matter as Mr. Serem Learned Counsel was present when the judgment was been delivered and that the Applicant had a duty to inquire whether judgment had been delivered, hence the Applicant demonstrated laxity and the cause of delay is unsubstantiated and is inexcusable.
18. The Respondent further submits that there is uncertainty on the suit property as regards development or sale of the same which is prejudicial.



19. That there was inordinate delay as the application was filed on 13th October, 2023, 76 days after judgment has been delivered.
20. That the Applicant demonstrated laxity and filed the instant application after one and half months.
21. That there was no notice of change of Advocates after judgment, before the current application was filed which demonstrates that the Applicant is notorious as regards not following procedure.
22. The Respondent lastly submits that the Applicant has not met the threshold to seek leave to file Appeal out of time, that the intended Appeal presents no triable issues and will greatly prejudice and cause substantial loss to the Respondent.
23. In a brief rejoinder Mr. Maritim Learned Counsel for the Applicant, submitted that the change of Advocates was not a requirement in this application and the Appeal.
24. On prejudice he submitted that any prejudice Kiley to be suffered by the Respondents would easily be compensated by way of costs.

Issues for Determination:

25. It is common ground that the Applicants are seeking extension of time to lodge an Appeal.
26. That the judgment they seek to Appeal against was delivered on 13th August 2023 not on 13/8/2018 as stated in prayer 1, and the 30 days Appeal period provided for under Section 79 G of the [Civil Procedure Act](#) thus lapsed on 12th September 2023.
27. This application was filed on 13th October 2023, hence there was a delay of 31 days in filing the Appeal hence the necessity of seeking leave thus this application.
28. It is also common ground that at the date of delivery of judgment, a Mr. Serem for the Defendants, the intended Appellants, now Applicant was recorded as having been present.
29. Having analyzed the application and the affidavits in support and the replying one, taking into account the submissions by the Learned Counsels as well as the authorities cited, the Court frames the following as issues for determination; -
 - i. Whether a notice of change of Advocates was required before filing of this application.
 - ii. Whether the application meets the threshold for extension of time to appeal.
 - iii. Whether the application is merited
 - iv. Who bears the costs of this application?
30. On issue number 1, it is the Respondents submission that [Order 9 Rule 9](#) ought to have been compiled with. The said provision of law proves;

“when there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or notice to act in person shall not be effected without an order of the Court –

 - a. Upon an application with notice to all parties or
 - b. Upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or



c. Party intending to act in person as the case may be.....”

31. None of the Counsels in the matter cited any authorities to support, and or to oppose this point of law raised by the Respondents leaving the task to the Court to find the applicable law.
32. In the cases of *Peter Kamau Ngugi and Another v Grace Akinyi Oloo and Another* 2-21 eKLR, in *Gitau v Githinji and Another* E & L Appeal No. 6/2022, among other decisions of the superior Courts the Court found that lack of compiling with *Order 9 Rule 9* renders an application as having been filed by a stranger and incompetent.
33. The same fate befalls this application and the same having been filed by strangers in the proceedings, it is incompetent and the same is hereby struck out.
34. The Court shall not consider the other issues for determination as this application is struck out with costs to the Respondents.

RULING, DELIVERED AND DATED AT KAPSABET THIS 19TH DAY OF MARCH 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Ms. Aketch holding brief for Mr. Kigen for Respondent
2. Mr., Maritim for the Applicant

