



REPUBLIC OF KENYA



**Wainaina v Equity Agrarian Credit Services Ltd & another (Civil Application  
E017 of 2024) [2024] KECA 1511 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1511 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E017 OF 2024  
FA OCHIENG, JA  
OCTOBER 25, 2024**

**BETWEEN**

**ABDUL NG'ANG'A WAINAINA ..... APPLICANT**

**AND**

**EQUITY AGRARIAN CREDIT SERVICES LTD ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KARIUKI T/A MUIBAU AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(udgment and orders of the Environment and Land Court at Nyahururu  
(Y. M. Angima, J.) delivered on 6th July 2023 in ELC Suit No. 3 of 2018)*

**RULING**

1. The application before me is dated 7<sup>th</sup> February 2024. It is an application seeking leave to file an appeal/ memorandum of appeal out of time.
2. The applicant also asked the court to order that the Notice of Appeal dated 11<sup>th</sup> July 2023 be deemed to be properly on record.
3. The Court was informed that on 6<sup>th</sup> July 2023, the Environment and Land Court Nyahururu delivered its judgment in Civil Suit No. 3 of 2018.
4. The application was supported by the applicant's affidavit which was sworn on 7<sup>th</sup> February 2024. It was the applicant's position that he was completely dissatisfied with the impugned judgment and that he therefore intended to challenge it by an appeal to this Court.
5. Annexed to the affidavit, was the draft memorandum of appeal, which the applicant believes, raises an arguable appeal, with high chances of success. Also annexed to the said affidavit was a Notice of Appeal dated 11<sup>th</sup> July 2023.



6. In the understanding of the applicant, the grant of the orders sought herein, would not prejudice the respondent in any manner. Indeed, the applicant believes that if he is granted leave to appeal, that would promote the realization of justice and fairness.
7. In answer to the application, the 1<sup>st</sup> respondent cast doubt on the authenticity of the Notice of Appeal, on the grounds that the date when it was allegedly lodged in court, had been deliberately rendered illegible.
8. In any event, the said notice of appeal had not been served upon the respondent.
9. Thirdly, the applicant had not demonstrated to this Court that he wrote a letter to the Deputy Registrar of the trial court, bespeaking the typed copy of the proceedings from the said court.
10. Furthermore, the notice of motion makes reference to a Ruling, (which the applicant wishes to appeal against), whilst there was no ruling that was delivered on the material date.
11. The application was canvassed by way of written submissions, coupled with oral highlights of the same.
12. In his written submissions, the applicant submitted that he lodged the notice of appeal, five days from the date when the trial court delivered its judgment. Notwithstanding the timely lodging of the notice of appeal, the registry is said to have taken about a month to assess the payable court fees.
13. It was the said delay, asserted the applicant, that caused the delay in filing the memorandum of appeal. He described the delay as being; "... the misdeeds of the superior court registry".
14. Consequent to the alleged misdeeds, the applicant paid for the notice of appeal on 15<sup>th</sup> August 2023. By the applicant's calculations, his appeal ought to have been filed within 60 days from the date when the notice of appeal was filed in court. Therefore, by his understanding, the applicant had until 17<sup>th</sup> October 2023 to file the memorandum of appeal.
15. However, it appears that another problem arose, as the proceedings were not sent to the applicant until 28<sup>th</sup> November 2023.
16. In the circumstances, the applicant reasoned that the application herein was lodged in court after a delay of 112 days, (or 3 months and 10 days). In his view, the said delay was not inordinate.
17. The second reason which the applicant provided for the delay was that the litigation herein, had left him destitute. Describing himself as being a man who does not have a guaranteed means of generating income, the applicant noted that he had been a borrower from the 1<sup>st</sup> respondent. I understood him to be saying that he did not have sufficient finances which would have made it possible for him to lodge his appeal within the period stipulated by law.
18. In the considered opinion of the applicant, his appeal was arguable. His said opinion was informed by the fact that the auction of his land was a total sham, as the land was gifted to the son-in-law of the directors of the 1<sup>st</sup> respondent. In effect, the applicant's position was that there had been no public auction.
19. Furthermore, the applicant stated that there was no evidence to prove the specific amount of money which he owed.
20. Finally, the applicant submitted that if the relief sought was granted, the respondent would not suffer any prejudice. In that regard, the applicant pointed out that the title of the suit property had already been transferred to the son-in-law of the directors of the 1<sup>st</sup> respondent.



21. In the said circumstances, the applicant urged the Court to exercise its discretion in his favour, so that he could have a chance to fight for the land which had been his home since 1965.
22. He pleaded with the court that it should not condemn him for being destitute, which was the reason for his failure to give instructions promptly.
23. In determining the application, the court is enjoined to determine whether or not the delay was inordinate. The said determination must be made whilst considering the explanations given by the applicant, to enable the court to ascertain if such explanation was plausible and reasonable, in the circumstances of the case.
24. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
25. The court must also determine whether or not the intended appeal was arguable. It is well settled that an appeal is deemed to be arguable if it gives rise to even one bona fide issue, that the appellate court should allow the parties to canvass in the substantive appeal.
26. As was held in the case of *Mbarak Said Ali & Another vs Sultan Palace Development Limited, Mombasa Civil Application No. E071 of 2020*;

“An arguable appeal is not one which must necessarily succeed; but one which ought to be argued fully before the court: one which is not frivolous.”
27. The discretion of the court, when it is called upon to determine whether or not to grant leave to appeal out of time, is unfettered. The court’s main concern is to do justice to the parties, by exercising its discretion judiciously.
28. In the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR, this Court held that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”
29. I have given due consideration to the application, together with the submissions made by the parties.
30. First, I note that the notice of appeal dated 11<sup>th</sup> July 2023 indicated that the applicant was dissatisfied with the Ruling delivered on 6<sup>th</sup> July 2023. On the other hand, the draft memorandum of appeal relates to the Judgment dated 6<sup>th</sup> July 2023.
31. From the record of the proceedings which the applicant supplied to this Court, I find that there was no Ruling delivered on 6<sup>th</sup> July 2023. Consequently, I find that the said notice of appeal cannot be deemed to be properly on record, as it purports to make reference to a non-existent Ruling.



- 32. As regards the delay, I note that whereas the judgment was delivered on 6<sup>th</sup> July 2023, it was not until 7<sup>th</sup> February 2024 that the applicant filed the application herein. The application was filed some 7 months after the judgment was delivered.
- 33. I have already held that the notice of motion exhibited herein, had no nexus with the judgment, as it made reference to a non- existent ruling. Therefore, the alleged misdeeds of the registry could not be construed as a plausible explanation for the delay.
- 34. In any event, the applicant purported to file a notice of appeal; albeit in regard to a ruling. In effect, the applicant had sufficient funds to file a notice of appeal. There is absolutely no merit in the assertion that the applicant was so impecunious, that he was incapable of raising funds to pay court fees, on the filing of the notice of appeal.
- 35. The applicant has remained silent in the face of the respondent’s contention that he served neither the notice of appeal nor the copy of the letter bespeaking the proceedings. In the event, the respondent was never given any indication that the applicant was giving consideration to lodging an appeal against the judgment.
- 36. Accordingly, when the applicant first gives a hint of his desire to appeal, after the lapse of seven months, I find that the applicant’s said action would be prejudicial to the respondent. I so hold because a decree-holder is entitled to presume that the decree would not be challenged at all, when the unsuccessful litigant, (against whom the decree was issued), had not taken any steps for seven months, from the date of the judgment.
- 37. During that period, the respondent began the process of execution, as pointed out by the applicant, in paragraph 6 of his supporting affidavit: thus, signaling the respondent’s presumption regarding the finality of the judgment.
- 38. On the viability of the intended appeal, I find that the same is arguable. In other words, the matters set out in the draft memorandum of appeal were not frivolous.
- 39. Nonetheless, as the applicant has failed to meet the other ingredients for the grant of leave to appeal out of time, I hereby dismiss the application dated 7<sup>th</sup> February 2024.
- 40. On the question of costs, I find no reason to depart from the general principle, that the same be awarded to the successful party.
- 41. Accordingly, the applicant will pay the 1<sup>st</sup> respondent, the costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

