



Arthur v Awale & another (Environment & Land Miscellaneous Case E002 of 2023) [2024] KEELC 1207 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E002 OF 2023**

AY KOROSS, J

MARCH 7, 2024

BETWEEN

GEORGE ODHIAMBO ARTHUR APPLICANT

AND

FREDRICK MARIWA 1ST RESPONDENT

CORNELIA OKIRI AWALE 2ND RESPONDENT

RULING

Applicant's case

1. In the notice of motion dated 14/08/2023 that is the subject of this ruling, the applicant seeks the following reliefs from this court: -
 - a. That the honourable court do grant leave for counsel to come on record and for the notice of appointment already filed be considered as duly filed.
 - b. That the honourable court do grant leave for the applicant to appeal out of time and/enlarge time for filing an appeal as against the decision of Hon. J.P. Nandi in Bondo SPM ELC No. E014 of 2020 delivered on 5/07/2023.
 - c. That the draft Memorandum of Appeal annexed hereto be deemed as properly filed and served.
 - d. Costs of the motion be provided for.
2. The motion is predicated on grounds particularised on its face and on the annexed affidavit deposited on 14/08/2023 by the applicant George Odhiambo Arthur.
3. In brief, it is his position the learned trial magistrate reserved the subject matter for judgment on 30/06/2023 however, due to official engagements, a notice was issued to the effect that all decisions that were to be rendered on that date would be rendered on 15/09/2023.



4. Nevertheless, he later learnt the judgment was rendered either on 30/06/2023 or 5/07/2023 and he immediately instructed counsel to file the instant motion since his previous advocate was not responding to his communications and time for purposes of filing an appeal as at that time, had lapsed. According to him, the appeal is arguable and he would suffer irreparably.

Respondents' case

5. By the firm of Ms. MOA Advocates who are on record for the respondents, the 2nd respondent filed a replying affidavit deposed on 2/10/2023 and in summary, he admitted the applicant's contestation that indeed judgment had earlier been reserved by the trial magistrate for 30/06/2023 but due to the court's official engagements, it could not be rendered but eventually it was delivered on 5/07/2023. According to him, the 1st respondent died on 14/08/2023.

Applicant's written submissions

6. As directed by the court, the parties canvassed the motion by way of rival written submissions. The firm of M/s. Jesse David, Ochanyo & Kurgat Advocates LLP which is on record for the applicant filed written submissions dated 30/08/2023. In them, counsel identifies a single issue for determination which is whether the motion is merited.
7. In rehashing the averments in the applicant's grounds and affidavit, counsel submits this court has jurisdiction to grant the orders sought and relies on several authorities which unfortunately he did not avail to this court. He seeks for the respondents to bear the costs of the motion.

Respondents' submissions

8. The respondents' counsel filed written submissions dated 13/11/2023 and submits orders could not be issued against the 1st respondent because she is deceased and the applicant is not deserving to be granted the orders sought because she has delayed for a period of close to 38 days.
9. Further, counsel submits the applicant has not tendered sufficient reasons for the delay and the appeal did not have chances of success. Counsel urges this court to dismiss the motion. Despite relying on several authorities and analogous to the applicant, the respondent did not tender these authorities and this court will not consider them.

Issues for determination

10. I have carefully considered the motion, its grounds, affidavits, parties' respective submissions, provisions of law relied upon and the issues arising for determination are;
 - a. Whether leave is required for the applicant's counsel to come on record.
 - b. Whether the applicant should be granted leave to appeal out of time.
 - c. What orders should this court issue including an order as to costs.
11. However, before I proceed further I must mention that from the record it is evident the 1st respondent is deceased having died on 14/08/2023. As it is, the appeal against her has not abated and if at all the applicant is granted leave to appeal, he will be at liberty to substitute her within the appropriate legal framework.



12. In addition, I have noted the 1st respondent's counsel filed a notice of appointment of advocates on 2/10/2023 and it is perplexing as to who instructed him to do so at that time, the 1st respondent was deceased.
13. This court has observed the 2nd respondent meandered and addressed this court on the merits of the appeal however, since this is a preliminary ruling and so as not to compromise the appeal, this court will disregard this line of argument.

Analysis and determination

14. The legal and jurisprudential frameworks on the issues earlier identified as falling for determination together with their facts will sequentially be analysed: -

a. Whether leave was required for the applicant's counsel to come on record.

15. Order 9 rule 9 and 10 of the *Civil Procedure Rules* provides that post judgment, any change of advocate has to be carried out with leave of the court.
16. In my considered view and as has been held in various court decisions, the intent of Order 9 Rule 9 and 10 of the *Civil Procedure Rules* is to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court to hear and determine the matter, I would not have hesitated but to uphold that once judgement has been rendered, leave has to be sought from the trial court.
17. However, the scenario is different in the instant case, this court is sitting as an appellate court. In my view, Order 9 Rule 9 and 10 of the *Civil Procedure Rules* does not apply in instances of an appeal because the then applicant's advocate's instructions in a lower court were exhausted at the conclusion of the suit. At an appellate stage, the applicant had a right to representation of his choice. I am persuaded by the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR which held thus;

“Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

18. The firm of M/s. Jesse David, Ochanyo & Kurgat Advocates are properly on record and they did not need to seek leave at an appellate stage. I find this prayer by the applicant is misplaced.

b. Whether the applicant should be granted leave to appeal out of time.

19. The motion that is before me invoked amongst others Section 79G of the *Civil Procedure Act* which provides as follows: -

“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.”



20. This provision of law together with the provisions of Section 95 of the *Civil Procedure Act*, Section 16A (2) of the *Environment and Land Court Act* and Order 50 Rule 6 of the *Civil Procedure Rules* empower this court to entertain a motion for leave to appeal out of time.
21. From settled jurisprudence, the grant of leave to appeal out of time is discretionary which should be exercised in a judicious manner. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court of Kenya cited with approval the Court of Appeal case of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR which laid down the principles as follows;
- “The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
22. Having outlined the law and jurisprudence on the principles for granting leave to appeal out of time, I will now turn to the facts of this case. It is common ground the decision of the trial court was to be rendered on 30/06/2023 but was eventually rendered on 5/07/2023.
23. It is unclear if notice was issued to the parties since the judgment was rendered in the absence of both parties. It appears both parties were not aware of this new date and on that basis alone, I am satisfied the applicant has explicated the reasons for the delay.
24. As to the issue of delay, judgment of the trial court was rendered on 5/07/2023 whilst the instant motion was filed on 15/08/2023. Taking into consideration the 30-day period for purposes of lodging an appeal, the applicant was late by a period of slightly over a week. In my considered view, this period is not inordinate.
25. Having scrutinized the annexed memorandum of appeal whereby the applicant is aggrieved by the decision of the trial court in its assessment of compensation and interest, It is unquestionable these issues raise arguable grounds of appeal.
26. Utmost, I find the notice of motion dated 14/08/2023 merited and issue the following orders:
- a. Leave to file an appeal out of time is hereby granted and the appeal shall be filed and served within 14 days from the date of this ruling.
 - b. Failure to comply with order (a) above shall lead to the automatic vacation of the order.
 - c. Costs of the motion shall abide the outcome of the appeal.
 - d. This file is hereby marked as closed.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF MARCH 2024.

HON. A. Y. KOROSS

JUDGE

07/3/2024



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Mr. Ochanyo for the applicant.

Miss Nyakwana h/b for Mr. Mwamu for the respondents

Court assistant: Ishmael Orwa

