



Makathimo v M’mbijiwe (Being the Legal Representative of the Deceased) (Civil Application E020 of 2023) [2023] KECA 1643 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KECA 1643 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E020 OF 2023
AO MUCHELULE, JA
MAY 31, 2023**

BETWEEN

LUKE MURUINGI MAKATHIMO APPLICANT

AND

EUNICE KARIMI M’MBIJIWE (BEING THE LEGAL REPRESENTATIVE OF THE DECEASED) RESPONDENT

(Being an application for extension of time to file and serve record of appeal out of time from the judgment of the Environment and Land Court at Meru (C.K Nzili, J.) dated 30th March 2022) In ELCA NO. E012 OF 2020)

RULING

1. The deceased Julia Kainda M’Mbiijiwe was the owner of LR No. Kibirichia/Kibirichia/1839. She entered into agreement to sell one acre of the land to the applicant Luke Muriungi Makathimo for Kshs.1,000,000/= . Before the Magistrate’s Court at Meru in CM ELC No. 79 of 2019 the deceased alleged breach of contract by the applicant, whereas the applicant sought order of specific performance and liquidated and general damages of Kshs.700,000/=. The deceased lost at the Magistrate’s Court and appealed to the Environmental and Land Court at Meru. The appeal was heard by C.K. Nzili, J. who determined that it was merited. The learned Judge found that both parties had breached the agreement, but went on to allow the applicant’s claim for specific performance and also allowed the deceased’s plea for declaration that the respondent had breached part of the sale agreement by erecting permanent structures on the land before the completion date, and awarded half of the liquidated damages as per the agreement. The judgment was delivered on 30th March 2022.
2. The applicant was aggrieved by the decision and sought to appeal, but blamed her advocates for frustrating her efforts. In the present present application under Rule 4 of the Court of Appeal Rules, 2022, Order 50 Rule 4 of the Civil Procedure Rules and Article 159(2) of the Constitution the applicant



is seeking to be allowed the extension of time to file and serve the record of appeal to challenge the judgment by the superior court.

3. In the grounds and supporting affidavit to the application, he stated that immediately upon the delivery of the judgment he instructed his advocate then on record to appeal. The said advocate filed a notice of appeal and gave him a copy “LMMI” that was dated 5th May 2022. He visited the advocate’s office in June 2022 to follow but was told the advocate was on maternity leave. He visited the office in September and October 2022 and the advocate’s staff assured him that everything was fine and that the appeal had been lodged. He was subsequently served with a notice of taxation dated 14th February 2023 (“LMM2”). That was when he sensed that all was not well. On the following day he went to the advocate’s office. The advocate had not resumed. He instructed his present advocate who informed him that, although his previous advocates had filed a notice of appeal she had not lodged the appeal and neither had she sought or obtained a certified copy of the proceedings of the superior court. This was when he filed his present application. He deponed that he had an arguable appeal with high chances of success, and that he was likely to suffer prejudice if he was not successful in the application.
4. The application was served but did not elicit any response from the respondent. The applicant’s counsel filed submissions in support of the application.
5. Upon the deceased’s death her case was taken over by Eunice Karimi M’Mbijjiwe who became the legal representative of her estate. She is the respondent.
6. Under Rule 77(2) of the Court of Appeal Rules, 2022, when the applicant was aggrieved by the judgment of the Superior Court that was delivered on 30th March 2022, he was supposed to file a notice of appeal within 14 days. The notice that his then advocate served him with was dated 5th May 2022. If that is taken to be the date that the notice was lodged (because the court stamp is not clear) then the notice was filed over a month beyond the statutory allowed time. Under Rule 84(1), the appeal was required to be lodged within 60 days of the filing of the notice of appeal. The applicant has filed this application believing that his advocates filed a valid notice of appeal, which was not the case.
7. There being no valid notice of appeal, I find that the application for extension of time to lodge and serve a record of appeal is incompetent and misconceived. It is dismissed.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2023

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

