



**Kagiri v Wambugu (Suing as the legal representative of the estate of Hannah Wanjiru Wangai (Deceased) (Civil Appeal (Application) 333 of 2019) [2023] KECA 508 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 508 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL (APPLICATION) 333 OF 2019  
FA OCHIENG, JA  
MAY 12, 2023**

**BETWEEN**

**SIMON KAGIRI ..... APPELLANT**

**AND**

**MARGARET WANGUI WAMBUGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HANNAH WANJIRU WANGAI (DECEASED) ..... RESPONDENT**

*(An application seeking for the memorandum of appeal and record of appeal filed and served on 19th December, 2019 be admitted out of time from the ruling of the Environment and Land Court at Nakuru delivered on 28th February, 2019 in ELC Case No. 336 of 2015)*

**RULING**

1. The applicant, Simon Kagiri, is asking the Court to order that the Memorandum of Appeal and the Record of Appeal, dated 13<sup>th</sup> December 2019, be admitted out of time.
2. In the alternative, he asks this Court to extend the time within which the Memorandum of Appeal and the Record of Appeal was to be filed and served.
3. By way of background to the application, the applicant was desirous of canvassing an appeal to challenge the decision which the learned Judge of the Environment and Land Court delivered on 28<sup>th</sup> February 2019.
4. As a first step in that direction, the applicant filed a Notice of Appeal dated 13<sup>th</sup> March 2019.
5. Simultaneously with the notice of appeal, the applicant filed a letter requesting the Deputy Registrar to supply him with certified copies of the proceedings. The certified proceedings were supplied to the applicant on 30<sup>th</sup> August 2019, and the Certificate of Delay was supplied on 2<sup>nd</sup> September, 2019.



6. Having obtained the proceedings, the applicant filed the Memorandum of Appeal on 19<sup>th</sup> December 2019. The Record of Appeal was also filed on 19<sup>th</sup> December 2019.
7. The respondent's position was that the applicant cannot rely upon his letter dated 13<sup>th</sup> March 2019, (through which he asked the Deputy Registrar to supply certified proceedings). The respondent pointed out that an appellant is only entitled to rely upon the letter bespeaking the proceedings, if the said letter had been copied to him.
8. In the case of *Samuel Kuria v Mbugua Kimani*, Civil Appeal No. 151 of 1996, R. S. C. Omolo JA held that the failure by the applicant, to copy the letter bespeaking proceedings, to the respondent, deprived the learned Judge of his unfettered discretion to enlarge time.
9. In practical terms, the letter written by the applicant is copied to the respondent. Rule 84(1) stipulates that an appeal shall be instituted within 60 days after the date when the notice of appeal is lodged at the appropriate registry.
10. The proviso to that rule is in the following terms;

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the applicant of such copy.”

Rule 84(2) stipulates thus:

“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.”

11. It is my understanding that whereas the appellant would normally copy the letter to the respondent, sub-rule (2) specifically makes reference to the requirement that the application (in the form of the letter) be served on the respondent. In this instance the application was not copied to the respondent.
12. Therefore, pursuant to the express provisions of Rule 84(2), the applicant was not entitled to rely on the proviso to sub-rule (1).
13. On the one hand, the delay in lodging the appeal has been explained satisfactorily; but on the other hand, the applicant failed to explain why he had not copied to the respondent, the application bespeaking the proceedings from the trial court.
14. Had the application been copied to the respondent, it would have granted to the applicant, the right to rely upon the certificate of delay.
15. But because it had not been copied to the respondent, the certificate of delay cannot come to the aid of the applicant. Instead, the applicant is obliged to request the court to exercise its discretion, to extend the time for lodging the appeal.
16. It is well settled that the discretion of the court is unfettered, in that respect.



17. Pursuant to rule 1(2) of the *Court of Appeal Rules*;

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

18. In effect, the court’s inherent power mandates the Court to make such orders as may be necessary for putting right that which would otherwise be an injustice.

19. In my considered opinion, it would be an injustice to shut out the applicant from pursuing his constitutional right to appeal, simply because he had failed to copy to the respondent, the application bespeaking the proceedings from the trial court.

20. The memorandum of appeal has already been lodged in court. It was lodged back in 2019, and the respondent was duly served. As she would have every opportunity to respond to the said appeal, I find that the respondent would not be prejudiced if the appeal was admitted out of time.

21. Accordingly, I allow the notice of motion dated 16<sup>th</sup> January 2020, and order that the Memorandum of Appeal, as well as the Record of Appeal which was served on 19<sup>th</sup> December 2019 be deemed to have been filed and served within time, as prayed.

22. The costs of the application shall be in the cause, in the substantive appeal.

**DATED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

