



REPUBLIC OF KENYA



**Embu Mission Church v Ndungu & 4 others (Civil Appeal
E027 of 2023) [2023] KECA 1639 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KECA 1639 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E027 OF 2023
AO MUCHELULE, JA
JUNE 21, 2023**

BETWEEN

EMBU MISSION CHURCH APPLICANT

AND

SALAFIN J. NDUNGU 1ST RESPONDENT

JOHNSON NJERU 2ND RESPONDENT

JOSPHAT M. NGUNGURU 3RD RESPONDENT

DICKSON WACHIRA 4TH RESPONDENT

VAJESLAUS M. JORAM 5TH RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time against the judgment of the Environment and Land Court of Kenya at Kerugoya (A.K. Kaniaru, J) dated 15th November 2022 in ELC No. 2 of 2020)

RULING

1. The applicant, Embu Mission Church, appealed to the Environment and Land Court at Embu against the decision of the Business Rent Tribunal in Embu Tribunal Case No. 19 of 2019 that was rendered in favour of the respondents Johnson Njeru, Salafin J. Nduru J., Josphat M. Ngunguru, Dickson Wachira and Vajeslaus M. Joram who were its landlord. It had received a notice seeking to alter the terms of the tenancy by proposing rental increase from Kshs.20,000/= to Kshs.40,000/=. In objecting to the rental increment, the applicant filed a reference to the Tribunal. The Tribunal heard the parties and ordered the rental increment. The learned A.K. Kaniaru upheld the Tribunal's decision in the judgment rendered on 15th November 2022.
2. The present notice of motion dated 16th March 2023 by the applicant sought the orders that it be granted leave to appeal the judgement out of time; and, in the meantime, there be an injunction



restraining the respondents from harassing, evicting, proclaiming, attaching, selling and/or in any way interfering with its quiet possession of the property which is situated in Embu Town. The applicant uses the property as a church. In the grounds and the supporting affidavit sworn by the applicant's advocate Julius Ndichu, it was acknowledged that following the judgment, no notice of appeal had been filed. The reason was that the applicant's previous advocate was not in court when the judgment was delivered. It was only in January 2023 that the applicant became aware of the judgment. By then the time for filing the notice had long passed. The judgment aggrieved the applicant. It issued a notice of appeal dated 15th March 2023, out of time. By the time of the filing of the application the respondent had begun execution by issuing a proclamation through an auctioneer. The applicant's case was that it had an arguable appeal, and that it would suffer irreparably if the application is not allowed; that the intended appeal would be rendered nugatory.

3. The applicant's Draft of Memorandum of Appeal had the following grounds:-

- “ 1) That the learned appellate court judge erred in law in upholding the tribunal's decision despite its apparent mistake of law and fact.
2. That the learned trial Judge erred in law in upholding the decision of the honorable tribunal to increase rent by 100%
3. That the learned appellate judge erred in law in upholding the tribunals method of assessing rent payable.
4. That the learned appellate court judge erred in law in failing to re-evaluate the evidence on record to arrive at his own independent judgment.”

4. The application was served on the respondents who did not file any response.

5. This application was brought under section 7 of the *Appellate Jurisdiction Act*, Rule 4 of the *Court of Appeal Rules*, 2022 and Order 40 Rules 1 to 9 of the Civil Procedure Rules. It is important to point out that a prayer for injunction pending appeal would be a Rule 5(2)(b) application under the Court of Appeal Rules, and the jurisdiction to allow or not allow would belong to a full bench of three judges. The Court would not have the jurisdiction to grant stay or injunction in the absence of a notice of appeal.

6. An application under Rule 4 of the Court of Appeal Rules for extension of time to appeal a decision of the superior court is a prayer to a single judge of this Court to exercise a judicial discretion to grant the relief of extension of time. The Rule provides as follows:-

“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

7. The discretion is wide and unfettered, the only interest being to do justice to the parties while recognising that the applicant would wish to exercise the right to appeal in circumstances where the respondent has a decision that he is entitled to execute, and therefore he should not be unduly prejudiced. The court should also bear in mind that the administration of justice is time bound, and therefore parties must endeavor to stick to timelines that have been set. The applicant should not have taken an unduly long time to seek to appeal, and any such delay has to be reasonably explained. The intended appeal has to be demonstrated to have possible chances of success, as a frivolous intended



appeal would not attract extension of time. These principles have been set up in many decisions by our Courts, and the decisions include Leo Sila Mutiso -v- Rose Hellen Wangari Mwangi [1999]2 EA 231, Andrew Kiplagat Chemarigo -v- Paul Kipkor Kibet [2018]eKLR, Nicholas Kiptoo Arap Korir Salat -v- IEBC and 7 Others [2015]eKLR and Paul Wanjobi Mathenge -v- Dancan Gichane Mathege [2013]eKLR.

8. This Court in Rajesh Rughani -v- Fifty Investments Ltd & Another [2016]eKLR stated as follows:-

“In Habo Agencies Limited -v- Wilfred Odhiambo Musingo [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi -v- Kariuki (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.”

9. I have anxiously considered the applicant’s application. It was deponed that the delay was excusable and inadvertent given the conduct of its former advocate, and that no prejudice would befall the respondents.

10. It is not in dispute that the delay that the Court is dealing with is about 4 months, when counted from the end of the 14 days from the date that the impugned judgment was delivered to the date of the application. This is because a notice of appeal was required to be lodged within 14 days from the date of the judgment. This is the requirement of Rule 77(2) of the Rules. By dint of Rule 84(1) of the Rules, the record of appeal ought to be lodged within 60 days from the date of the filing of the notice of appeal. Granted that no specific time of delay can be said to be incurable, what the applicant was required to do was to explain why it was not able to act within the law. It was explained that the delay was occasioned when the applicant’s former counsel did not attend court for the delivery of the judgment and therefore the applicant did not become aware of the judgment until sometimes in January 2023. It was not explained whether at the conclusion of the hearing a judgment date was set, and whether the applicant was present where the hearing was concluded. If the applicant was not present, was it informed by the advocate that judgment would be delivered on 15th November 2022, and what follow-up was done following the date of judgment?

11. If the delay between 15th November 2022 and sometimes in January 2023 has been explained, there was no explanation why it took another two months before the application was filed, if indeed the applicant was keen to appeal the judgment! I say this because every delay, however short, has to be reasonably explained. In all, therefore the delay in bringing this application has not been satisfactorily explained.

12. I have looked at the supporting affidavit and the draft Memorandum of Appeal. I do not find that there has been clear demonstration that the intended appeal has possible chances of success.

13. The consequent is that the application has no merits, and it is dismissed.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE 2023.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

A. O. MUCHELULE JUDGE OF APPEAL

