



Boro v Githunguri & 3 others (Suing as Administrators of the Estate of Mugacha Thaara Deceased) (Civil Appeal (Application) E209 of 2022) [2023] KECA 889 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KECA 889 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E209 OF 2022
HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA
JULY 24, 2023**

BETWEEN

EVANS KAGECHE BORO APPLICANT

AND

STANLEY M. GITHUNGURI 1ST RESPONDENT

PRISCILLA NGARURU MUGACHA 2ND RESPONDENT

ALLAN GICHINGA MUGACHA 3RD RESPONDENT

WANGUI MUGACHA 4TH RESPONDENT

**SUING AS ADMINISTRATORS OF THE ESTATE OF MUGACHA THAARA
DECEASED**

(Being an application for leave to file and serve notice of appeal from the Judgment of the Environment and Land Court at Nairobi (Angote, J) delivered on 28th April 2022 in Nairobi ELC No. 255 of 2022)

RULING

1. Evans Kageche Boro the applicant herein has moved this Court under Articles 48, 51, and 159(2)(d) of the Constitution of Kenya; Section 3A, 3B of the Appellate Jurisdiction Act and Rules 4, 5(2)(b), 42, 82 and 90 of the Court of Appeal Rules. The main orders sought are as follows:
 - i. Spent
 - ii. That leave be granted to the applicant to file and serve a notice of appeal and appeal out of time.



- iii. This honourable court be pleased to grant any other order suitable in the circumstances.
 - iv. That the cost of this application be in the cause.
2. According to the grounds stated on the face of the motion and an affidavit sworn by the applicant in support of the motion, it is contended that although the judgment was delivered on April 28, 2022, the applicant's advocate was not present when the judgment was delivered and only became aware of the judgment on June 3, 2022, when the advocates for the respondents forwarded a draft decree for approval. The applicant, therefore, seeks leave of the Court to file a notice of appeal and the appeal out of time. He has annexed a draft memorandum of appeal raising three grounds and states that the respondent will not suffer any prejudice if the orders sought are granted.
3. The application was opposed through a replying affidavit sworn by Allan Gichinga Mugacha (Allan), who deposes that the applicant's advocates were fully aware of the date of the judgment as they had been served with a judgment notice on February 22, 2022 by the respondents' advocate, which notice was duly acknowledged by the applicant's advocate. Allan deposes that the applicant's advocate failed to attend court and cannot claim that they were not aware of the judgment. He contends that the application before the Court is simply an afterthought.
4. We have carefully considered the motion before us. We note that going by the provisions under which the motion was brought, that is, Articles 48, 51, and 159(2)(d) of the Constitution of Kenya; Section 3A, 3B of the Appellate Jurisdiction Act and Rules 4, 5(2)(b), 42, 82 and 90 of the Court of Appeal Rules, this is an omnibus application as the provisions cited all deal with different types of applications.
5. The Court of Appeal Rules cited, for instance, Rule 4, deals with applications for extension of time, which applications under Rule 55(1) are heard by a single Judge. Rule 5(2)(b) provides for an application for stay of execution which, under Rule 55(2)(b) is heard by a full bench. Rule 82 provides for separate notices of appeal from the same decision, and Rule 90 provides for the filing of a supplementary record of appeal where documents are omitted from the record of appeal. It is improper to bring applications under these Rules in one omnibus application as they not only deal with different situations, but the jurisdiction to hear matters under the Rules is also different. We agree with the graphic description given by *Emukule J in Rajput vs Barclays Bank of Kenya Ltd & 3 Others [2004] 2 KLR 393*, in relation to such an omnibus application that:

' It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.'
6. The applicant appears to have realized this and, therefore, in the actual orders sought, the focus is basically on one prayer for leave to file and serve notice of appeal and appeal out of time. This prayer is rather confused, because the applicant is applying for leave to file the notice of appeal and extension of the time provided under the Rules for filing the notice. Jurisdiction in regard to the former is vested upon the full bench of the Court under Rule 55(2)(a) while as already stated jurisdiction in regard to the latter is vested upon a single judge under Rule 4 as read with Rule 55(1) of the Court of Appeal



Rules. It is clear that due to the manner in which the application has been brought, it has ended up before a full bench when a prayer under Rule 4 ought to have been heard by a single judge.

7. As was stated by the Supreme Court in *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015]eKLR*:

' A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make 'omnibus' applications, with ambiguous prayers, hoping that the Court will grant at least some'

8. Be that as it may, an application under Rule 4 of the Court of Appeal Rules, requires that the applicant lays the basis for the exercise of the Court's discretion by giving a satisfactory explanation for the delay, and demonstrating that the delay is not inordinate (See *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others [2014] eKLR*).

9. The applicant in the grounds stated on the face of the motion, has indicated that no notice of appeal was filed because his advocate was not aware of the judgment as he was not present when it was delivered, and that he only came to know of the judgment on June 3, 2022 when a draft decree was forwarded to him for approval. There is no affidavit from the applicant's advocate swearing to this fact, which should be especially within the knowledge of the applicant's advocate. Moreover, there is no response to the respondents' replying affidavit wherein it is indicated that the applicant's advocate was aware of the date for delivery of the judgment because he was served with a judgment notice by the respondents' advocate informing him that the matter had been

fixed for the delivery of the judgment on April 28, 2022.

10. In the circumstances, we are not persuaded that the applicant has given a good reason for the failure to file the notice of appeal, as it is evident that the advocate was aware of the date for the delivery of the judgment. Having failed to attend court, it was his responsibility to find out the outcome of the judgment and take appropriate action. The delay of about 51 days is inordinate and not explained.

11. For these reasons, we find that the applicant's motion is not only defective but also lacks merit as there is no basis for this Court to exercise its discretion in his favour. The motion is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ABIDA ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

