



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Muritu v Kigwe Limited & 3 others (Civil Application  
E466 of 2021) [2023] KECA 886 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 886 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E466 OF 2021  
GWN MACHARIA, JA  
JULY 24, 2023**

**BETWEEN**

**SUSAN WANJIRU MURITU ..... APPLICANT**

**AND**

**KIGWE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**VIOLET WACUKA NGUGI ..... 2<sup>ND</sup> RESPONDENT**

**MHASIBU HOUSING LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for amendment of Notice of Appeal and stay of execution and proceedings pending the hearing and determination of an intended appeal from the Judgment and Decree of the High Court at Nairobi (L. Komingoi, J.) delivered on 22<sup>nd</sup> July 2021 in ELC No. 454 of 2013))*

**RULING**

1. Before me is a notice of motion dated December 14, 2021 brought pursuant to rule 5(2)(b), 35, 44 and 77 of this [Court's Rules, 2010](#). The applicant seeks the following main orders; -
  - a. That pending the hearing and determination of the intended appeal, this honorable court be pleased to grant a stay of further proceedings and execution of the judgment and decree of L. Komingoi delivered on July 22, 2021.
  - b. That upon the above prayer being granted, this honorable court be pleased to extend the time as regards to late service of the amended notice of appeal as well as the letter bespeaking the proceedings.



- c. That the costs of this application be in the cause.
2. The application is supported by the grounds on the face of it and the affidavit sworn by the applicant, who avers that she is the widow and personal representative of the estate of her late husband, John Muritu Kigwe who was an interested party in the suit in the Land and Environment Court (ELC); and that upon judgment being delivered, and being aggrieved, her advocate filed a notice of appeal, but inadvertently omitted to serve it on their counter parts until November 23, 2021. It is further stated that there is an error on the face of the date of the judgment, being that it was inadvertently dated August 22, 2021 instead of July 22, 2021. She thus seeks leave to amend it to reflect the proper date, and for an order extending time of the letter requesting for proceedings.
  3. The applicant filed submissions dated July 21, 2021, submitting that rule 4 of the *Court of Appeal Rules* gives this court a wide discretion to extend time for doing anything required of a party in law. Furthermore, the mistake of indicating the wrong date of the judgement was neither deliberate nor intentional. Reliance was placed on the case of *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR in this regard. Further that, it was not until serving the notice of appeal on November 23, 2021 that it was brought to the applicant’s counsel attention that the same had an error. Finally, the applicant posits that the respondent stands to suffer no harm whatsoever if the application is allowed.
  4. I have considered the application, the submissions and the law, upon which I have deduced that the issue before me for determination is whether the orders sought are merited. Firstly, it is notable that this court, sitting as single judge cannot issue orders under rule 5(2)(b) of this *Court’s Rules*; more specifically that I cannot determine whether or not to stay proceedings. I lack jurisdiction, sitting as a single judge in that regard. I will therefore only address the issue over which I have jurisdiction to determine.
  5. The applicant placed reliance on rule 44, which is now rule 46 under the current *Court’s Rules, 2022*, in seeking extension of time to serve the amended notice of motion. It provides that:
    46.
      - (1) Whenever a formal application is made to the court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and—
        - a. if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or
        - b. if it is not practicable to lodge the document with the Registrar, handed to the court and to the respondent at the time of the hearing.
  6. It is trite that the power reserved for the court to amend any document is a discretionary power. However, like all judicial discretion, it must be exercised judiciously and upon reason, rather than arbitrarily, on humour, or fantasy.
  7. In *Attorney General & another v Coalition for Reform and Democracy (CORD) & 7 others* [2015] eKLR this court stated:
 

“The record shows that the errors intended to be corrected are careless ones but which do not cause any prejudice to be occasioned to the respondents. All parties are agreed as to when the impugned ruling and order were made and clearly addressing the notice of appeal to the



Supreme Court is an error that is correctable by this Court even under its inherent powers. The objective of the rules of the court and more importantly sections 3A and 3B of the [Appellate Jurisdiction Act](#) is to facilitate the just and fast disposal of cases and justice devoid of undue regard to technicalities.

8. It is this court's considered view that the leave sought would serve the sole purpose of allowing access to the judicial process, more so facilitate access to justice, and in any case,

**No Prejudice Or Inconvenience Would Be Occasioned To Any Party.**

9. The applicant also seeks extension of time to file the letter requesting for typed proceedings. She admits that in the first instance, the letter is dated July 27, 2021 but was served on November 23, 2021. Rule 79(1) of the [Court of Appeal Rules](#) provides that the notice of appeal ought to be served within 7 days after being lodged. Further, rule 84 provides 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 appellant of such copy. However, 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.
10. The letter was served four months late and extending this time will inadvertently affect the computation of the time within which to file an appeal. Nevertheless, it is clear that the applicant has not been indolent. Having filed this application shortly after serving the notice of appeal and the error being brought to her attention, is a testament that she is eager to have the appeal heard and determined.
11. For the foregoing reasons, I am inclined to allow the application in the following terms;
  - a. That leave is hereby granted to the applicant to amend the notice of appeal.
  - b. The time for the applicant to file and serve the amended notice of appeal is hereby extended. The same shall be filed within five (5) of this ruling.
  - c. The applicant shall within seven (7) days thereafter serve both the amended notice of appeal and the letter requesting for certified proceedings upon the respondent.
  - d. The costs of the application shall be in the intended appeal.

**Dated and Delivered at Nairobi this 24<sup>th</sup> Day of July, 2023.**

**G.W NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

