



**Githinji v Kigotho & another (Civil Application E091 of 2021)
[2022] KECA 968 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 968 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E091 OF 2021
KI LAIBUTA, JA
AUGUST 26, 2022**

BETWEEN

JANE NJOKI GITHINJI APPLICANT

AND

JOSEPH GATHUO KIGOTHO 1ST RESPONDENT

JOSEPHAT WAITHAKA KIGOTHO 2ND RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal and Record of Appeal from the Judgment of the Environment and Land Court of Kenya at Nyeri (Antony Obwayo, J.) delivered on 2nd November 2016 in Environment and Land Court Case No. 448 of 2014)

RULING

1. By a Notice of Motion dated 3rd November 2021 and made under Rule 4 of the Court of Appeal Rules, the Applicant (Jane Njoki Githinji) seeks, inter alia, extension of time to file her notice of appeal, memorandum of appeal and record of appeal out of time; and that the costs of the application abide in the result of the intended appeal or otherwise as the justice of the case requires.
2. The intended appeal is from the judgment of the Environment and Land Court at Nyeri (Antony Ombwayo, J.) delivered by Lucy Waitthaka, J. on 2nd November 2016 in ELC Case No. 448 of 2014.
3. The Motion is supported by the applicant's affidavit sworn on 3rd November 2021 and is made on 4 grounds set out on the face of the Motion, namely: that the impugned judgment was delivered on 2nd November 2016 in the absence of the applicant; that her former advocate did not notify her of the date of judgment; that the applicant learnt of the judgment after lapse of the time prescribed for lodging of appeal; and that, aggrieved by the said judgment, the applicant is desirable of filing an appeal, and hence this application for extension of time.



4. The applicant's supporting affidavit restates the grounds aforesaid and adds that she became aware of the judgment when the respondents moved to recover vacant possession of the suit property; that her advocates on record had been served with the respondents' application dated 28th April 2017 seeking facilitation by the Deputy Registrar of execution of the judgment and transfer of the suit property to the respondents; that her advocate did not bring the said application or the hearing notice in that regard to her attention; that her former advocates did not notify her of the ruling dated 2nd October 2017; that mistake of her advocate should not be visited on her; that she has "a solid appeal raising solid issues of law and with a high probability of success;" that allowing this application would not occasion any prejudice on the respondents; and that the delay in filing this application is excusable.
5. In response, the 1st respondent filed a replying affidavit sworn on 1st December 2021 in opposition to the applicant's Motion. In it, he states: that the applicant was at all times aware of the proceedings and judgment, as he had always informed her; that he had notified her of the judgment one month from its delivery; that he had enlisted the local Chief and Assistant Chief's help in persuading the applicant to relinquish vacant possession of the suit property; and that the applicant's intended appeal has no chance of success.
6. Learned counsel for the applicant (Ms. S. K. Amani & Associates) filed written submissions dated 16th November 2021, while Learned counsel for the respondents (M/s. Nderi & Kiingati, Advocates) filed theirs dated 1st December 2021.
7. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just. However, I hasten to observe that such discretion may only be exercised where the Court has jurisdiction to do so.
8. It is noteworthy that the applicant has not lodged her notice of appeal as mandated by Rule 77(1) and (2) of the *Court of Appeal Rules*. In the circumstances, I have no jurisdiction to hear and determine her application. In *Phoenix of EA Assurance Company Limited vs. S. M. Thiga T/A Newspaper Service* [2019] eKLR, this Court had this to say on the matter:

"A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself."
9. In another locus classicus in this subject, this Court pronounced itself in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd.* [1989] eKLR thus:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."
10. As the Supreme Court observed in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR:

"A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite."



11. In view of the foregoing, I reach the inescapable conclusion that I have no jurisdiction to hear and determine the applicant's Motion. Indeed, I am mandated to down my tools and say no more, save to voice the all-familiar reminder that the quickest sinking sands of a case lie in its foundation. In effect, the absence of a notice of appeal to this Court deprives an intended appeal of the very foundation on which all proceedings would be anchored.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

