



**Kimari v Mburu & 3 others (Civil Application E171 of 2022)
[2022] KECA 1001 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1001 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E171 OF 2022
DK MUSINGA, JA
SEPTEMBER 23, 2022**

BETWEEN

PETER KAHURA KIMARI APPLICANT

AND

PETER GIKURA MBURU 1ST RESPONDENT

ALI HASSAN 2ND RESPONDENT

NAIROBI CITY COUNCIL 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

(Being an application for leave to lodge a Notice of Appeal out of time against the Ruling and Order of the Environment and Land Court at Nairobi (Angote, J.) delivered on 21st April 2022 in E.L.C. Suit No. 130 of 2018.)

RULING

1. The applicant's Notice of Motion dated May 20, 2022 seeks leave to lodge a notice of appeal out of time. The applicant intends to appeal against a ruling delivered on April 21, 2022 by the Environment Court (Angote, J.) in ELC No. 130 of 2018.
2. The applicant, the owner of a property known as L.R.209/7260/84, filed the aforesaid suit against the respondents seeking to enforce his rights over the property.

When the matter came up for virtual hearing on November 4, 2021, the applicant was unable to attend, and his advocate sought an adjournment which was not opposed, but the learned judge dismissed the suit for the applicant's non-attendance. The applicant filed an application for reinstatement of the suit, which was not opposed. On the scheduled date of its delivery, April 21, 2022, internet connectivity at the applicant's advocate's chambers was interrupted and was only reinstated towards the end of the session. When the applicant's advocate enquired from the court about the outcome of the application



he was asked to collect the signed Ruling from the court registry on April 25, 2022, but the same was not availed until May 6, 2022 when he realized that the application for reinstatement of the suit had also been dismissed.

3. The applicant believes that his intended appeal has good chances of success and urges the Court to exercise its discretion in his favour so that he can pursue his constitutional right of appeal.
4. The 1st and 3rd respondents did not file anything in opposition to the application. The 2nd respondent filed submissions and grounds of opposition to the application. I must state that under rule 52 of this Court's *Rules* a person served with a notice of motion may only file an affidavit in reply and not grounds of opposition. A party who wishes to challenge factual depositions in an applicant's affidavit can only do so by way of a replying affidavit.
5. Similarly, submissions alone cannot be relied upon to controvert averments in an affidavit. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR, this Court held that submissions do not constitute evidence.
6. Strictly speaking, the applicant's averments in his affidavit in support of the application have not been controverted. That does not, however, imply that the written submissions ought to be disregarded in their entirety. They are useful in canvassing issues of law only; and drawing the Court's attention to important portions of the trial court's record that has been annexed to the applicant's affidavit in support of the application and no more.
7. In my view, the period of delay is not inordinate and has been well explained. The respondent shall not suffer such prejudice as may not be compensated by an award of costs if I grant the orders sought. To the contrary, if the application is dismissed, the applicant will have been locked out of the seat of justice without being afforded an opportunity to be heard on a serious real estate dispute.
8. Having considered the well settled principles for grant of extension of time as set out in a plethora of this Court's decisions, I am inclined to exercise my discretion, which I hereby do, in favour of the applicant. Consequently, I grant leave to the applicant to file and serve his notice of appeal within fourteen (14) days from the date of delivery of this ruling. The applicant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

JUDGE OF APPEAL

