



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wachira v Mugekenyi (As Administrator of the Estate of Mbugua Mugekenyi - Deceased) & 10 others (Civil Application E250 of 2020) [2022] KECA 1207 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1207 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPLICATION E250 OF 2020**  
**F TUIYOTT, JA**  
**NOVEMBER 4, 2022**

**BETWEEN**

**MARY WACHUKA WACHIRA ..... APPLICANT**

**AND**

**JOHN GEORGE MBUGUA MUGEKENYI (AS ADMINISTRATOR OF THE  
ESTATE OF MBUGUA MUGEKENYI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**  
**ARTHUR KABIRIRI WAWERU ..... 2<sup>ND</sup> RESPONDENT**  
**SHEM KIHORO ..... 3<sup>RD</sup> RESPONDENT**  
**JOHN MBURU WAWERU ..... 4<sup>TH</sup> RESPONDENT**  
**AMOS KAHUHA KIMANI ..... 5<sup>TH</sup> RESPONDENT**  
**JAMES MUCHAI WACHIRA ..... 6<sup>TH</sup> RESPONDENT**  
**NJUGUNA MATHU ..... 7<sup>TH</sup> RESPONDENT**  
**PETER WANGO GATHATA ..... 8<sup>TH</sup> RESPONDENT**  
**PETER NDUNGU MBUGUA ..... 9<sup>TH</sup> RESPONDENT**  
**LAND REGISTRAR KIAMBU ..... 10<sup>TH</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 11<sup>TH</sup> RESPONDENT**

*(An application for extension of time to lodge and serve Notice of Appeal from the Ruling of the High Court of Kenya at Thika (L Gacheru, J) dated April 8, 2020 in THIKA ELC CASE NO 162 OF 2017)*



## RULING

1. The applicant has filed a Notice of Motion dated August 17, 2020 under rule 4 of the [Court of Appeal Rules](#) seeking extension of time to file a notice of appeal and an appeal against the whole judgment of L Gicheru, J, delivered on April 8, 2020 in Thika ELC Case no 162 of 2017.
2. In support of the application is her affidavit sworn on even date where she deposes that the judgment was delivered virtually on April 8, 2020 but that she only learnt of it on July 1, 2020 when she received a phone call from Mr James Kinyanjui, her former advocate on record, who requested her to attend his chambers for a detailed discussion of the judgment. She further deposes that as there was a government lockdown on inter-county travel at the time, she had no means of travelling immediately and was only able to do so on July 8, 2020 by which time, the period for lodging an appeal had lapsed. She states that the said advocate forcefully advised her that an appeal against the judgment would be futile and that negotiations with the plaintiff (now the respondent) would be the best approach. Being appalled by this advice, in addition to the failure of the advocates to advise her of the judgement in a timely manner, she instructed her current advocates Messrs. Guandaru Thuita & Company Advocates to lodge an appeal. Through an application dated July 23, 2020, the said advocates moved the ELC seeking three substantive orders; that leave be granted for the advocates to come on record by consent; a stay of execution of the said impugned judgment; and enlargement of time to file a notice of appeal. By orders issued on July 23, 2020, the ELC granted the substitution of advocates and a stay of 60 days and directed that a substantive application for stay be made to this court. As the request for extension of time had not been attended to, the applicant filed an application dated July 30, 2020 asking the court to allow the prayer. On the same day the ELC reiterated its earlier directions that the applicant files a substantive application before this Court and added that the prayer for extension of time be sought in that application, hence the application now before court.
3. The applicant pleads that the omission to file the notice of appeal was entirely a mistake of her advocates and that mistake of counsel should not be visited upon her.
4. The application was opposed by the 1<sup>st</sup> respondent via two affidavits. One of Ng'ang'a Mwongeri, the legal representative of the Estate of John George Mbugua Mugekenyi, who was the legal representative of the initial plaintiff, the Estate of Mbugua Mugekenyi (deceased). The affidavit is sworn on September 3, 2020. He deposes that the affidavit in support of the application dated August 17, 2020 signed by the applicant is neither commissioned nor dated and is therefore bad in law and should be expunged; that throughout the history of the case, the applicant has never failed to attend court and was in court on October 23, 2019 when the date of judgment was reserved for April 3, 2020; that the applicant is not candid with facts and is contradictory when she says that she was informed of the judgment on July 10, 2020 and on the other hand July 8, 2020 in paragraphs 11 and 12 of her supporting affidavit; that the allegation has not been proved and/or confirmed by her previous advocates on record; and the delay of a period of 4 months has thus not been explained. He further deposes that on July 10, 2020, the applicant's former advocates wrote to their advocate informing them that the applicant had conceded to the outcome of the judgment and wished to purchase the portion she occupied at the prevailing market price. In response, the respondents agreed to the request at a price kshs 4,000,000. This was in letter dated August 6, 2020 written to by the respondent's advocates to the applicant's current advocates. It was the position of the respondent that as at the date she swore the affidavit, the applicant had not repudiated her offer to settle the matter.



5. Counsel for the 1<sup>st</sup> respondent filed a supplementary affidavit sworn on September 11, 2020 wherein he further deposes that on September 7, 2020 they received a letter dated September 3, 2020 from the applicant's current advocates disowning the letter of July 10, 2020 as being written without the applicant's instructions. Upon confronting the applicant's former advocates, the advocates through a letter of September 9, 2020 insisting that the letter of July 10, 2020 was written with the applicant's instructions.
6. None of the other respondents have filed any response to this application.
7. The 1<sup>st</sup> respondent has not filed any submissions. For the applicants, the submissions filed on her behalf by counsel are substantially a regurgitation of the position taken in the application set out above. In addition, she makes reference to a supplementary affidavit filed by her countering the allegations of conceding to the appeal and castigating her previous advocate for acting without her instructions. That further, her affidavit was dated and sworn before a commissioner of oaths but the wrong copy was uploaded in the portal, an inadvertent mistake. I have not seen that supplementary affidavit as it was not on the record before me
8. The discretion granted to this court by rule 4 of the Court of Appeal Rules when considering an application for extension of time is one to be exercised judiciously and as a guide, are the well settled principles restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR) :-
 

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors...”
9. I begin with an issue taken up by the 1<sup>st</sup> respondent that the affidavit in support of the application is both undated and unsworn. It would seem that it is the copy served on the 1<sup>st</sup> respondent that suffers these defects because the copy filed in court is dated August 17, 2020 and is stamped as sworn before Crispin Nganga Ngugi, advocate and commissioner for oaths. While the law is that copies of applications and documents served on parties should be true copies of those filed in court, I chose not to make too much of the defects in this matter because the affidavit filed in court is duly dated and sworn and the 1<sup>st</sup> respondent who has robustly responded to the contents does not state that the defects prejudice him in any way. I proceed on the basis that the application is supported by a properly dated and commissioned affidavit.
10. Back to the substantive issue, a notice of appeal ought to be filed in accordance with the provisions of rule 75 (now rule 77) which provides: -
  75. Notice of appeal
    1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
    2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
11. According to the applicant, the notice of appeal was not filed within the above prescribed timelines due to her former advocates neglect to inform her that the impugned judgment of April 8, 2020 had been delivered. She states that she only got wind of the said judgment when her former advocates called her and invited her to their offices to discuss the contents of the



judgment. As pointed out by counsel for the 1<sup>st</sup> respondent, there is a contradiction in regard to the date of the supposed phone call. On the body of the application (paragraph (c)), it is stated:-

- (c) The applicant only learnt of the decision on Friday July 10, 2020 when she was called by her firm of Advocate and informed of the Development.

This is inconsistent with the contents of paragraphs 11 and 12 of the supporting affidavit: -

11. That I only learnt of the existence of the subject decision on Wednesday the 1<sup>st</sup> day of July 2020 when I was called on phone by Mr James Kinyanjui, my advocate's associate and informed that the court had rendered a verdict, and requested me to attend their chambers for a detailed reading of the judgment.

12. That at the time there was a government lockdown on inter-county travel and I had no means of travelling. I was only able to travel on July Wednesday 8, 2020, which is when he explained to me of the court's judgment.

12. It is not clear to me whether the contradiction was inadvertent or deliberate, yet as conceded by the 1<sup>st</sup> respondent the applicant was represented by counsel Kinyanjui on April 3, 2020 when the judgment was delivered, apparently in the absence of the applicant. As to when she was informed of the decision by her advocates, her advocates' letters of July 10, 2020 and September 9, 2020 may offer an answer. In the former communication, her advocates in part state as follows:-

“Following the judgment delivered on April 8, 2020 we have had a chance to meet with our clients and after taking them through the contents of the entire judgment and explaining to them the ramifications of the same we have been instructed by the 6<sup>th</sup> defendant (Mary Wachuka Wachira) address you as hereunder;

That our client has conceded to the outcome of the judgment and that she is willing to engage your client with a view of letting her purchase the portion she has been occupying at the prevailing market price of the plot in the area.....”

13. In the letter of September 9, 2020 the advocates say as follows: -

9th September 2020

Guandaru Thuita

& Co Advocates

Kp Flats, Flat No

14 Jakaya Kikwete

Road

Next To Hotel Kivi

Milimani P.o. Box

19539-00100 Nairobi

Dear Sir,

RE: Elc No 162 of 2017 (thika)

John George Mbugua Mugekenyi Vs



Arthur Kabiriri Waweru & others

The above matter and your letter to Rakoro & Company Advocates dated September 3, 2020 and copied to us refers.

In your letter you indicated that Mr James Kinyanjui acted without instructions and wrote a letter dated August 10, 2020 as per the instructions given to yourselves by our erstwhile client. Our offices denies ever writing a letter to Mr Rakoro dated August 10, 2020 and the only letter our offices wrote was dated July 10, 2020 after being instructed to do so by Mary Wachuka Wachira.

According to your office the proposal to purchase the property was made without our then client who is now your client and that assertion is purely on the instruction given to your office.

Both our offices and your offices received different set of instructions and there is no reason why one set of instructions received from one office should be used against the other as it was received independently and acted upon independently.

We therefore deny having made a proposal to Rakoro & Co. Advocates to purchase the property without instructions as the same letter of proposal was copied to our then client and urge your office to stop making unsubstantiated claims against our offices as you pursue the Appeal before you.

Yours faithfully,

James N Kinyanjui For

Mwicigi Kinuthia & Co Advocates

14. It is therefore believable that the applicant was informed of the judgment on July 1, 2020 through telephone and she travelled to her advocates' offices on July 8, 2020 for discussion on its contents. While it can be said that her advocates were to blame for failing to inform her of the judgment for about 3 months, an inquiry must be made as to whether the applicant was entirely without fault. A place to start is this important disposition by Ng'ang'a Mwongeri in the replying affidavit: -

“ 4. This matter has been proceeding in court from 2006, first at Nairobi, as HCCC no 473/2006 (OS) and was then transferred Thika in 2017 and all the 14 years the matter has been in court the applicant who was the 6<sup>th</sup> defendant never missed coming to court. She was in court on October 23, 2019 when the date for judgment was reserved for April 3, 2020. The defendants were represented by Mr Kinyanjui advocate as holding brief for Mr. Mwicigi.”

15. In that affidavit it is contended that the applicant was in court when the judgment date of 8<sup>th</sup> April 2020 was reserved. Going by her advocates submissions the applicant swore a supplementary affidavit in respect of certain matters yet she chose not to controvert the assertion that she was aware of the judgement date. Inexorably, I conclude that the applicant was aware that the judgment date was for April 3, 2020 though delivered on April 8, 2020. If it turns out, as I am asked to believe, that she was only informed of the judgment on July 1, 2020, then the question arises as to whether she was diligent in not following up the progress of her case from April 3, 2020 to July 1, 2020 well aware that the judgment was pending. The delivery of judgment is an important moment in litigation for any party. It is the point when the outcome of a litigation is communicated to parties. If the applicant failed for 88 days to make inquiry about what may have happened on such an important date, then she has to be less than an attentive litigant. There is no plausible explanation for the inaction in this period of 88 days and the applicant would be as much to blame as her own advocates. Although I am told that she



thereafter took action by appointing her current advocates who then filed certain applications before the ELC, her new found energy does not absolve her from the long period of inaction.

In *Habo Agencies Limited vs Wilfred Odhiambo Musingo* (2015) eKLR, this Court observed:

“It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

16. Having taken that view, I am unable to find that the period of delay of 88 days (less the 14 days period for filing a notice of appeal) has been explained adequately and in my view the same is inordinate. I trust that I have considered the application within the well settled principles that guide the discretion of this court in determining an application of this nature.
17. I am therefore unable to allow the application dated August 17, 2020 and it is hereby dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**F TUIYOTT**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

