



Kilama v Kidhembe & another (Environment & Land Miscellaneous Case E027 of 2024) [2024] KEELC 5553 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND MISCELLANEOUS CASE E027 OF 2024**

EK MAKORI, J

JULY 29, 2024

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
FILE AN APPEAL OUT OF TIME BY ERINE MGOI KILAMA**

BETWEEN

ERINE MGOI KILAMA APPLICANT

AND

KAZUNGU SAMINI KIDHEMBE 1ST RESPONDENT

HILTON KAZUNGU 2ND RESPONDENT

RULING

1. The application dated 8th July 2024 seeks the following orders:
 - a. Spent.
 - b. The court be pleased to grant leave to the Applicant to file an appeal out of time against the ruling and or orders of Hon. Kituku and delivered by Hon Nangea in Kilifi Miscellaneous Case Number 15 of 2022 *Kazungu Samini Kidhembe and another v Erine Mgoi Kilama*.
 - c. The costs of the application be provided.
2. The Applicant's Supporting Affidavit, deposed on 8 July 2024, supports the application. The Respondent opposed the same vide the Respondent's replying affidavit, dated 17 July 2024, and a further affidavit, dated 22 July 2024.
3. The main issue I frame for this Court's decision, which is of utmost importance, is whether the Court should grant leave to the Applicant to file an appeal out of time against the ruling and orders of Hon. Kituku and delivered by Hon Nangea in Kilifi Miscellaneous Case Number 15 of 2022 *Kazungu Samini Kidhembe and another v Erine Mgoi Kilama*.



4. The Applicant contends that the delay in filing the appeal was due to the erroneous filing of the Applicant's Memorandum of Appeal by counsel in Kilifi file Misc. Case No. 15 of 2022 sought a stay pending appeal in the Lower Court instead of filing it in the Malindi ELC. Besides, there was also a problem with the Kilifi CTS, making extracting orders difficult.
5. The Applicant submits that in considering whether to enlarge the time within which to appeal, the Court should be guided by decided judicial authorities significantly – *Mwangi v Kenya Airways* [2003] eKLR, where the Court held that among the factors to consider is the length of the delay in bringing the appeal, reasons for the delay, chances of success on appeal, and the degree of prejudice that may be occasioned on the Respondent in allowing for the enlargement of time. The holding in *Nicholas Kiptoo Arap Salat v IEBC & 7 others* [2014] eKLR, that errors committed by counsel should not be visited on a client in consideration of matters of his nature, and *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR, with the Court holding that doors of justice should not be closed on a party for mistakes committed by counsel.
6. The Applicant firmly believes that the reasons for the delay, including counsel's error, the length of the four-month delay, and the trial issues on appeal, all merit the enlargement of the time to appeal. The Applicant is confident that the Respondent will suffer no prejudice.
7. Conversely, the Respondent strongly argues that the Court should not automatically grant an extension of time, as established in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR. The Respondent contends that the Applicant has not provided any valid reasons for the over four-month delay in filing this application and will urge the Court to view this as an afterthought. The Respondent asserts that the Applicant's delay in filing the appeal and the application created a legitimate expectation that the Intended Appellant had abandoned an appeal regarding the ruling delivered on 13th February 2024, given the time-lapse.
8. The Court is invited to find that the proceedings were a product of a Miscellaneous Application. The product of the proceedings resulted in an order and not a decree, and hence, an appeal does not exist as a matter of right but by leave of the Court under the provisions. The Court is urged to examine the provisions of Section 75 of the *Civil Procedure Act*.
9. The Respondent further aver that Order 43 Rule (1) of the *Civil Procedure Rules* sets out the orders and rules concerning which appeals would lie as of right. Under Order 43(2), it is provided that an appeal shall lie with the leave of the Court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1), leave to appeal must be obtained before such an appeal can be preferred. The Respondent contends that the application does not provide an order granting leave to appeal the rulings and orders of Hon. Kituku and delivered by Hon Nangea in Kilifi Miscellaneous Case Number 15 of 2022 *Kazungu Samini Kidhembe and another versus Erine Mgoi Kilama*. The ruling of Hon. Wasike, delivered on 25th June 2024, confirms that there was no leave to appeal under Order 43(3) of the *Civil Procedure Rules*; in the application dated 1st March 2024. The Respondent cites the case of *Serephen Nyasani Menge v Risipah Onsase* [2018] eKLR to support this contention.
10. The submissions by counsels on the issues at hand - enlargement of time within which to appeal - are germane in the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, Otieno-Odek JA had this to say on what to consider before allowing an extension of time within which to appeal:

“I have anxiously considered the application, the affidavits on record, and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought



to be guided by consideration of factors stated in many previous decisions of this Court, including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See *Fakir Mohamed V Joseph Mugambi & 2 Others*, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the [Appellate Jurisdiction Act](#) to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate, and affordable resolution of disputes before the Court.”

11. Two reasons have been cited for the delay in bringing up the intended appeal: The Counsel for the Applicant erroneously lodged the Memorandum of Appeal in the Application for a stay in the Lower Court and the CTS downtime. This may not be the reason for the delay of 4 months. Applicant further contends that the grant of leave may not prejudice the Respondent. The Respondent states that the intended appeal may not see the light of day because the orders appealed against require that leave to appeal should have been granted by the Lower Court. The same was not sought and granted.
12. In the Memorandum of Appeal filed, the Applicant will seek to challenge the eviction orders issued in the Lower Court, contending that he has occupied the land for over 30 years.
13. I have balanced the two warring rights – that of the Applicant to appeal as a matter of right and the Respondent to enjoy the fruits of the decision rendered in the Lower Court. I have also considered that leave to appeal, if not sought and granted in the Lower Court, can be an issue for discussion in the main appeal. Here, we are dealing with an extension of time within which to appeal and not leave to appeal. Considering that the Applicant faces imminent eviction, and without discussing the merit of the appeal, I will allow the Applicant to appeal out of time.
14. Therefore, the application dated 8th July 2024 is hereby allowed, costs in the intended appeal.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 29TH DAY OF JULY 2024

E.K. MAKORI

JUDGE

In the presence of:

Ms. Mwangi, for the Applicant

Mr. Mwangunya, for the Respondent

Happy: Court Assistant

