



REPUBLIC OF KENYA



**Muchina v Kihara (Miscellaneous Civil Application E006 of 2024)
[2024] KEELC 5533 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS CIVIL APPLICATION E006 OF 2024**

LN GACHERU, J

JULY 29, 2024

BETWEEN

JESSE CHEGE MUCHINA APPLICANT

AND

MARY WANJERI KIHARA RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 2nd May, 2024, which is brought under Section 79 G, of the Civil Procedure Act, the Applicant herein seeks the following orders:
 - a. That the Court be pleased to extend time within which to file an Appeal against the Judgment delivered on 8th November 2023, in Murang'a C.M. Civil Case No. 239 of 2019.
 - b. That the costs of this application be provided for.
2. The Application is premised on the grounds stated thereon and on the Supporting Affidavit of the Applicant, Jesse Chege Muchina, sworn on 2nd May, 2023.
3. The Applicant herein was the Plaintiff in Murang'a C.M. Civil Case No. 239 of 2019, wherein, he had sued the Respondent claiming a liquidated sum of Ksh.600,000/-, exclusive of costs of the suit, for breach of a sale agreement for the purchase of land parcel number Loc.9/Gacharageini/3391.
4. The Applicant has averred that he was dissatisfied with the decision of the trial Court dated 8th November, 2023, which dismissed his suit with costs to the Respondent. Further that on 8th November, 2023, he made an oral Application before the trial Court for a certified copy of the said Judgment, and instructed his then Advocates on record, Gichuki Waiganjo & Co. Advocates, to lodge an Appeal against the said Judgment issued on 8th November, 2023.
5. However, the said Law Firm did not file the Said Appeal as instructed, and he subsequently instructed a new Firm of Advocates being; Kirubi Ben & Co. Advocates, and tasked them with the Appeal



- whereupon, he was advised that they needed certified copies of the proceedings before the trial Court to enable them to evaluate the evidence on record as they could not lodge the Intended Appeal without the aforesaid proceedings.
6. He further contended that the Law Firm of Kirubi Ben & Co. Advocates, applied for certified copies of the proceedings on 16th November, 2023, in order to acquaint themselves with the issues in contention in the suit before the trial Court. That they paid a deposit of Ksh.1000/- for the same.
 7. It was further contended that the certified copies of proceedings were supplied to the Applicant's Advocates on 22nd April 2024, by which time the time to lodge an appeal had lapsed.
 8. The Applicant explained that the failure to lodge an Appeal within the stipulated time was caused by the Court's delay in supplying his Advocates with the certified copies of the proceedings.
 9. The Applicant further contended that he raises an arguable Appeal with very high chances of success, hence this Application which seeks for leave to Appeal out of time against the Judgment of the trial Court dated 8th November, 2023, which should be allowed as prayed.
 10. The said Application is vehemently opposed by the Respondent through the Replying Affidavit of Mary Wanjeri Kihara, Sworn on 24th June, 2024. She described this Application as unmerited and which amounts to an abuse of the due process of the Court and further averred that the Law Firm of Kirubi Ben & Co. Advocates, are not properly on record, thus, the said Firm of Advocates lacks the audience to address the matter because the suit before the trial Court has already been determined.
 11. The Respondent contended that Kirubi Ben & Co. Advocates, did not seek leave of Court to represent the Applicant, and also failed to file a Notice of Appointment thereby flouting the mandatory provisions of Order 9, Rule 9 of the Civil Procedure Rules. Further, that the subject Application is an afterthought because the trial court granted the Applicant a stay of execution for 30 days from 8th November 2023, but the aforesaid stay lapsed on 8th December, 2023, without the Applicant filing any Application for a stay of execution.
 12. The Respondent refuted the Applicant's claim that he paid for certified copies of the proceedings before the trial Court, and also asserted that the receipt of payment annexed to the Applicant's Supporting Affidavit marked "JCM 3" was paid for by the Respondent because it bears her name.
 13. The Respondent added that the Applicant has demonstrated unwillingness to file an Appeal against the Judgment of the trial Court dated 8th November, 2023, as he claims that his Advocates were supplied with certified proceedings on 22nd April, 2024. However, some fifteen (15) days later, he filed for a Certificate of delay dated 7th May, 2024.
 14. It was the Respondent's further contention that on 11th March, 2024, she requested her Advocates on record to apply to the trial Court for both the Decree and Certificate of costs, and her Advocates applied for the same through a letter dated 21st March, 2024, which letter was served upon the Applicant's Advocates on record in the proceedings before the trial Court, Gichuki Waiganjo & Co. Advocates, on 4th April, 2024. She also alleged that it is her aforesaid letter which jolted the Applicant from slumber and inaction.
 15. The Respondent further stated that the matter before the trial Court is listed for Ruling on assessment of costs on 26th June, 2024, and if the orders sought in the instant Application are allowed, she stands to suffer irreparable loss and damage as the said assessment of costs will be rendered nugatory, yet it is the Applicant who has failed to abide by the timelines set out in the law.



16. She characterized the Applicant's Intended Appeal as attested to by Memorandum of Appeal annexed marked as "JCM6" as lacking any chances of success and amounting to an abuse of the due process of the Court.
17. Further, the Respondent alleged that the Applicant has not offered any security of costs, hence the instant Application should be dismissed, entirely with costs.
18. She further argued that the Applicant has not explained the delay between 8th November, 2023, when the trial Court's decision was delivered and the filing of the current application on 2nd May, 2024.
19. It was further contended that the proceedings before the trial Court consumed about 5 years in Court and therefore this Application amounts to a delaying tactic and litigation must come to an end.
20. The instant Application was canvassed by way of written submissions, which the court has carefully read and considered.

Applicant's Submissions

21. The Applicant filed written submissions dated 2nd July, 2024 through the Law Firm of Kirubi Ben & Co. Advocates, and submitted that the instant Application is founded on the provisions of Section 79G of the *Civil Procedure Act*, which provides for admission of Appeals out of time if the appellant satisfies the Court that he has a good and sufficient cause for failing to lodge the Appeal within the stipulated thirty (30) days from the date of the Decree or Order.
22. The Applicant's further submitted that the Respondent was misdirected in relying on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, as set out in paragraph 3 of her Replying Affidavit dated 24th June 2024, wherein she claimed that the Law Firm Kirubi Ben & Co. Advocates, lacks audience to address this Court on the matter before it. It was submitted that the provisions of Order 9 of the Civil Procedure Rules, are not applicable to the instant Application; Furthermore, that no change of Advocates is needed as there has been none.
23. The Applicant reiterated the averment that she applied orally for certified copies of the proceedings and Judgment of the trial Court after the delivery of the decision on 8th November, 2023, and deposited Ksh.1000/=, being the deposit thereof on 16th November, 2023. He submitted that the said proceedings and Judgment were availed to his current Advocates on 22nd April 2024, by which time the time to lodge the Intended Appeal had lapsed on 8th December, 2024, pursuant to the provisions of Section 79G of the *Civil Procedure Act*.
24. Further, that the failure to file the Intended appeal within the statutory period of thirty (30) days was caused by pressure at the typing pool of the trial Court, which led to the typed proceedings and Judgment in question being supplied to the Applicant on 22nd April 2024, in response to his written request dated 16th November, 2023.
25. It was also submitted that his Application for leave to lodge an Appeal out of time was filed about ten (10) days, from the date of receipt of the typed proceedings and Judgment of the trial Court by his current Advocates, which shows seriousness on the part of the Applicant to prosecute the Intended Appeal. Further, that he has presented serious issues for consideration in his Intended Appeal as set out in paragraph 10 of his Supporting Affidavit.
26. The Applicant relied on the provisions of Article 50(1) of *the Constitution* of Kenya 2010, to buttress the proposition that every person has a right to exhaust all avenues of litigation and not to be condemned unheard.



27. It was his further submissions that he stands to lose more than the Respondent having paid Ksh.600,000/=, to the Respondent towards the purchase of the suit land, Loc.9/Gacharageini/3391, which amount he stands to lose unless he is allowed to file the Intended Appeal.

Respondent's Submissions

28. The Respondent filed her written submissions on 19th July, 2024, through the Law Firm of L.M Kinuthia & Associates, and raised Two (2) issues for determination being:
- (1). Whether the Application herein suffers from plausible unexplained delay?
 - (2). Whether the Respondent shall suffer prejudice?
29. It was submitted that the Applicant has not explained the delay of more than six (6) months from the date of the decision of the trial Court and the filing of the instant suit. The Respondent further submitted that the said delay was inordinate. Further, that the Applicant was only jolted from deep slumber upon being served by the Respondent with a Bill of Costs on 4th April, 2024 in respect of Murang'a C.M. Civil Case No. 239 of 2019.
30. The Respondent reiterated the averments contained in her Replying Affidavit dated 24th June, 2024, wherein she had averred that the Applicant made no effort to lodge an Appeal while having full knowledge that the trial Court's had allowed a stay of execution for the duration of thirty (30) days which lapsed on 8th December, 2023.
31. It was her further submission that upon the Applicant's Advocates receiving certified copies of the proceedings and Judgment of the trial Court on 22nd April, 2024, the Applicant still was not keen to lodge the Intended Appeal because he filed for a Certificate of Delay on 7th May, 2024, thereby, wasting (15) fifteen days through inaction.
32. She reiterated her averment that the Applicant is not the one who paid for the typed proceedings as claimed, and that the receipt marked "JCM3b," annexed to the Applicant's Supporting Affidavit bear's her name because she paid for the same.
33. Further, the Respondent submitted that she stands to suffer prejudice if this Application is allowed as she will be deprived of the fruits of a successful Judgment which she obtained. That she is a widow with responsibility over her children, who are attending school, thus, endless litigation would occasion loss and damage to her. She described the Applicant as a litigious person.
34. It was her further submissions that consequent to her Application dated 21st March, 2024, for the Decree and certificate of costs in the proceedings before the trial Court, the trial Court scheduled the matter for assessment of costs on 26th June, 2024; and that the same matter is listed for Taxation of Costs on 2nd October, 2024. That if the Application is allowed she stands to suffer irreparable loss and damage, whereas it is the Applicant who failed to act as required by the law.
35. The Respondent refuted the Applicant's claim that he made an oral Application before the trial Court on 8th December, 2024, for certified copies of the proceedings and its Judgment of even date. She argued that if it were true that the said Application was made, then it begs the question why the Applicant did not simultaneously seek for stay of execution of the same Judgment within the stipulated thirty (30) days period.
36. It was submitted that the Applicant's Memorandum of Appeal is a sham as it does not raise triable issues. She relied on the decision of the Court in the case of *The County Government of Mombasa V Kooba Kenya Ltd* (Court of Appeal at Malindi) Civil Appeal Appl. No. 130 of 2018, in support of



the argument that an Applicant seeking leave to Appeal out of time is required to provide the court with sufficient reasons for the delay in filing the Appeal. That the length of the delay is one of the issues to be considered by a Court adjudicating over an Application for leave to Appeal out of time such as the present suit.

37. Further she relied in the case of *Abdul Aziz V Mungai Mathayo* (1976) LR 61, 62, to buttress the proposition that it is only when the Applicant has presented the Court with sufficient reason for the extension of the time to lodge the Appeal that the Court is moved to exercise its discretion in the Applicant's favour by proceeding to consider the other relevant factors such as, the absence of any prejudice; or, the chances of success of the Intended Appeal. The Respondent also cited the reasoning of the Court in the case of *Karnay Zabarya & Another V Shalom Levi* (Appl. No. 80 of 2018).
38. The Court has carefully considered the instant Application, the grounds for and against the same, the rival written submissions, the cited authorities and the relevant provisions of law, and finds the issues for determination are;
- i). Whether the Law Firm of Kirubi Ben & Co. Advocates has properly come on record in place of the law Firm of Gichuki Waiganjo & Co. Advocates.
 - ii) Whether the Applicant is entitled to the Orders sought?
 - i). Whether the Law Firm of M/S Kirubi Ben & Co. Advocates has properly come on record in place of the Law Firm of Gichuki Waiganjo & Co. Advocates.
39. Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 provides that:
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
40. In the case of *Alice Wambui Nganga v John Ngure Kahoro* [2021] eKLR, the Court reasoned as follows:
- “The Court is called upon to determine the question of leave first. The Law Firm of Norman Otieno & Co. Advocates, have sought for leave. The provisions of Order 9, allows the Court to grant leave when a consent is filed and Rule 10, allows the said prayer seeking leave to be brought together with other prayers. The prayer for leave for the said Law Firm has not been disputed nor contested thus the Law Firm of Norman Otieno & Co. Advocates, is properly on record.”
41. In instant Application, the Applicant has not sought the Court's leave to substitute the Law Firm of Gichuki Waiganjo & Co. Advocates, who were on record for the Applicant in the suit before the trial Court until delivery of the trial Court's Judgment on 8th November, 2023, with the Law Firm of Kirubi Ben & Co. Advocates.
42. The Applicant submitted that there is no Notice of change of Advocates that is legally required for Applications which are founded on the provisions of Section 79(G) of the *Civil Procedure Act*. Section



79(G) of the Civil Procedure Act provides as follows: In the case of See Bound Limited vs London Distillers (K) Limited [2014] eKLR, the Court held as follows:

“For the foregoing reasons, this court has come to the conclusion that it cannot consider or determine the Decree Holder’s application unless the said application is either filed by the firm of M/S Masika&Koross Advocates or in the alternative, a fresh application seeking the said orders is filed after the firm of M/S Gatundu& Co Advocates has fully complied with Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010.”

43. In the case of Lions Bluff Lodge Limited V Francis Mwabula Mwanyefa [2018] eKLR, the Court held as follows:

“It is therefore evident that an advocate who acts for a party in proceedings in a lower court continues to have instructions in the next appellate court. In the absence of a consent or court order permitting the firm of M/S Kagwimi Karanja & Co Advocates to come on record on behalf of the Appellant herein, this court came to the firm conclusion that the present application was incompetent and incurably defective. This court could not therefore delve into the merits of the said application.”

44. Further, in the case of S. K. Tarwadi vs Veronica Mueblmann [2019] eKLR, the Court observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the Civil Procedure Rules was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

45. Similarly, in the case of Lalji Bhimji Shangani Builders & Contractors V City Council of Nairobi [2012] eKLR, the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

46. Moreover, in the case of Monica Moraa -vs- Kenindia Assurance Co. Ltd. [2010] eKLR, the Court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

47. In the present suit, Judgment was rendered on 8th November, 2023; and therefore, the provisions of Order 9, Rule 9 of the Civil Procedure Rules became applicable herein.



48. In the case of *James Ndonyu Njogu V Muriuki Macharia* [2020] eKLR, the Court understood the meaning and import of Order 9, Rule 9 of the *Civil Procedure Rules* as follows:

“It must be remembered that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the Court and other parties.

11. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.”

49. Having considered the instant Application and the annexures thereto, the written submissions and pursuant to the provisions of Order 9, Rule 9 of the *Civil Procedure Rules*, the court finds and hold that the correct procedure to be followed in the present case was that counsel coming on record ought to have sought leave of the Court to come on record, which application could have been filed earlier or simultaneously with the instant application seeking leave to Appeal out of time.

50. The Applicant herein did not do so and consequently this Court finds and holds that the instant Notice of Motion Application and the whole suit dated 2nd May, 2024 is not merited. For the above reasons, the said Application is dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF JULY 2024.

L. GACHERU

JUDGE

29/7/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Mr Mwangi Ben for the Applicant

Mr L.M Kinuthia for the Respondent

L. GACHERU

JUDGE

29/7/2024

