



**Ciang’ombe v Njagi & 3 others (Miscellaneous Application
E007 of 2023) [2024] KEELC 5518 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
MISCELLANEOUS APPLICATION E007 OF 2023**

**CK YANO, J
JULY 25, 2024**

BETWEEN

EUSTUS MUGENDI CIANG’OMBE APPLICANT

AND

GITARI NJAGI 1ST RESPONDENT

NJERU NJAGI 2ND RESPONDENT

GACII NJAGI 3RD RESPONDENT

MAUKI NJAGI 4TH RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 19th December, 2023 by the applicant. The application is brought under Section 1A, 1B, 3, 3A, 79G of the *Civil Procedure Rules* 2010 and all other enabling provisions of the Law and the Applicant is seeking leave to appeal out of time against the decision of the lower court delivered on 19th August, 2021 in Chuka CM ELC Case No. 16 of 2020 and consequently that the notice of appeal filed herewith be deemed to be duly filed in time.
2. The applicant’s application is based on the grounds on the face of the motion and is supported by the supporting affidavit sworn by the applicant on the 19th December, 2023. The Applicant deposed that on 19th August 2021 the Honourable Court N. Kahara delivered a judgment in ELC Case No. 16 of 2020. The Applicant has attached a copy of the judgment marked EMC1.
3. The Applicant avers that he is aggrieved by the said judgment and wishes to appeal against the same.
4. The Applicant avers that the rules of this court requires that the notice of Appeal in respect of the intended Appeal should be filed within 14 days of the decision, that the 14 days have since expired and he cannot commence the intended appeal without seeking leave to file a notice of appeal out of time. The Applicant has attached a copy of the Notice of Appeal marked EMC II.



5. The Applicant states that the delay was occasioned by a number of procedural events that were beyond his control mainly that upon the delivery of the judgment on the 19th August, 2021 he had no knowledge that there is a certain duration to file an appeal since he is a layman and is not conversant with court procedures and technicalities thus the appeal delayed, that consequently he is a hustler and he is now jobless and therefore he lacks money to appeal thus was not possible to file within time.
6. The Applicant avers that he believes that he has an arguable appeal with overwhelming chances of success. That the issues for determination in the intended Appeal are pertinent and it is in the broader interest of justice that the honourable court does grant the orders prayed for in the application herein. That the delay in any event is not inordinate.
7. The Applicant states that given the nature of the dispute in the case at the lower court, he believes that it is prudent and in the best interest of justice for the matter to proceed only once there is a conclusive determination. That it is also clear to him that the respondents will not stand to suffer any prejudice in the event that the orders sought in the application herein are granted.
8. The application is opposed by the 1st respondent through a replying affidavit sworn on 5th March, 2024 in which he depones inter alia, that the application filed is misplaced and is an abuse of the court process and ought to be dismissed with costs. That they are the beneficiaries of the estate of one Njagi Mugwa M'Kanamba alias Njagi Mugwa (Deceased).
9. The 1st respondent avers that the Applicant instituted Civil proceedings vide a plaint dated 3rd February, 2020 seeking inter alia orders for the Land Adjudication Officer to register the parcel of land situated at Makamora village, Kamahindi Location in the names of the Deceased. That on 19th August, 2021 Honourable Njoki Kahara (S.R.M) dismissed the suit with costs on the grounds that the matter offended the mandatory provisions of the Land Adjudication Act and subsequently a decree was issued on 6th April, 2022. The 1st respondent has annexed a copy of the judgement and decree marked "GN-1".
10. The 1st respondent pointed out that the applicant ought to have lodged an Appeal within the statutory timelines of thirty (30) days from the date of the decree. That the decision on whether or not to grant leave to file an appeal out of time is a discretionary power that is exercised by the court and which is not right.
11. The 1st respondent avers that it is comical for the Applicant to file the present application exactly two (2) years and four (4) months since the judgment was delivered seeking to file an appeal out of time having been aggrieved by the Lower Court's decision made on the 19th August 2021 citing baseless and unfounded reasons for his delay as due to lack of money and that in any case it is the Applicant's right to seek for pro bono services that are within the behest of the judiciary. That equity does not aid the indolent.
12. The 1st respondent avers that they are elderly individuals whose ages are between the seventies (70s) and eighties (80s) and that the Applicant has been a nuisance and continuously threatened and harassed them by forcefully occupying the suit property and denied them access to their land. That it has also been an expensive affair for them to retain their advocates even in their old age and that it is crystal clear that the applicant is keen on frustrating them in any form or manner by litigating on issues that were determined by the Lower Court. The respondents state that it is noteworthy that the Applicant's suit was dismissed on a pure point of Law for failure to follow the proper procedure before moving the court on any interests arising from a property that is within the sections of adjudication. The 1st respondent questioned the purpose of the appeal since the Law is very clear on the remedies available to individuals who have interests on such claims. That equity follows the law.



13. It is the 1st respondent's contention that the applicant has annexed an undated notice of appeal and has equally failed to attach a draft Memorandum of Appeal to appraise the court on the issues that he seeks to appeal on and therefore at the moment it is just an assumption of his intention and a fallacy that he intends to appeal and is only out to frustrate them from enjoying quiet use and occupation of their land and continue to incur expenses including legal fees in a matter that was dismissed on a pure point of Law and has minimal success. That litigation must come to an end.
14. The 1st respondent avers that he is advised by his counsel that the rights of parties must be balanced and protected at all times and it would be unfair and unjust for the court to grant the orders as sought in the present application as the extension of time is an equitable remedy that is only available to a deserving party. That the Applicant has not met the threshold required to warrant the granting of the orders and therefore the application ought to be dismissed at the first instance. That he who seeks equity must do equity.
15. The 1st respondent avers that the applicant is yet to settle the decretal sum in terms of costs as awarded by the trial court in the sum of Kshs. 58,475 and it is just when they have started the process of executing the same that he has rushed to court with this application. The 1st respondent has annexed a copy of the certificate of costs marked "GN-2".
16. The 1st respondent prays that the application dated 19th December 2023 be dismissed or struck out with costs as it is a delaying tactic to prevent them from peacefully enjoying the use of their land and it's a waste of court's time.
17. The application was canvassed by way of written submissions which were duly filed. The Applicant filed his submissions dated 26th March, 2024 in person while the respondents filed their submissions dated 14th March, 2024 through the firm of Muthomi Gitari LLP.
18. The court has read and considered the submissions filed by the parties and I need not reproduce the same in this ruling.

Analysis and Determination

19. I have considered the application as well as the affidavit in support and against and the rival submissions. I find that the issue for determination is whether the court should grant the Applicant leave to Appeal out of time against the decision of the lower court delivered on 19th August 2021 in Chuka CMC ELC Case No. 16 of 2020.
20. My mandate to intervene has been invoked substantively under Section 79G of the [Civil Procedure Act](#) which provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order; provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”



21. The principles that guide the court in the exercise of its mandate under the said section are set out in the very case law that the respondents have relied upon. In *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral & Boundaries Commission & 7 Others* (Supra), the Supreme Court stated;
- “...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant...
- “...we derive the following as the underlying principles that a court should consider in exercising such discretion:
- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis.
 - d. Whether there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted.”
22. Therefore, the factors to consider in exercising discretion are that, I am supposed to take into consideration the length of the delay, reason for the delay, possibly, the arguability of the intended appeal and any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
23. Starting with the period of delay, it is evident from the record that the impugned judgment was delivered on 19th August 2021. The application under consideration which seeks the court’s intervention was filed on 19th December, 2023, being a period of about 2 years and three (3) months from the time the appeal ought to have been filed. In my view, and considering the circumstances of this case, it is my opinion that the delay is inordinate.
24. The next factor falling for consideration is the explanation that the applicant has proffered for the failure to file the appeal timeously. The reason given by the applicant is attributed to his lack of knowledge of the court’s procedures and timelines under the Law because he says he is a layman. Of course, it is trite law that ignorance of the law is no defence. The Applicant also stated that he is a hustler and is now jobless and therefore he lacked money to appeal thus it was not possible to file appeal within time. I find the reasons advanced by the Applicant not persuasive and inexcusable. There was no evidence adduced by the applicant to support his allegations.
25. On the chances of the appeal succeeding, I have perused the file and I did not see a copy of any memorandum of appeal. Instead, the applicant has filed a Notice of Appeal which of course is not applicable in this court. I am therefore restrained from commenting on the chances of the appeal succeeding as no draft has been exhibited.



26. The respondents submitted that they will suffer great prejudice and injustice if the application is allowed. I concur with the respondents' submission and further state that two years is way too long to allow an appeal out of time especially where no sufficient cause for the delay has been shown and further the respondents should be allowed to enjoy the fruits of their judgment. Parties cannot litigate endlessly. There must be an end to litigation
27. On the totality of the above assessment and reasoning, I am not satisfied that the applicant has satisfied the prerequisites for granting of a relief under Section 79G of the *Civil Procedure Act*. I therefore proceed to dismiss the Application dated 19th December, 2023 with costs to the respondents.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH JULY, 2024

In the presence of:

Court Assistant – Kiruja

Applicant present in person.

No appearance for Respondents.

C.K YANO,

JUDGE

