



Tumbo & another v Ratemo & 3 others (Environment & Land Miscellaneous Case E003 of 2024) [2024] KEELC 5411 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2024**

**M SILA, J
JULY 18, 2024**

BETWEEN

SARAH MANANI TUMBO 1ST APPLICANT

FRANCIS KAYAGO ONDICHO 2ND APPLICANT

AND

PHYLIS OGAKE RATEMO 1ST RESPONDENT

FELIX OMBOKI RATEMO 2ND RESPONDENT

MARY KEMUMA RATEMO 3RD RESPONDENT

REGISTRAR OF LANDS, KISII 4TH RESPONDENT

RULING

(Application to file appeal out of time and for stay pending appeal; need to demonstrate good and sufficient reasons; no good and sufficient reasons demonstrated; court utilising inherent discretion to extend time but subject to thrown away costs; prayer of stay cannot be dealt with as there is no appeal)

1. The application before me is that dated . The applicant seeks two principal orders being :
 - a. Leave to appeal out of time against the judgment delivered on 25 March 2024 in Kisii CMCCELC No. 93 of 2018.
 - b. Stay of execution of the judgment pending hearing and determination of the intended appeal.
2. The application is opposed.
3. From the material supplied, I can discern that the applicants were the plaintiffs in the suit Kisii CMCCELC No. 93 of 2018. They lost the case through the judgment delivered on 25 March 2024.



Although in the supporting affidavit it is said that the judgment is annexed I have actually not seen such annexure. However, from the limited material that I can pick in the affidavits, it would appear that the contention was over ownership of a land parcel Nyaribari Chache/B/B/Boburia/14270, and that a title issued to the applicants on 11 December 2017 was ordered cancelled. In his affidavit the 2nd applicant avers that he requested for typed proceedings and a certified copy of the judgment all in vain and that he has never been supplied with them. He also claims that he suffered an illness which incapacitated him to the extent that he was not able to give instructions to appeal. He adds that due to the medical expenses incurred he was equally financially incapacitated. That is his explanation for the delay in filing the appeal.

4. In opposing the application the 2nd respondent has contended that counsel for the applicants was present when judgment was delivered and he did not ask for proceedings. He adds that the judgment was posted online in the Court Tracking System (CTS) portal on the same day and it was available to all parties. He avers that the claim that he has asked for typed proceedings is unsupported by evidence and is a blatant lie. He does not think that good and sufficient cause has been shown to warrant this application being allowed.
5. The 2nd applicant swore a supplementary affidavit. He attached a letter dated 15 April 2024 requesting for proceedings. He also attached a letter dated 22 May 2024 from the Kisii County Hospital which states that the applicant reported to that facility on 20 March 2024 with a history of severe headache, dizziness and generalized body malaria. It says that he was put on medication and advised on bed rest. The letter says that he was advised to attend the outpatient clinic on 21 April 2024.
6. I directed counsel to file submissions on the application and I have taken note of the submissions filed.
7. Before I go too far, I find it untoward and unprocedural for the applicants to annex copies of the letter that allegedly asked for proceedings and medical notes in a supplementary affidavit. Those are documents that should have been filed at the outset when lodging the application so that the respondent can have opportunity to interrogate them. In fact, that supplementary affidavit was filed after the respondent had already filed submissions. It is not good practice and I think the applicant was probably trying to steal a march on the respondents.
8. Be that as it may, the applicable law is Section 79G of the *Civil Procedure Act*, Cap 21, Laws of Kenya, is the operative section and it provides as follows :

79G. Time for filing appeals from subordinate courts

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.

9. It will be seen that appeals are to be filed within 30 days of the decision but the period taken for preparation and delivery of the copy of decree or order can be excluded. The court however has discretion to admit an appeal out of time if the appellant satisfies court that he has good and sufficient cause for not filing the appeal within time.
10. It has not been disputed that the judgment was uploaded the same day that it was delivered i.e 25 March 2024 so it was available on the same day. It is also not disputed that counsel for the applicants was



present when the judgment was delivered. It therefore does not help the applicants to say that they wrote a letter dated 15 April 2024 asking for the proceedings. With the judgment they were capable of filing the Memorandum of Appeal.

11. The other reason given is that the 2nd applicant was unwell. Even if I give benefit of doubt to him, what about the 1st applicant? Nothing has been said about her. Since the appeal appears to be of benefit to both applicants, why did she not give instructions for filing the appeal? That, has not been disclosed.
12. In a nutshell I do not think that the applicants have met the threshold of good and sufficient cause as required by Section 79G of the *Civil Procedure Act*. Those timelines given in the Act for filing an appeal have a role to play in executing the overriding objective which inter alia is to do justice to the parties without unreasonable delay. They should therefore never be taken for granted and no party should think that time will be extended as a matter of course.
13. Having said that, this court has expansive jurisdiction under Section 3A of the *Act*, which gives the court inherent powers to make any orders deemed fit in the cause of justice. Utilising this section, I will bend over backwards to accommodate the applicants so that they are not shut out of the seat of justice and so that they can be heard on appeal. However, to balance the scales, the order to appeal out of time is subject to the applicants paying thrown away costs to the respondents, through their counsel on record, in the sum of Kshs. 15,000/= within the next 14 days. In default of the said payment the leave to file appeal out of time will not apply and any appeal filed will be struck out. Subject, as I have said, to payment of the thrown away costs, the Memorandum of Appeal be filed and served within 14 days. In default, this leave to appeal out of time will lapse. If the applicants do not adhere to the orders above the application herein will be deemed as dismissed with costs.
14. There is the prayer for stay pending appeal. Stay pending appeal can only be granted when there is an appeal filed. The applicants are at liberty to seek stay pending appeal once they file an appeal if they are minded to do so.
15. Orders accordingly.

DATED AND DELIVERED THIS 18TH DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII.

