



Ndiritu v Kihara & 3 others (Environment & Land Miscellaneous Case E015 of 2023) [2024] KEELC 5874 (KLR) (20 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND MISCELLANEOUS CASE E015 OF 2023**

AK BOR, J

AUGUST 20, 2024

BETWEEN

MARY NJERI NDIRITU APPLICANT

AND

MARY NJOKI KIHARA 1ST RESPONDENT

JAMES MWAI KIHARA 2ND RESPONDENT

JACKSON MUTURI KIHARA 3RD RESPONDENT

NANCY GATHONI KIHARA 4TH RESPONDENT

RULING

1. Through the application dated 12/2/2024, the Applicant seeks enlargement of the time to file her appeal arising from Nanyuki CM ELC Case No. 73 of 2019 on the grounds that the failure to file an appeal within time was caused by mistake and inadvertence on her part yet she has an arguable appeal. The application was supported by the Applicant's affidavit in which she deponed that the judgment in the matter was delivered on 20/12/2023 when she was present in court and that upon delivery of that judgment the court granted stay of execution for 45 days. That she misconstrued that to mean that that was the period within which she was to lodge her appeal and learnt on 26/1/2024 when she went to see her present advocate that appeals are supposed to be lodged within 30 days. She added that there was likelihood of prejudice if time were not extended for her to lodge the appeal and further, that the dispute concerned the land on which she dwelled, which her late husband purchased from the deceased plaintiff. She exhibited a copy of the judgment together with a draft memorandum of appeal to the application.
2. James Mwai Kihara, the 2nd Respondent, opposed the application through the replying affidavit which he swore on 14/3/2024. He deponed that it was the duty of a litigant to pursue prosecution of their case and constantly check with her advocate the progress of the case. He pointed out that the Applicant



admitted in her affidavit that she was present in court when the judgment was delivered on 20/12/2023 and that she relied on her own interpretation of the court orders despite being represented by an advocate. The 2nd Respondent maintained that no cogent explanation had been provided for the delay of 18 days in lodging the appeal.

3. The 2nd Respondent took issue with the Applicant's draft memorandum of appeal which mentions different parties and a different case number as well as a different magistrate and not the trial court. It was his wish that it should be dismissed for want of form since it also mentioned a different date of 18/7/2023 for the delivery of the judgment instead of 20/12/2023.
4. Mr. Kihara deponed that he stood to suffer prejudice as he would be deprived of the enjoyment of the fruits of the judgment due to the indolence of the Applicant in pursuing her right of appeal. He denied that the Applicant was in occupation of the suit property and averred that he had possession of the suit land. Regarding the Applicant's claim that she had obtained proceedings for the lodging of the appeal, he averred that there was no evidence of that.
5. The court directed parties to file submissions. The Applicant submitted that she misconstrued the court's order for stay of execution of 45 days as being the time for lodging the appeal and was shocked to learn on 14/1/2024 that it should have been filed within 30 days. She added that her draft memorandum of appeal raises arguable points of law and fact.
6. The Respondents submitted that under Section 79 (G) of the *Civil Procedure Act*, an appeal from a decision of a subordinate court to the High Court should be filed within 30 days of the date of decree even though the court may admit an appeal out of time if satisfied that an appellant had sufficient cause. The Respondents urged that under Order 50 Rule 4 of the Civil Procedure Rules, the period between 21st December and 13th January in the following year was not to be excluded in computing time for filing an appeal.
7. The issue for determination is whether the court should enlarge time for the Applicant to lodge her appeal against the decision of the trial court.
8. The Applicant claims that she learned on 26/1/2024 that appeals should be lodged within 30 days and not 45 days as she had earlier presumed. She did not give any explanation as to why the present application was not filed until 14/2/2024. The delay in lodging the appeal on time has not been explained satisfactorily.
9. The draft memorandum of appeal attached to the application to demonstrate that the Applicant has an arguable appeal has many inconsistencies which the Applicant ought to have addressed when the Respondent highlighted those anomalies in his response.
10. The court finds no merit in the application dated 12/2/2024. It is dismissed with costs to the Respondents.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Mr. James Nderi for the Applicant

Court Assistant: Diana Kemboi

No appearance for the Respondents

