



Muriuki (Suing in his Capacity as the Chairperson and on Behalf of Ukombozi Green Gardens Welfare Association) v Ukombozi Holdings Limited (Environment & Land Miscellaneous Case E002 of 2023) [2025] KEELC 613 (KLR) (19 February 2025) (Ruling)

Neutral citation: [2025] KEELC 613 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND MISCELLANEOUS CASE E002 OF 2023
JA MOGENI, J
FEBRUARY 19, 2025

BETWEEN

PATRICK MURIUKI APPLICANT
SUING IN HIS CAPACITY AS THE CHAIRPERSON AND ON BEHALF OF
UKOMBOZI GREEN GARDENS WELFARE ASSOCIATION

AND

UKOMBOZI HOLDINGS LIMITED RESPONDENT

RULING

1. Coming up for determination is the Appellant/Applicant's Notice of Motion dated 3/7/2023 expressed under Order 22 Rule 22, Order 42 rule 6, Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010 which was subsequently amended vide the Application dated 22/9/2023. The Applicant prays for Orders THAT;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. The Honorable Court be pleased to grant the Applicant leave to appeal out of time against the Ruling delivered by Hon J.A Agonda on 3/7/2023.
 - e. Costs of this Application be in the cause.
2. The Application is premised on the prolix grounds on its face and Supporting Affidavit of Patrick Muriuki, the Applicant. He averred that the trial Court delivered a Ruling on 3/7/2023 in respect of his Application dated 8/5/2023 and being dissatisfied with the ensuing Orders, his Advocates sought



- to set it aside/appeal. That a request for typed proceedings was made on 4/7/2023 and payments made thereto as shown by annexures 'PM-1' and 'PM-2'. That his efforts to obtain the proceedings were in vain as the Court file was said to be missing until sometime on 17/8/2023. That it is evident therefore that the delay in filing the appeal was not deliberate on his part.
3. The Application is opposed.
 4. The Respondent filed its Grounds of Objection dated 15/5/2024. The gist of the objection inter alia is that;
 - a. The issues raised in the amended Motion are beyond the Court's jurisdiction.
 - b. The Applicant filed THIKA ELC E002 OF 2023 touching on the same subject matter as the trial Court suit – Ruiru MCELC E072 of 2022.
 - c. Judgment was delivered on 4/4/2023 inter alia directing the Applicant to pay Throw away costs of Kshs. 20,000/= and file a Defence within 14 days. That despite paying the throw away costs, the Applicant failed to file his Defence within 14 days and as a result the default Judgment in favor of the Respondent was reinstated and the Respondent was allowed to execute it.
 - d. That aggrieved with the Ruling of 4/5/2023, the Applicant filed the instant Motion as well as Thika ELC LC E002 OF 2023 contrary to the doctrines of sub judice and res judicata.
 5. On 8/5/2024 directions were taken and parties agreed to prosecute the Application by way of written submissions.
 6. The Applicant did not file his submissions.
 7. The firm of Chege & Mageto Advocates filed submissions dated 18/7/2024 on behalf of the Respondent. Two issues were drawn for determination; whether the Preliminary Objection should be allowed and who bears costs of the Application.
 8. On the first issue reliance was placed on the case of Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 696 as to what constitutes a Preliminary Objection, that in this instance the Preliminary Objection is a pure point of law as it raises the issues of sub judice and res judicata as enshrined under Sections 6 & 7 of the *Civil Procedure Act* respectively. That accordingly the Court is devoid of jurisdiction to entertain this Application as drawn. In support of that proposition the case of The Owners of the Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Limited [1989] KLR 1 was cited.
 9. Concerning the issue of costs, the Respondent submitted that generally costs follow the event as espoused in Section 27 of the *Civil Procedure Act* and the Supreme Court decision of Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others [2013] eKLR. That in light of the pending suit before this Court, the instant Application is an abuse of Court process and should be dismissed with costs.
 10. Having read and considered the Court record, the Application and objection thereto, the sole issue for determination in my view is whether the Application is merited.
 11. The gist of the Applicant's Application seeks leave to appeal out of time against the Ruling dated 3/7/2023. A party seeking such leave must appeal to the discretionary powers of the Court that are exercised within the laid down parameters set out in the *Civil Procedure Act*. Such discretion should not be exercised whimsically or capriciously but must be based on the peculiar circumstances of the case, considering the cause of the delay, the period involved, the possible prejudice if any likely to be suffered by the other side and balancing the interest of both sides; where one party has a Judgment



that favors them and the other has a constitutional right to pursue an appeal, including the need to conclude cases timeously.

12. The relevant law in an Application seeking leave to appeal out of time is anchored on the proviso of Section 79G of the *Civil Procedure Act* that;-

“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.”

13. Section 95 of the *Civil Procedure Act* provides;

“95. Enlargement of time

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

13. Additionally, Order 50 rule 6 of the Civil Procedure Rules states;

“6. Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the Application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any Application to extend such time and of any order made thereon shall be borne by the parties making such Application, unless the Court orders otherwise.”

14. In this amended Application, the impugned Ruling and draft Memorandum of Appeal were not annexed. However, in the Supporting Affidavit of the initial Application dated 3/7/2023 the impugned Ruling was annexed as ‘MO-1’ and the draft Memorandum of Appeal was ‘MO-2’. The omission to attach such evidence in the instant Motion is enough to render it untenable but in light of the provisions of Article 159 of *the Constitution* of Kenya and oxygen principles in the *Civil Procedure Act*, the Application is determined on merits as follows.

15. A reading of the assailed Ruling reveals uncontested facts to wit; the trial suit was heard ex parte and Judgment in default was entered in favor of the Respondent herein on 16/11/2022. Aggrieved by the Judgment, the Applicant herein moved the trial Court vide his Application dated 8/5/2023 seeking to set aside/stay the ex parte Judgment. That Application was allowed on 4/4/2023 albeit on conditions



that the Applicant pays the Respondent Kshs. 20,000/- as Throw away costs to the Respondent; file his Defence within 14 days of the said date and failing which the said orders would automatically lapse. See page 4 of 'MO-1'. A mention date was set for 4/5/2023 to confirm compliance. Whereas the throw away costs were paid, the record is clear that the Defence was not filed within 14 days as directed by the Honourable Court. As a consequence, and in the absence of the Applicant and/or his Counsel, the ex parte Judgment was reinstated and the Respondent allowed to execute it. Indeed, the Respondent submitted that the Application is overtaken by events since it already executed the Judgement in its favor.

16. Having outlined the above facts, it emerges that the orders of 4/4/2023 were self-executory in nature and the Applicant having failed to comply, the Court dismissed the Applicant's Application on 3/7/2023 resulting in a negative order.

17. Be that as it may, the question that begs an answer is whether the Applicant had good and sufficient cause for not filing the appeal in time. The Supreme Court in the case of *Nyamboki Vs. Gathuru (Application 6 of 2019)* [2019] KESC 44 (KLR) held as follows in determining an Application seeking such extension;

“In determining such an Application, the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an Applicant has been slothful, and filed such an Application as an after-thought.”

18. Earlier on the Supreme Court had devised principles to be considered in an Application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral And Boundaries Commission & 7 others* [2014] eKLR as follows;

- “ 1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
6. Whether the Application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” See also *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* [1999] 2 EA 231.”

19. An appeal from the Subordinate Court to this Court is by way of Memorandum of Appeal only. In this case the Applicant posits that the trial Court file was missing but has not been substantiated by way of evidence and in any event the trial Court file is not mandatory for the filing of a Memorandum of Appeal. The instant Application is dated 22/9/2023 which is a period of over two months since



the impugned Ruling was delivered on 3/7/2023. The said delay in my view has not been adequately explained to unlock the Court's discretion in the Applicant's favor.

20. Would the Respondent suffer any prejudice in the event the Application is allowed? Indeed, the Respondent averred that it had already executed the ex parte Judgment and as such the Application is overtaken by events. This averment was not controverted by the Applicant. In my opinion therefore allowing the Application would amount to an academic exercise. I rely on the Court of Appeal Ruling in *Wainaina Vs. Equity Agrarian Credit Services Ltd & Another* (Civil Application E017 of 2024) [2024] KECA 1511 (KLR) that declined to grant the Applicant leave to appeal inter alia on the basis that execution had already ensued signaling the Respondent's presumption regarding the finality of the Judgment.
21. Last but not least, in seeking an equitable remedy as in this instance, an Applicant must approach the Court with clean hands. It is also trite that equity aids the vigilant and not the indolent. The Applicant failed to comply with Court orders within the directed timeline of 14 days in particular filing of his Defence. This inaction militates against the discretion he seeks from the Court to favor him.
22. The upshot of the forgoing is that the Application dated 22/9/2023 is unmerited and it is for dismissal with costs to the Respondent.

Ordered accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

Ms. Nduru holding brief for Mr. Mwalo for the Applicant

Ms. Kiema holding brief for Ms. Chege with Ms. Kanyi for the Respondent

Ms. Lillian – Court Assistant

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MOGENI J

JUDGE

