



**Machera v Mohabe (Environment & Land Miscellaneous Case
E007 of 2024) [2024] KEELC 14209 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 14209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND MISCELLANEOUS CASE E007 OF 2024
GMA ONGONDO, J
SEPTEMBER 26, 2024**

BETWEEN

THOMAS MARWA MACHERA PROPOSED APPELLANT

AND

JACKSON MARWA MOHABE PROPOSED RESPONDENT

RULING

1. In application by way Notice of Motion dated 3rd May 2024 mounted under, inter alia, sections 3A and 95 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and Article 159 (c) of *the Constitution* of Kenya 2010, the proposed appellant/applicant through Mwita Kerario and Company Advocates is seeking the orders infra;
 - a. That the proposed appellant be granted leave to appeal out of time against the whole judgment and subsequent orders of the Senior Principal Magistrate’s Court Kehancha delivered on 2nd November 2024.
 - b. That the memorandum of appeal annexed to the application be deemed as duly filed and served.
 - c. That the costs of the application be provided for.
2. Grounds (a) to (c) set out on the face of the application are the basis of it. Further, the supporting affidavit of even date by learned counsel for the Applicant and a request letter marked as ‘AMK’, are in support of the application
3. Briefly, the applicant stated that he was out of the country for work until March 2024 and could not instruct counsel to file an appeal from the trial court’s judgment within the prescribed time. That thereafter, he instructed his current counsel who proceeded to request for certified copies of



proceedings and judgment of the trial court. That the proposed respondent is not likely to suffer any prejudice in the event the application is allowed.

4. In a replying affidavit sworn on 24th May 2024 by Jackson Marwa Mohabe, the proposed respondent through learned counsel Jura Nelson, opposed the application, termed it unmerited and that the same be dismissed with costs. He averred, inter alia, that the applicant has not given good or sufficient cause for delay of six months in filing the intended appeal as provided for in section 79 G of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya. That the trial court's judgment was delivered in the presence of counsel for the applicant. That there is no evidence that any attempt was made to contact the applicant for instructions to file an appeal and the court to take judicial notice that there are various avenues of communication are available Worldwide.
5. Further, the respondent stated that the application is an afterthought and an abuse of judicial process, That the provision of [the Constitution](#) of Kenya 2010 cited in the application, is immaterial and cannot sanitise the applicant's indolence. That the purported draft memorandum of appeal is incompetent having been filed as a miscellaneous application and as no appeal lodged, the prayers sought in the application are incapable of grant.
6. In the foregone, are the orders sought in the application merited?
7. I take into account sections 75 and 79G Of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya which stipulate the orders from which appeal lies and the time of filing of appeals from subordinate courts respectively. Also, I bear in mind Orders 42 and 43 of the Civil Procedure Rules 2010 on appeals and appeals from orders.
8. The draft memorandum of appeal contains issues including refund of the purchase price, the transfer of the land in dispute and admission to transfer of the same. The issues call for the proposed appeal on merits,
9. In the case of Butt-vs-Rent Restriction Tribunal (1979) eKLR, the Court of Appeal noted;

‘.....the appellant has an undoubted right of appeal.....’
10. An opportunity to be heard in the proposed appeal is a fundamental principle of justice as stated in Halsbury's Laws of England 5th Edition 2010 Volume 61 paragraph 639; see also Articles 48, 25 (c) and 50 (1) of [the Constitution](#) 2010.
11. The applicant stated that he was out of the country and he had to request for proceedings to enable him lodge appeal from the trial court. In the circumstances, I find that there is a plausible and satisfactory explanation for the delay in the mounting the application for the proposed appeal; see Andrew Kiplangat Chemaringo-vs-Paul Kipkorir Kibet (2018) eKLR.
12. Accordingly, this application has merit. The same is hereby allowed in terms of orders (a) and (b) stated in paragraph 1 hereinabove with costs to abide the outcome of the proposed appeal.
13. The applicant to file and serve memorandum of appeal within the next thirty days from this date.
14. It is so ordered.

DELIVERED AND DATED AT MIGORI THIS 26TH DAY OF SEPTEMBER 2024.

G M A ONGONDO

JUDGE

IN PRESENCE OF;-



Mr Mwita Kerario learned counsel for the applicant

Mr Nelson Jura learned counsel for the respondent

Tom, Court Assistant

