



**Tuitoek & another v Koech (Miscellaneous Civil Application
E006 of 2024) [2024] KEELC 6492 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
MISCELLANEOUS CIVIL APPLICATION E006 OF 2024**

**L WAITHAKA, J
SEPTEMBER 25, 2024**

BETWEEN

PRISCAH TUITOEK 1ST APPLICANT

RODAH CHEBET 2ND APPLICANT

AND

PHILIP KIMETO KOECH RESPONDENT

RULING

1. By a notice of motion dated June 27, 2024, brought under Sections 1A, 1B, 3A, 79G and 95 of the [Civil Procedure Act](#) and Order 42 Rule 6 of the Civil Procedure Rules, the applicants herein seek leave to file an appeal out of time against a ruling delivered on 7th May 2024 in Eldama Ravine CMC ELC Case No. E006 of 2023-Kimeto Koech vs. Priscah Tuitoek & Rodah Chebet.
2. Upon grant of leave, the applicant prays that the draft memorandum of appeal attached to the application be deemed to be duly filed upon payment of requisite court fees.
3. The applicants also seek an order of stay of proceedings in CMCELC No.E006 of 2023-Kimeto Koech vs. Priscah Tuitoek & Rodah Chebet pending the hearing and determination of the application and the intended appeal.
4. The application is premised on the grounds on its face and supported by the affidavit of Rodah Chebet, sworn on 27th June 2024, in which the grounds on the face of the application are reiterated. In a nutshell, through the ruling of the lower court sought to be appealed out of time, the lower court allowed the respondent's application for leave to appoint Maltida Chebet as his representative for the purpose of prosecuting his case.



5. The applicants seek leave to appeal that decision out of time on the grounds that the lower court lacked jurisdiction to make such an order without a medical report confirming that the respondent suffered from mental infirmity hence incapable of prosecuting his own suit.
6. That owing to failure on the part of their former advocate to communicate the decision of the court to them, they did not get to know about the decision of the lower court; that they got to know about the decision of the lower court on 20th June 2024 when they visited their former advocates chambers, to follow on the matter; that upon getting to know about the ruling, they instructed their current advocates who filed a notice of change forthwith and that by the time they got to know about the ruling the statutory period for appealing had lapsed.
7. Terming their intended appeal arguable and one that raises fundamental legal issues touching on the jurisdiction of the lower court in making an order appointing a party as a guardian ad litem on account of old age, the applicants urge the court to allow the application on the following additional grounds: -
 - i. The respondent will suffer no prejudice if the application is allowed;
 - ii. The delay in bringing the application is not inordinate and is excusable;
 - iii. Unless stay is granted, they will be greatly prejudiced as they would be denied the opportunity to cross examine the plaintiff.
8. The applicants have annexed the following documents to the affidavit sworn in support of their application: - authority to swear the supporting affidavit marked RC-1; the ruling of the lower court marked RC-2 and the draft Memorandum of Appeal marked RC-3.
9. Maltida Jebet Kimeto, who pursuant to the impugned ruling of the lower court was appointed representative of the respondent, swore an affidavit on 12th July 2024 through which she contends that the applicants have not made up a case for being granted the orders sought. She gives the following reasons for her contention: -
 - i. Nothing stopped the applicants from filing an initial record of appeal by 7th June 2024 and thereafter filing a supplementary record of appeal;
 - ii. That the application is an afterthought the same having been filed 52 days after the impugned ruling was delivered;
 - iii. That the respondent did move the court under the *Mental Health Act* but through a duly registered power of attorney appointing her as his representative;
 - iv. That the prayer for her appointment as a guardian ad-litem was but an alternative prayer;
 - v. That the prayer granted by the court was for leave to Matilda Jebet Kimetto (herself) to represent the plaintiff in the matter/case;
 - vi. That the respondent would be prejudiced if the application is allowed as it will lead to delay in hearing and concluding his case.
10. Terming the intended appeal lacking in merit, an afterthought, a delaying tactic and a waste of judicial time, the respondent through his court appointed representative, describes the application as incomprehensible, vexatious, frivolous, incurably defective and brought in bad faith. According to the respondent's court appointed respondent, the orders sought by the applicants are meant to strain the respondent who is old and sickling.



11. The deponent has also denied the applicants contention that they stand to suffer prejudice if the application is dismissed.
12. Pursuant to directions given on 7th July 2024, parties agreed to canvass the application by way of written submissions.

Submissions

Applicant's submissions

13. In their submissions dated 23rd August 2024, the applicants gave a background of the application and framed the following issues for determination;
 - i. Whether the applicants should be granted leave to appeal out of time against the ruling
 - ii. Whether the Memorandum of Appeal should be deemed as duly filed upon payment of the requisite fees.
 - iii. Whether the proceedings in CMC ELC No. E006 of 2023 should be stayed pending the hearing and determination of the appeal and application.
14. On the first issue, it is submitted that this court has unfettered discretion to enlarge time by dint of Sections 79G and 95 of the *Civil Procedure Act* 2010 as long as sufficient reason for the delay is furnished by the applicant.
15. The applicants blamed their former advocates for failure to inform them of the delivery of the ruling; that by the time they learnt of the said ruling, time for filing the appeal had lapsed. They beseech the court not to allow the mistake of their advocates to fall upon them stating that they have since changed their advocates. They relied on the cases of Hamam Singh & others v. Mistri (1971) EA 122 Shah H. Bharmal & Brothers v Kumar (1961) EA 679 and Edith Gichungu Koine v Stephen Njagi Thoithi (2014) eKlr.
16. The applicants further submitted that they stand to suffer prejudicial harm and irreparable loss if leave is not granted; that their intended appeal raises triable issues with a high probability of success as they seek to challenge the jurisdiction of the lower court, the evidence used to substantiate the case and the competence of the guardian ad litem appointed. They relied on the cases of UAP Insurance Company Ltd v Micheal John Beckett (2004) Eklr, Port Florence Community Health Care v Crown Health Care Limited (2022) eKlr and Co-operative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya) (2015) eKlr.

Respondent's submissions

17. In his submissions dated 17th September 2024, it is the respondent submits that the applicants have not given a good or sufficient cause for the delay and that the intended appeal's sole purpose is of delaying the proceedings.
18. He framed the following as the issues for determination
 - i. Whether the applicants should be granted leave to file an appeal out of time.
 - ii. Whether this court should stay the proceedings in CMEL E006 of 2023.
 - iii. Who should meet the costs of the application



19. On the first issue, the respondent submits that in an application for extension of time, the court should take into account several factors as held in the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014) eklr. It is his contention that the applicants do not deserve the court's discretion exercised in their favour as the delay has not been sufficiently explained. They relied on the cases of *Olivia Wamuhu Kinyanjui v Margaret Njeri Ndirangu* (2015) eklr and *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi HCCC NO. 397 OF 2002 (U.R)*.
20. It is further submitted that the applicants have not complied with the conditions set out in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* (2017) eklr, in order for the court to exercise discretion in their favour; that the applicants have not approached the court with clean hands and they cannot purport to blame their former advocate whilst they were aware of the ruling date as they were present and only wasted time shopping for alternative representation.
21. It is his submission, that he will be prejudiced if the extension is granted as this will delay the proceedings and expeditious disposal of the matter.
22. On the second issue, the respondent submits that stay of proceedings is an equitable relief and the court must consider if the application has been filed expeditiously and must only grant a relief in very exceptional circumstances. He submits that the applicants have not met the threshold for grant of a stay of proceedings in that the appeal is not arguable, the appeal will not be rendered nugatory and no substantial loss will occur. He relied on the following cases to support his position: *Kenya Wildlife Services v James Mutembei* (2019) eklr, *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)* & *The Judicial Committee of the Privy Council in Thomas v The Attorney General of Trinidad and Tobago* (1991) LRC (Const.) 1001.
23. On the issue of costs, he relied on Section 27 of the *Civil Procedure Act* and the case of *Rosemary Wairimu Munene, Ex-parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014*

Analysis and determination

24. This court has discretionary power to grant leave to file an appeal out of time. That power is granted by Section 79G of the *Civil Procedure Act*. In that regard, see the case of *Edward Kamau & Another vs. Hannah Mukui Gichuki & Another* where it was stated: -

“On whether this court should grant extension of time for filing an appeal, the applicable law is section 79G of the *Civil Procedure Act*...

Under the proviso to the said section, 79G of the *Civil Procedure Act*, an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

The court further stated: -

“The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, SC Appl 16/2014 laid down the following as the underlying principles that a court should consider in exercise of discretion to extent time: -

- i. Extension of time is not a right of a party. It is equitable remedy that is available to a deserving party at the discretion of the court;
- ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- iii. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- iv. Where there is a reason for the delay; the delay should be explained to the satisfaction of the court;
- v. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
- vi. The application should have been brought without undue delay; and
- vii. In certain cases, like election petitions, public interest should be a consideration for extending time.”

25. *In Gitau vs. Kagwi & another (Civil Appeal No.314 of 2023)*(2024)KEHC 6320 (KLR)(30 May 2024 (Ruling) the Court of Appeal held:-

“In general the matter which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

26. In applying the principles/tests espoused in the above cited cases to the circumstances of this case; there was a delay of about three weeks in bringing the application for leave to file appeal out of time. The applicants have given the reason for the delay as failure by their previous counsel to inform them about the ruling. Concerning the explanation/reason offered by applicants for failure to file appeal in time, I adopt the sentiments of the court in the case of *Mwangangi v. Mugi (CA No 1 of 2023)*(2024) KEHC 6321 (KLR) (30th May 2024 (Ruling) where the court held:-

“The applicant had a duty to pursue his advocates to find out the position on the litigation but their no disclosure that the applicant followed up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not an excusable mistake which the court may consider with some sympathy.”

27. Whereas in the circumstances of this case, the delay in bringing the application was not very inordinate to warrant refusal of grant of leave, I find the explanation offered unsatisfactory since failure by counsel to inform his/her client of the decision of the court is not per se a good reason for being granted leave to appeal out of time.

28. As to whether the appeal has chances of success, I have considered the decision of the court sought to be appealed from and the circumstances leading to the issuance of the impugned ruling. It is the considered view of this court that the appeal has no chances of success as contrary to the contention by the applicant, the trial court did not appoint a guardian ad litem for the plaintiff but a representative pursuant to a power of attorney that the plaintiff had donated to the representative. Whilst the plaintiff had an alternative prayer for appointment of a guardian ad litem, it has not being demonstrated that the court granted that order and not the order of a legal representative.

29. For the foregoing reasons, I find the application dated June 27, 2024 to be lacking in merits and dismiss it with costs to the respondent.



30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 25TH DAY OF SEPTEMBER, 2024.

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:-

Mr. Sirma holding brief for Mr. Kipkenei for Defendant/ Applicant

Mr. Masinde holding brief for Mr. Kipsamo for the Plaintiff/Respondent

Court Assistant: Ian

