



Mbui (Legal representative of James Muchachi Mbui) v Barclays Bank of Kenya (Now Absa Bank Kenya PLC) & another (Environment and Land Miscellaneous Application E010 of 2024) [2024] KEELC 6938 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6938 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2024
CK YANO, J
OCTOBER 24, 2024

BETWEEN

ESTHER NJERI MBUI (LEGAL REPRESENTATIVE OF JAMES MUCHACHI MBUI) APPLICANT

AND

BARCLAYS BANK OF KENYA (NOW ABSA BANK KENYA PLC) 1ST RESPONDENT

PETER KURIA WANYOIKE 2ND RESPONDENT

RULING

1. The applicant herein filed the notice of Motion application dated 12th February, 2024 seeking leave to file an appeal out of time against the judgment dated 7th March, 2023 delivered by Hon. D. W. Nyambu in Meru Chief Magistrate’s Court ELC Case No. 112 of 2018 (formerly Meru HCC No. 8 of 2009), that the memorandum of appeal annexed to the supporting affidavit be admitted by this court and costs. The application is brought under Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 51 Rules 1 and 3 of the *Civil Procedure Rules, 2010*, Article 50 of the *Constitution* of Kenya, 2010 and all other enabling provisions of the law and is premised on the grounds in the face of the motion and supported by the affidavit of Esther Njeri Mbui, the applicant herein, sworn on 12th February, 2024 and a further affidavit dated 22nd July, 2024 in which the applicant has annexed copies of the said judgment, a letter requesting for proceedings, a copy of a death certificate for Mr. B.G Kariuki the draft memorandum of Appeal, certificate of official search, and a letter to the 1st respondent.
2. Briefly, it is the applicant’s case that the lower court delivered judgment on 7th March 2023. That the learned trial magistrate had earlier on delivered a ruling in the same matter and the respondents were not satisfied with that ruling and filed ELC Appeal No. E038 of 2021 which was in court since 2021 until 25th January, 2024 when the same was withdrawn by the appellants in that appeal for the reason



that the same had been overtaken by events since the lower court had delivered judgment way back on 7th March 2023.

3. The applicant states that she could not file the appeal without knowing the outcome of the said appeal No. E038 of 2021 lest she bombarded the court with the same issues between the same parties and from the same lower court file. That the respondents were appealing against the ruling of the lower court's decision not to allow the respondents produce documents in their defence after time had lapsed. That the respondents did not in any way anticipate that without adducing evidence, the court would rule in their favour. That the main judgment was delivered in favour of the respondents much to the dissatisfaction of the applicant herein.
4. The applicant states that the requisite period within which one has to file an appeal had lapsed. The applicant avers that she is an innocent litigant and the failure to file the intended appeal in time is based on the fact that the respondents had filed the appeal which was still pending in this court, and that it was only logical that the applicant allows the said appeal to be concluded. That the applicant was not able to immediately pursue the withdrawal or finalization of the said appeal then since it was not her appeal and subsequently her advocate then on record B.G Kariuki had passed on. The applicant states that she has intentions of challenging the aforesaid judgment and that the intended appeal raises triable issues with a high probability of success. That no prejudice will be occasioned to the respondents if the orders sought herein are issued. That the court has unfettered discretion to grant leave to file an appeal out of time in exercise of its appellate jurisdiction. That the application has been brought in good faith and without inordinate delay.
5. The applicant denied that suit land has been sold and that it is still registered in the name of the applicant's late husband. The applicant avers that the 1st respondent has no claim from her since all monies they claimed from the 2nd respondent was all paid. That the certificate of official search shows that their matrimonial property is still charged and incumbered by the 1st respondent, and thus the need for the court to hear and determine the intended appeal.
6. In opposing the application, the 1st respondent filed a replying affidavit dated 15th April 2024 sworn by Samuel Njuguna, a legal officer at the 1st respondent bank wherein the deponent inter alia, has given foundational transactions and/or events leading to the dispute herein. It is the 1st respondent's contention that for the applicant to be granted the orders sought, she ought to demonstrate each of the criterion that has been set namely, the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. The 1st respondent contend that the applicant has not discharged that burden and therefore the court should dismiss the application with costs to the respondents.
7. The 1st respondent pointed out that the applicant has delayed for over a year from 7th March 2023 when the judgment that she seeks to appeal against was delivered. That the applicant has not provided cogent reasons to justify the delay. That the delivery of the ruling did not in any way alter the judgment of the lower court. That the ruling of the High Court was irrelevant to the main suit. It is also stated that the applicant has not demonstrated to the court the chances of the intended appeal succeeding should leave be granted. The 1st respondent states that the property in question may have changed hands multiple times since the auction, and therefore any orders issued by the court would be rendered ineffective. That the 1st respondent must be allowed to enjoy the fruits of their judgment. Further, that granting the orders that the applicant seeks herein would be highly prejudicial to the 1st respondent as they have since auctioned the property legally, yet they are forced to incur legal costs in defending this suit to this point. The 1st respondent urged the court to dismiss the application with costs.



8. The application was canvassed by way of written submissions. The applicant filed her submissions dated 26th July 2024 through the firm of Hillary Sandi & Co. Advocates while the 1st respondent filed theirs dated 26th September, 2024 through the firm of Karanja Njenga & Co. Advocates. The court has read and considered the submissions filed by the applicant and the 1st respondent and I need not reproduce the same in this ruling.
9. I have considered the application herein, the response and the submissions filed. I have also taken into account the authorities relied on by the parties to support their rival positions. The issue for determination is whether or not the applicant should be granted leave to file appeal out of time.
10. Under Section 79 G of the *Civil Procedure Act*, appeals from the decisions of the lower court to the High Court (and this court) must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. However, the proviso to the said section allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of Judicial discretion. An applicant seeking leave to file appeal out of time must show that he/she has a good cause for doing so.
11. The principles upon which the court should exercise the said discretion and grant leave out of time are now well settled. The court ought to consider the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted (see *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997 and *Thuita Mwangi Vs Kenya Airways Limited* [2003] eKLR). The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.
12. As for the length of delay, the Judgment of the subordinate court was delivered on 7th March 2023. The instant application was filed on 15th February, 2024. The 30 days period within which the applicant ought to have filed the appeal lapsed on or about 7th April 2023. The application has been brought after a period of over ten (10) months. It is my considered view that the application was brought after an unreasonable delay.
13. In justifying the delay, the applicant stated that the learned trial magistrate had delivered a ruling on the case and that the respondents were dissatisfied with that ruling and filed ELC appeal case no. E038 of 2021. That the said appeal was in court from the year 2021 until 25th January, 2024 when same was withdrawn by the respondents herein and who were the appellants in that appeal. The applicant did not explain how that appeal prevented her from filing the intended appeal within time. The applicant states that she could not file her intended appeal without knowing the outcome of the said appeal No. E038 of 2021 lest the court was bombarded with the same issues between the same parties in the same suit. That explanation in my humble view is farfetched since there is nothing that stopped the applicant from filing her own appeal against the impugned judgment. It is common knowledge that various parties in a matter may file their own separate appeals arising from the same decision. It is also common practice that where such separate appeals are filed, and because they arise from the same matter, may be consolidated and heard together, especially to avoid the danger of different courts making different decisions over the same matter. Therefore, having been aggrieved by the impugned judgment, and despite the pendency of ELC Appeal No. E 038 of 2021, nothing prevented the applicant herein from lodging appeal either within the time stipulated in law or seek leave as soon as possible. I also note that the applicant has stated that she was unable to fast track the appeal on her end because her advocate then on record, Mr. B.G Kariuki passed on during the pendency of the appeal. However, the death certificate which has been exhibited indicates that the said Advocate died on 6th January, 2023 which was two months before the impugned judgment was delivered. The reason given by the applicant for the delay is



not convincing. In my view, the application is an afterthought. In addition, the applicant has not even shown any evidence to indicate that immediately the judgment was delivered she applied for copies of the proceedings and judgment for purposes of appeal. The only letter requesting for proceedings is the one dated 25th January, 2024 and which was addressed to the Deputy Registrar of this court in respect to ELC appeal No. E038/2021. This court has not seen a request for the proceedings in Meru CMC Elc Case no. 112 of 2018 (formerly Meru Hccc No. 8 of 2009). It is therefore my finding that the reason given by the applicant herein for the delay was not well explained, is farfetched and frivolous and the delay was quite inordinate. And having perused the draft memorandum of appeal, I am also not persuaded that the same has any chances of success. This is because the said draft memorandum of appeal dwells on extraneous issues, other than the main issues in the case which are whether the suit property was charged to advance facilities to the 2nd respondent and in which the deceased executed a guarantee in favour of the 2nd respondent to receive facilities from the 1st respondent. It is also my finding that allowing the application herein would greatly prejudice the 1st respondent since the impugned judgment was delivered close to a year before the application herein was made. It is trite law that litigation must come to an end. The 1st respondent must be allowed to enjoy the fruits of the judgment that was delivered in the lower court.

14. Accordingly, and for the reasons stated hereinabove, it is my finding that the applicant herein has not satisfied the conditions for grant of leave to appeal out of time.
15. Consequently, I find that the notice of motion dated 12th February, 2024 is devoid of merit and the same is hereby dismissed with costs to the 1st respondent.
16. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2024

In the Presence of

Court assistant – Tupet

No appearance for parties

C.K YANO

ELC JUDGE

