



Theuri & 6 others v Theuri & another (Environment & Land Case E046 of 2022) [2024] KEELC 13340 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E046 OF 2022
A OMBWAYO, J
NOVEMBER 21, 2024**

BETWEEN

GEORGE THEURI 1ST APPELLANT

**HANNAH WANGUI KAMAU & 5 OTHERS & 5 OTHERS & 5
OTHERS 2ND APPELLANT**

AND

NESTER WANJA THEURI 1ST RESPONDENT

RUKENYA COMMERCIAL AGENCIES 2ND RESPONDENT

RULING

1. The Appellants filed the instant application dated 30th September, 2024 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That the Honourable court be pleased to issue leave to the Plaintiff/Applicants to file appeal out of time on the judgment.
 4. Spent.
 5. That the costs of this Application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Grace Wanjira Kabaiku the 7th Plaintiff/Applicant herein sworn on 30th September, 2024. She stated that judgment was delivered on 23rd May, 2024 in favour of the Defendants/Respondents as against the Plaintiffs/Applicants. That the Respondents approached the Applicant with an offer letter in respect to the proposed sale of the suit property. She further stated that the Applicants had lost touch with their advocate on record and thus did not have any legal representation. She stated that in their attempt to



settle the dispute, the offer period had lapsed and the Respondents served them with a notice to vacate the suit land.

3. She went on to state that the Applicants were under the impression that the 90-day period by the court and the further 30-day period in the offer letter constituted the stay period within which they could settle the matter. That the Applicants have an appeal with high chances of success and that the execution will render the intended appeal nugatory rendering them homeless.

Response

4. The 1st Defendant/Respondent filed her Replying Affidavit dated 8th October, 2024 where she averred that the proposal for re-sale was initiated by the Applicant and that the 1st Respondent had no obligation to accommodate the Applicants request. She averred that the offer letter was issued by the 1st Respondent's lawyers after being approached by the said purchasers. She added that the parties in the said letter are not parties to the proceedings and since it was not executed, it has no legal effect. The 1st Respondent averred that the eviction order was to take effect after 90 days from the date of judgment and thus the Applicants had sufficient time to relocate. She averred that the Applicants were duly represented during the proceedings and were fully aware of the orders issued. She further averred that if they had the intention to appeal the decision, they should have sought legal advice within the required time frame. She went on to aver that the draft memorandum of appeal does not raise any triable issues as the 1st Respondent holds a good title to the property. The Applicant filed a further affidavit dated 16th October, 2024 where she reiterated the contents of his supporting affidavit to the application. She stated that the Applicants provided proof that they have been living on the suit land since 2006/2007 and thus acquired the full rights under adverse possession. She further stated that the 1st Respondent's husband had appointed an agent who sold the suit property to the Applicant. She stated that they could not repurchase the land already bought and also settled outgoing costs for a second purchase of plots they already owned. The Applicant stated that the 1st Respondent's counsel was aware that the Applicants instructions to advocates only extended up to judgment and thus as the time they didn't have.
5. She stated that the Respondent's counsel initiated negotiations with the Applicant for purchase of the suit property after judgment had been delivered. She went on to state that majority of the Applicants neither signed the offer letter or sale agreement since they believed that they had rights but were not sure how to approach it since judgment had been delivered against them. She stated that despite the parties addressed in the letter not being parties to the proceedings, notice to vacate was still issued against their plots. She also stated that they only became aware of the time limits after they sought legal advice from the firm of Wachira Wekhomba Aim Advocates.

Submissions

6. Counsel for the Applicants filed their submissions dated 22nd October, 2024 where they identified four issues for determination. First issue was whether the honourable court has jurisdiction to extend time period for filing an appeal. While submitting in the affirmative, they relied on Section 7 of the *Appellate Jurisdiction Act* Cap 9 Laws of Kenya and the case of *Loise Chemutai Ngurule & Jacob Anguya Ngurule V Wilfred Leshwari Kimung'en, Wilfred Abuye Kimung'en & Kenneth Rotich* [2015] KEELC 447 (KLR).
7. The second issue was whether the delay by the Plaintiffs/Applicants is inordinate and reason for the delay. They relied on the case of *Utalii Transport Company Ltd & 3 Others V NIC Bank Ltd & Another* [2014] eKLR and submitted that there is no prescribed test for inordinate delay but the same is discretionary on case by case basis. They submit that the reason for the delay was that they lost touch



- with their counsel and that the 1st Respondent had initiated talks on proposal for resale. The third issue on whether the draft memorandum of appeal raises triable issues, they submit in the affirmative and argue that the appeal touches on innate applicable laws.
8. The final issue is whether the Respondent shall suffer any prejudice. They submit in the negative and argue that the Respondent for almost 15 years has never set foot or developed the suit land. They further argue that the 1st Respondent indicated that they wish to dispose of the suit land. They urged the court to allow them file the appeal out of time.
 9. Counsel for the 1st Respondent on the other hand filed their submissions dated 25th October, 2024 where they identified one issue for determination, whether the Plaintiffs' application has merit. They relied on the case of *Stitching Medical Credit Fund V SBM Bank Kenya Limited (Commercial Case E142 of 2020)* [2024] KEHC 3466 (KLR) and submitted that Section 7 of the *Appellate Jurisdiction Act* pertains to Notice of Appeal. They submit that the same ought to be filed and served within 14 days from the date of judgment. They add that the said section empowers the court to extend time for an aggrieved party to file the Notice of Appeal after lapse of the statutory period.
 10. They also submit that the leave sought by the Applicant is moot as it has already been overtaken by events. It is their submission that the Applicants already filed the Notice of Appeal dated 4th June, 2024. They relied on the case of *Martin Otieno & Another V Thomas Murita Marwa* [2021] eKLR which relied on the case of *Trimbon Agricultural Engineering Ltd V David Njoroge Kabaiko & Another* [2020] eKLR and submit that the High Court cannot extend time once notice has been filed. In conclusion, counsel urged the court to dismiss the instant application with costs.

Analysis and Determination

11. This court has carefully considered the application and the main issue for determination is whether the application is merited.
12. Section 7 of the *Appellate Jurisdiction Act* provides as follows:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

13. It is trite law that this court is clothed with jurisdiction to extend time for a litigant who is desirous of filing a Notice of Appeal to the Court of Appeal for the first time.
14. In the case of *Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another* [2000] KECA 419 (KLR) the court held as follows:

The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of *Peter Njoroge Mairo vs Francis Gicharu Kariri & another*, Civil Appeal (Application) No 186 of 1999, (unreported), said:

In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of *Edward Allan Robinson & 2 others vs Philip Gikaria Muthami*, (Civil



Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:

Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.

Besides, from a careful reading of the provisions of rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time. The jurisdiction to restart the appellate procedures is not donated by section 7, above, but by rule 4 of the Rules. The rule, in effect, empowers the Court to reinstate the struck out appeal, while section 7, above, empowers the High Court to, in effect, assist a litigant in distress who otherwise would not seek help of either Court for any interim relief before he lodged his appeal for the first time.”

15. In the Peter Njoroge Mairo case this Court also decided that extension of time to lodge a notice of appeal granted by the High Court does not automatically extend the time to lodge the record of appeal, and that therefore that appeal, as lodged, was incompetent.”
16. In the instant case, it is not in dispute that judgment was delivered on 23rd May, 2024. It is noteworthy that the Appellants filed a Notice of Appeal dated 4th June, 2024 on 6th of June, 2024. I find that the Notice of Appeal is thus properly on record having been filed within the 14-day statutory period. The Applicant in this case seeks leave to file the appeal out of time, it is this court’s view that the appeal in this instance can be taken to be the record of appeal.
17. It is this court’s opinion that the binding reasoning of the Court of Appeal case in the Trimborn Agricultural Engineering Limited Case (supra) gives the Court of Appeal the power to extend time for filing of record of appeal and not the High court. In light of the same, it is this court’s view that it lacks the requisite powers to extend time to file the record of appeal as the said powers is bestowed upon the Court of Appeal. In the upshot, the application dated 30th September, 2024 is dismissed with costs. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF NOVEMBER 2024.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

