



**Kagundu & another v Thungutha (Environment & Land Miscellaneous Case E009 of 2024) [2024] KEELC 13324 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13324 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E009 OF 2024**

**CK YANO, J**

**NOVEMBER 20, 2024**

**BETWEEN**

**JECINTA KAGUNDU ..... 1<sup>ST</sup> APPLICANT**

**MUKWAMBURA THUNGUTHA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARIA KARUNDU THUNGUTHA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 1<sup>st</sup> July, 2024 brought under Section 79G of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 51 of the Civil Procedure Rules, the applicants seek for leave to file appeal out of time against the judgment of the learned Principal Magistrate Hon. Mbayaki Wafula delivered on 20<sup>th</sup> December, 2023 in Marimanti PM ELC Case No. 12 of 2019 and costs of the application to be costs in the intended appeal.
2. The application is based on the grounds set out on the face of the application and supported by the affidavit dated 1<sup>st</sup> July, 2024 sworn by Jecinta Kagundu Gerald.
3. The applicants state that they had instructed their advocate to apply for judgment and the proceedings of the court with a view to filing an appeal, but the advocate informed them that he was not able to apply for the proceedings and the judgment of the court immediately because the judgment was delivered at a time when he had taken his end of year holiday and was to open his chambers in January, 2024. That on 16<sup>th</sup> January, 2024, their advocate wrote to the magistrate's court seeking a copy of the judgment. The Applicants have annexed a copy of the letter marked "JKG1".
4. The Applicants state that on 18<sup>th</sup> January, 2024, their advocate made payment of Kshs. 1,000/= to court for the supply of the court's judgment. The applicants have annexed a copy of the receipt marked "JKGII".



5. The Applicants aver that their advocate followed the matter of the judgment vide his letter of 22<sup>nd</sup> January, 2024 which was received in court on the same date. The applicants have annexed a copy of the letter marked “JKGIII”.
6. The Applicants aver that the judgment of the lower court was not available until 25<sup>th</sup> May, 2024 when they made a further payment of Kshs. 1,000/= for the same through their advocate who had made an earlier payment. The Applicants annexed a copy of the receipt marked “JKGIV”.
7. The Applicants state that their advocate applied for a certificate of delay which was issued though it erroneously states that they had not paid the court fees until 2<sup>nd</sup> May, 2024. The applicants state that they have demonstrated that they paid for the judgment on 18<sup>th</sup> January, 2024. That the delay was occasioned by the lower court’s failure to make the record available for purposes of appeal.
8. The application is opposed by the respondent. The respondent filed a replying affidavit dated 12<sup>th</sup> August, 2024 wherein she avers that the judgment in the lower court was delivered on 20<sup>th</sup> December, 2023 and both parties’ Counsels were present before Hon. Mbayaki Wafula to take the judgment. That as such, it is not true that the Applicants’ advocates had taken his end of the year holiday as alleged in the supporting affidavit.
9. The respondent states that since then, the Applicants have had ample time to file an appeal within the stipulated period. That the Applicant’s assertion that the delay in filing of the appeal was occasioned by the lower court’s failure to provide the judgment in a timely manner is both unfounded and inaccurate.
10. The respondent avers that her counsel applied for the judgment on 23<sup>rd</sup> January, 2024 and despite not following up since they did not urgently need it, he received a copy of the judgment on 15<sup>th</sup> March, 2024. That that meant that the typed and signed judgement was ready by that date. The respondent annexed a copy of the payment receipt marked “MT01”.
11. The respondent states that her counsel on record informed her that they mapped the matter in the Judiciary e-filing and they would have received the copy of the judgement even earlier. However, they had no urgency and they were satisfied with the judgement and had no immediate plan with the judgement.
12. The respondent avers that if the Applicants were genuinely dissatisfied with the judgment, they should have demonstrated a proactive approach. That their advocate only requested for the judgment on 16<sup>th</sup> January, 2024, almost a month after it was delivered. That their failure to follow up on the judgment with urgency indicates a lack of intention to appeal.
13. The respondent states that in any case, if the delay was occasioned by the court or the registry, the court would have issued a Certificate of delay which was not issued and has not been filed in this court.
14. The respondent contends that the Applicants’ assertion that the judgment was not available until the 2<sup>nd</sup> May, 2024 is inaccurate as they had been issued with a copy on 15<sup>th</sup> March, 2024. That she believes that the Applicants’ counsel, being well-versed in the strict timelines within which an appeal should be filed, should have ensured timely actions were taken. That even if the judgement was only available to them on the 2<sup>nd</sup> May, 2024 as alleged in the affidavit, it took them two more months to make the instant application. The respondent contends that the delay is unreasonable and is an indication of disregard of the court timelines and urgency on the part of the Applicants.
15. The respondent avers that she has been advised that the decision to grant leave to appeal out of time or to admit an appeal out of time is a matter judicial discretion. That one key factor that assists the Court in exercising discretion is whether the Applicants have filed a memorandum of appeal together



with the present application. That, that demonstrates their genuine intention to pursue the appeal and helps ensure that the Court's time is not g used in vain.

16. The respondent contends that Applicants' delay and failure to file a draft memorandum of Appeal reflects a lack of genuine intention to appeal and suggest an attempt to merely just file the appeal to prolong litigation. That they have not demonstrated any urgent need or compelling reason for the delay nor provided for any substantial grounds that would justify an appeal or indicate a high likelihood of success. That the applicants have also not made any offer for security for costs in their application hence indicating lack of goodwill on their part.
17. The respondents avers that it is clear that the Applicants are not acting in good faith. That their appeal appears to be an attempt to subject the property and parties involved to continuous and unnecessary litigation rather than addressing any legitimate grievance with the judgment.
18. The respondent states that the Court should not condone this application as allowing the application will be prejudicial to her. That the interests of justice require that litigation be concluded in a timely manner and that there be an end to litigation.
19. The respondent avers that the applicants have not provided sufficient grounds to warrant the extension of time to file the appeal. The respondent reiterated that the delay was occasioned by the Applicants' own inaction and undue delay. That the delay by the Applicants both in obtaining the judgement, coming to court after receipt of the judgement, failure to obtain a certificate of delay from the court, failure to file a draft memorandum of appeal together with the Application, failure to make any offer for security of costs and failure to provide any proof or evidence of their averment indicates lack of seriousness and genuineness in the matter.
20. The respondent states that the Applicants have not met the legal threshold for the grant of leave to file an appeal out of time. For those reasons, the respondent wants the application dismissed with costs to the respondent.
21. The application was canvassed by way of written submissions which both parties filed.
22. The Applicants gave a brief background of the matter and cited Section 79G of the *Civil Procedure Act*. The Applicants also relied on the case of Paul Musili Wambua Vs. Attorney General & 2 Others (2015) eKLR, Susan Ogutu Oloo & 2 Others Vs. Doris Odindo Omolo (2019) eKLR, Githau Vs. Kagiri & Another (Civil Appeal 314 of 2023) (2024) KEHC 6320 KLR, Nicholas Kiptoo Korir Arap Salat Vs. IEBC and 7 Others (2014) eKLR, Joseph Odide Walome Vs. David Mbadi Akello (2022) and Njoroge Vs. Kimani (Civil Application Nai E049 of 2022 (2022)KECA 1188 (KLR).
23. The Applicants submitted that the provisions of Section 79G of the *Civil Procedure Act* notwithstanding, the counsel for the applicants was not able to instantly apply for the proceedings and the judgment of the court to allow him appeal because the judgment was delivered at a time when he had taken his end of year holiday. That upon opening of his chambers in January, 2024, counsel wrote a letter to the magistrate's court on the 16<sup>th</sup> January, 2024 seeking a copy of the judgment and subsequently made a payment of Kshs. 1,000/= on the 18<sup>th</sup> January, 2024 to facilitate the supply of the judgment and that this shows how much determined they are in instituting an appeal within the soonest time possible.
24. It was submitted that upon writing a letter dated 22<sup>nd</sup> January, 2024 to the magistrate's court for grant of Certificate of Delay, it was indeed issued to the applicants and it therefore amounts to proof that the court acknowledges the delay was occasioned by the registry. That on the other hand, the respondent does not stand to suffer any prejudice if the application is granted.



25. The Applicants submitted that in granting leave, the court has to balance the competing interests of the applicants with those of the respondent, a position well stated in *M/S Portreitz Maternity Vs. Janes Karanga Kabia Civil Appeal No. 63 of 1997*.
26. It was submitted that the court should uphold the applicants' right to appeal to the court of Appeal as provided for by Section 3(1) of the *Appellate Jurisdiction Act* as read with Article 164(3) of *the constitution* of Kenya 2010. That the applicants shall suffer irreparable damage if the application is not granted.
27. The respondent submitted that the Applicants' application is premised on Section 79G of the *Civil Procedure Act*. That from that provision, it is clear that the extension of time to file an appeal out of time is only available where the appellants satisfies the court that they had good and sufficient cause for not filing the appeal in time.
28. The respondent submitted that the explanation given by the Applicants' advocate is that the judgement was delivered at a time when he had taken his end of year holiday. That, that explanation cannot be said to be sufficient since the date of the judgement was set in court and communicated to the advocate in advance and he could have made arrangement to be in court or be represented.
29. It was submitted that it is evident that the Applicants do not have any reason why they did not file their appeal within the prescribed timelines and that in a desperate attempt to convince the Court to exercise its discretion in their favour, they have chosen to dupe the court that their advocate was on holiday and as such, the court should not exercise its discretion in favour of a litigant who attempts to circumvent the cause of justice by misleading the court. The respondent relied on the cases of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR* and the case of *Paul Musili Wambua Vs. Attorney General & 2 Others (2015)eKLR*.
30. The respondent submitted that from the foregoing authorities, the court sets out four parameters to be taken into account before granting an extension of time namely; 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.
31. Regarding the length of delay, the respondent submitted that it is not disputed that the judgment that the Applicants are seeking to appeal against was delivered on 20<sup>th</sup> December, 2023 and the instant application was filed on the 1<sup>st</sup> July, 2024. That this is more than 6 months from the date of the judgment and a delay of over 5 months cannot be said to be reasonable. That even after receiving the judgment on 2<sup>nd</sup> May, 2024, they only filed the Application on 1<sup>st</sup> July, 2024 which is 2 months later.
32. Regarding the reason for delay, the respondent stated the reason by the applicants is that the judgment was delivered when the advocate had taken his end of year holiday. That they argued that they applied for the typed judgment on 16<sup>th</sup> January, 2024 and received it on 2<sup>nd</sup> May, 2024. The respondent contends that this is not true since they applied for a copy way later on 23<sup>rd</sup> January, 2024 and received one on 15<sup>th</sup> March, 2024 even without following up. The respondent argued that that meant that the typed judgment was ready as early as at 15<sup>th</sup> March, 2024 and therefore the explanation does not hold water as they seem not to have had any urgency to obtain a copy of the judgment.
33. The respondent pointed out that the second reason given by the applicants for the delay is that the delay was occasioned by the lower court's delay in providing them with a copy of the judgment. The respondent contends that had that been true, the court could have issued the Applicants with a certificate of Delay. That there is no evidence that a Certificate of Delay was given in this case.



34. The respondent submitted that even after getting a copy of the judgment on 2<sup>nd</sup> May, 2024 as alleged, the applicants filed the Application on 1<sup>st</sup> July, 2024, 2 months later and therefore even if they had gotten the judgment on time, they would still not have filed the appeal within the prescribed time.
35. As to whether there is an appeal with any chances of success, the respondent submitted that the Applicants have not annexed any memorandum of appeal to enable the court consider the chances of success of the intended appeal and as such the Applicants have not demonstrated the arguability of the intended appeal. The respondent argued that this shows that the application for extension of time is an afterthought and an attempt to frustrate the Respondent from enjoying her fruits of a lawful judgment.
36. On the degree of prejudice to the respondent if the application is granted, it was submitted that the subject case was in court for almost 5 years since 2019 and during that time there was an inhibition order on the land against the Respondent. That both the applicants have their own pieces of land where they live and cultivate while the subject land is the only land that the Respondent has and lives in. It was submitted that entertaining the application would be prejudicial to the respondent who will continue being denied the fruits of her judgment.
37. The Respondent submitted that the Applicants have come to court with unclean hands and they do not deserve the discretion of the court as doing so would be rewarding dishonesty. The respondent relied on the case of Edith Gichungu Koine Vs. Stephen Njagi Thoiti (2014)eKLR. The respondent urged the court not to subject her to endless cycle of litigation as the applicants have not met the legal threshold to file an appeal out of time.

### **Analysis And Determination**

38. Having considered Application, the response and the submissions of the two parties alongside the legal authorities they have relied upon, the main issue for determination is whether the applicants should be granted leave to file appeal out of time against the judgment of the lower court delivered on 20<sup>th</sup> December, 2023 in Marimanti PM ELC Case No. 12 of 2019.
39. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The said section provides that: -

“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 satisfied the court that he had good and sufficient cause for not filing the appeal in time”.
40. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time.” This therefore means that an appeal may indeed be admitted out of time, or the court may extend time for filing an appeal.
41. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in Thuita Mwangi Vs. Kenya Airways Ltd. [2003] eKLR.

They include the following: -

- i. The period of delay



- ii. The reason for the delay
  - iii. The arguability of the appeal
  - iv. The degree of prejudice which could be suffered by the respondent if the extension is granted;
  - v. The importance of compliance with time limits to the particular litigation or issue; and
  - vi. The effect if any on the administration of justice or public interest if any is involved.
42. In this case, the judgment was delivered on 20<sup>th</sup> December, 2023, while the present application was filed on 1<sup>st</sup> July, 2024 which is about six months after the lapse of the 30 days within which the appeal ought to have been filed. The applicants have submitted that the delay was occasioned by their counsel who had proceeded for the December Holiday and further that the lower court failed to supply the applicants with judgment until 2<sup>nd</sup> May, 2024. Although the applicants stated that they applied for and were granted certificate of Delay, I have looked at the court record and I do not see such document. Even assuming there was, the applicants admitted that they obtained the judgment and proceedings on 2/5/2024, which is two months later. The applicants have not even attempted to explain why they waited for two months from 2/5/2024 when they received the judgment and proceedings before filing the instant application. I am not persuaded that the delay which is close to six months has been convincingly explained. That delay was inordinate and needed sufficient explanation. In this regard, I am in agreement with the respondent's submission that the application is an afterthought. No doubt the respondent will be prejudiced if this litigation which began in 2019 is prolonged any further.
43. On the totality of the above assessment and reasoning, I am not satisfied that the applicants have satisfied the prerequisite for granting of a relief under Section 79G of the *Civil Procedure Act*.
44. The Application dated 1<sup>st</sup> July, 2024 is hereby dismissed with costs to the respondent.
45. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024**

**C.K YANO,**

**JUDGE**

In the presence of:

Court Assistant – Mwangi

Ms. Gumato holding brief for Murango for Applicants

Murimi for Respondent

