



REPUBLIC OF KENYA



**Namawa v Saratuki (Miscellaneous Application E001 of 2024)
[2024] KEELC 7451 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E001 OF 2024
EC CHERONO, J
NOVEMBER 7, 2024**

BETWEEN

JANE NASIMIYU NAMAWA APPLICANT

AND

HASSAN KHAMALA SARATUKI RESPONDENT

RULING

1. This ruling seeks to determine the application dated 11/04/2024 where the Applicant is asking the following orders;
 - a. That the application be dispensed with in the first instance.
 - b. That leave to appeal out of time be granted to the applicant pending hearing and determination of this application
 - c. That there be stay of execution for orders mad on the 15/05/2023 until the appeal herein is heard and determined.
 - d. That costs be in the cause.
2. The application is premised on the grounds set out on the face thereof supported by the affidavit of jane nasimiyu nanwa, the Applicant herein.
3. The applicant avers that she was not aware of the delivery of the judgment since the presiding magistrate had left the station and no notice had been issued. She stated that she only became aware that judgment had been delivered sometime in December 2023 when the Respondent sought to enforce the same by evicting her from the suit land. She stated that her proposed appeal is arguable with High chances of success.



4. In opposition thereto, the Respondent filed a replying affidavit sworn 27/05/2024 where he averred that the judgment date of 16/05/2023 was communicated to the counsels on record through their official email addresses provided and that the Respondent herein was also informed personally of the judgment by the Applicant's counsel on 30/05/2023. It was further his contention that the Applicant is not candid where she alleges that she was not aware of the court's Judgment. It was stated that the application has been filed seven (7) months after the delivery of the impugned judgment which delay is inordinate. That the applicant does not have an arguable appeal having failed to adduce evidence before the trial court. The Respondents urged this court to dismiss the application with costs.
5. The Applicant, with the leave of the court filed a further affidavit sworn on 08/07/2024 as a rejoinder to the assertions in the replying affidavit. It was argued that although proceedings in the matter were concluded on 05/02/2020, the judgment was delivered on 15/05/2023 which time duration was questionable.
6. When the application came up for directions on 09/07/2024, the parties agreed to canvass the same by filing written submissions. The Applicant filed submissions dated 15.07/2024.
7. I have considered the application, the affidavits in support of the application, the replying affidavit, submissions and the applicable law. The single issue for determination in this application is whether the applicant has established the principles for the grant of the orders sought.
8. Looking at the first prayer in the application, the Applicant is seeking leave to appeal out of time. The second prayer is for stay of execution of the orders of 15/05/2023 until the intended appeal is heard and determined. A draft copy of the proposed Memorandum of appeal is annexed to the supporting affidavit.
9. Section 79G of the Civil Procedure Act provides as follows;

“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 satisfies the court that he had good and sufficient cause for not filing the appeal in time”.
10. The provisions of the law is that a party who is aggrieved by decree or order issued by a magistrate court has a right of appeal within 30 days from the date of issue. However, the law gives the courts discretion to admit an application for extension of time upon satisfying itself that good and sufficient cause has been shown.
11. In her supporting affidavit to this application, the Applicant annexed a copy of the impugned judgment delivered on 16/05/2023 by Hon. G.p Omondi in Bungoma PM-ELC NO. 325 of 2015. At the bottom of the judgment, the trial Magistrate indicated that the said judgment was delivered to the parties the same date via e-mail to the following e-mail addresses;
 1. nyukuriemanuel@gmail.com
 2. Lucynanzushi26@gmail.com
12. From the court e-filing platform, the e-mail the trial court used to deliver a copy of the impugned judgment belongs to the M/S Lucy Namzushi & Co. Advocates who were on record for the applicant in the lower court and now appearing for the same person in the present case. No affidavit has been filed



by Lucy Nanzushi Advocate denying that the e-mail used to deliver the impugned judgment does not belong to her and that she was not served with said judgment. The Respondent in his replying affidavit deposed that his advocates M/S Areba Atancha & Co. Advocates were not aware of the impugned judgment but were informed by the Applicant's Advocate Mrs Lucy Nanzushi through whatsapp. Copies of whatsapp extracts were annexed and marked HKS-1. These averments given on oath have not been controverted.

13. In the case of Edith Gichungu Koine v Stephen Njagi Thoithi (2014) eKLR, Odek JJA (as he then was) held thus;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the decree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

14. The superior court stated that there is also a duty imposed on courts to ensure that the factors are consonant with the overriding objective of the Civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.
15. From the materials placed before me, the impugned judgment was delivered by the trial court on 16th May 2023. It is well over eleven months between then and the filing of this application. I find that the delay is inordinate and no proper reasons/explanation has been given for the delay.
16. Having found that the applicant has not satisfied the requirements for extension of time to appeal and that she has failed to meet the threshold for the grant of stay pending the intended appeal, I come to the irresistible conclusion that this application must fail.
17. Accordingly, it is my considered view that the Notice of Motion application dated 11th April, 2024 is devoid of merit and the same is hereby dismissed with costs.
18. It is so ordered.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 07TH NOVEMBER, 2024.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Nanzushi for the Applicant.
2. Respondent/advocate-absent.
3. Bett C/A.

