



**Hamisi v Khamis & 2 others (Environment and Land Miscellaneous Application  
E054 of 2024) [2024] KEELC 13698 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13698 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E054 OF 2024  
NA MATHEKA, J  
DECEMBER 10, 2024**

**BETWEEN**

**MWINYI BADI HAMISI ..... APPLICANT**

**AND**

**JUMA MZEE KHAMIS ..... 1<sup>ST</sup> RESPONDENT**

**MWINYI MZEE KHAMIS ..... 2<sup>ND</sup> RESPONDENT**

**TATU KHAMIS MOHAMED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

- 1 The application is dated 26<sup>th</sup> June 2024 and is brought under Section 1A, 3A, 63(e) & 79G of the [Civil Procedure Act](#) (CAP 21), Order 42 Rule 6 and Order 51 Rule 1, 2 and 4 seeking the following orders;
1. That this application be certified urgent, service be dispensed within the first instance and be heard exparte.
  2. That leave be and is hereby granted to the Applicant to file Memorandum of Appeal out of time in respect of the judgment of the lower court dated August 2023 vide CMCC NO. 500 OF 2016 Juma Mzee Khamis & 2 Others Versus Mwinyi Badi Hamisi.
  3. That consequent to prayer (2) above being granted, the Applicant be at liberty to file the Memorandum of Appeal within (14) days and/or such shorter period as the Honourable Court may deem fit and or expedient.
  4. That pending the hearing and determination of the substantive appeal the Honourable Court issue an order for stay of execution of the decision entered and delivered herein against the Appellant on 3<sup>rd</sup> August 2023
  5. That the costs of this application do abide the intended appeal.



- 2 This application is supported by the affidavit of FATMA JUMA and grounds that the Respondents herein commenced a suit on the 3<sup>rd</sup> August 2023, CMCC NO. 500 OF 2016 Juma Mzee Khamis & 2 Others Versus Mwinyi Badi Hamisi against the Applicant herein. That the Respondents prosecuted the case successfully and obtained judgment dated 3<sup>rd</sup> August 2023 against the Applicant herein. Owing to the foregoing, the Applicant herein gave counsel instructions to lodge an appeal to the Environment and Land Court which Memorandum of Appeal was dated 22<sup>nd</sup> August 2023 and equally filed. Following a Notice to show cause dated 17<sup>th</sup> April 2024 from the Respondents to commit the Appellant herein, they filed an Application dated 29<sup>th</sup> May 2024 and prayed for, among others pending the hearing and determination of this application, there be an order of stay of execution in CMCC NO. 500 of 2016 vide the decree dated August 2023. Upon considering the aforementioned application, this Court issued the orders on 10<sup>th</sup> June 2024 that the application wrongly filed before this court and the Applicant to deal accordingly. That following the order from the Honourable Court it was clear that the file was placed before the High Court owing to the advocate inadvertently registering in the wrong court when in fact the matter was supposed to be registered before the Environment and Land Court. Notably, the Memorandum of Appeal was filed in the wrong court. Noting the error they sought the matter be withdrawn so as to file the Memorandum of Appeal in the right court. That unless orders sought herein are granted, the Applicant is likely to be prejudiced.
- 3 In their replying affidavit the respondents stated that on 3<sup>rd</sup> August 2023, the Trial Court delivered Judgment in the suit in their favour for Kshs. 3,500,000/= plus costs and interest. On the 12<sup>th</sup> October 2023 they were served with a memorandum of appeal with no proof of filing. The High Court orders was made on 10<sup>th</sup> June 2024 and it was not until 24<sup>th</sup> July 2024 when they were served with this application.
- 4 This court has considered the application and submissions therein. 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. Section 79G of the [Civil Procedure Act](#) 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 satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
- 5 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 town. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* (1970) EA 482 the court stated as follows;
- Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”



6 The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR thus;

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

7 The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* (2013) eKLR the court held as follows;

- (1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

8 I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that on 3<sup>rd</sup> August 2023, the Trial Court delivered Judgment in the suit herein in which the {}Applicant was dissatisfied. A Memorandum of Appeal was dated 22<sup>nd</sup> August 2023 and equally filed. F{} following a Notice to show cause dated 17<sup>th</sup> April 2024 from the Respondents to commit the Appellant herein, they filed an Application dated 29<sup>th</sup> May 2024 and prayed for stay of execution. Upon considering the aforementioned application, this Court issued {}the orders on 10<sup>th</sup> June 2024 that the application wrongly filed before this court. They withdrew the same hence this application. This excuse is unacceptable. The Applicants took no steps from August 2023 until the notice to show cause in April 2024. After the Court issued {}the orders on 10<sup>th</sup> June 2024 that the application wrongly filed before this court this application was filed on 11<sup>th</sup> July 2024. The draft Memorandum of Appeal states inter alia that the trial magistrate erred in fact and law by failing to evaluate all the material evidence hence arrived at the wrong conclusion. I find that the applicant does not have an arguable appeal. I also find that the applicant is guilty of inordinate delay and this application is an afterthought. I find this application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10<sup>TH</sup> DAY OF DECEMBER 2024.**



**N.A. MATHEKA**  
**JUDGE**

