



Irungu v Wairimu & another (Environment and Land Miscellaneous Application E038 of 2024) [2024] KEELC 13738 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E038 OF 2024
BM EBOSO, J
DECEMBER 9, 2024**

BETWEEN

ERIC MUIYURO IRUNGU APPLICANT

AND

GEORGE KINYUA WAIRIMU 1ST RESPONDENT

MWIHOKO HOUSING COMPANY LIMITED 2ND RESPONDENT

RULING

1. Before court for determination is the notice of motion dated 8/7/2024 through which Eric Muiyuro Irungu seeks various orders, some of which are spent at this point of rendering this ruling. The outstanding question relates to the applicant’s plea for an order enlarging the time for lodging an appeal against the Judgment rendered on 13/10/2022 in Ruiru SPMC MCE & L Case No E025 of 2021. The application is premised on the grounds outlined in the motion; in the applicant’s supporting affidavit; in the further affidavit dated 19/8/2024; and in the applicant’s written submissions dated 20/8/2024. The key question to be determined in this ruling is whether the application satisfies the criteria for enlarging the time within which to lodge an appeal to this Court.
2. The case of the applicant is that he is aggrieved with the Judgment and he would like to appeal against it but the time for lodging an appeal has lapsed. He contends that the limitation period lapsed without him lodging the appeal because he was involved in “expeditious actions in exhausting alternative pursuits in exercising his inherent right to access justice in the lower court as allowed by the Constitution of Kenya and by the Civil Procedure Rules.” He contends that the alternative pursuits included filing and prosecuting an application to set aside the impugned Judgment, which application was dismissed vide a ruling rendered by the lower court on 23/3/2023. He adds that the ruling dated 23/3/2023 attracted an application for an order enlarging time for lodging an appeal against the said ruling, and the said application was dismissed by this Court [Kemei J] *vide* a ruling rendered on 6/6/2024. Having failed to secure an order setting aside the Judgment, and having failed to obtain an



order enlarging the time for appealing against the ruling of the lower court, he decided to bring the present application which seeks an order enlarging the time for appealing against the Judgment of the lower court. He urges the court to grant the plea.

3. The respondent opposed the application through grounds of opposition dated 16/7/2024 and written submissions dated 3/10/2024. The case of the respondent is that the application is incompetent, misplaced and an abuse of the court process. The respondent adds that the applicant's right of appeal against the impugned Judgment was overtaken by his decision to apply for an order setting aside the Judgment, which was heard and determined by the lower court. The respondent terms the application as *res judicata*. The respondent urges the court to dismiss the application.
4. The court has considered the application; the response to the application; and the parties' respective submissions on the application. As observed in the opening paragraph of this ruling, the single issue to be determined in this ruling is whether the application satisfies the criteria upon which this court exercises jurisdiction to enlarge time for lodging an appeal to this Court against a judgment of the lower court.
5. Section 16A of the [Environment and Land Court](#) provides for a limitation period of 30 days within which to lodge an appeal to this Court against a judgment of the lower court. Section 79G of the [Civil Procedure Act](#) similarly provides for a limitation period of 30 days. Both Section 16A(2) of the [Environment and Land Court Act](#) and Section 79G of the [Civil Procedure Act](#) grant this Court discretionary jurisdiction to enlarge time for lodging an appeal to this Court against a judgment of the lower court.
6. The general principles that guide our courts when exercising jurisdiction to enlarge time for initiating court proceedings were outlined by the Supreme Court of Kenya in [Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others](#) [2014]eKLR 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 a reasonable reason or the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
7. Has the applicant satisfied the above criteria? The applicant deposed in paragraphs 3, 4, 5, 6 and 7 of his supporting affidavit that in September 2022, he learnt that the impugned Judgment was scheduled for delivery on 13/10/2022. Indeed, the impugned Judgment was subsequently rendered on the above date. The applicant had an automatic right of appeal. He elected to pursue a review of the Judgment, as opposed to pursuing an appeal, through a formal application dated 27/10/2022 made to the trial court, inviting the trial court to set aside its Judgment.



8. The trial court (lower court) heard the applicant's application and rendered a merit ruling dated 23/3/2023 on the application, in which it found the application unmerited. The applicant did not exercise his right of appeal against the said ruling within the prescribed limitation period. He subsequently brought before this court what he presented as Thika ELC Land Appeal No E041 of 2023 (sic) in which he sought an order enlarging the time for lodging an appeal against an unidentified decision. He also asked for an order deeming as duly filed, the memorandum of appeal which he had presented alongside the motion.
9. It is clear from the exhibited ruling that was subsequently rendered by this Court [Kemei J] on the applicant's application dated 18/9/2023 that the applicant sought an order enlarging the time within which to appeal against the lower court's ruling dated 23/3/2023. This Court [Kemei J] considered the application and found it unmerited. The Court dismissed the application vide a ruling dated 6/6/2024.
10. Having lost what he presented as Thika ELC Land Appeal No E041 of 2023, the applicant decided to bring the present miscellaneous application, seeking an order enlarging the time for lodging an appeal against the Judgment rendered on 13/10/2022 - the very Judgment in respect of which the applicant had sought a review.
11. It is clear from the above analysis and chronology of events that the applicant was aware of the impugned Judgment prior to its delivery. He was also aware of the impugned Judgment at the time of delivery. He elected not to bring an appeal to challenge the Judgment. He made a conscious decision to pursue a review of the Judgment in the lower court as opposed to pursuing an appeal in this Court against the said Judgment. He has indeed conceded that he did not lodge an appeal because he decided to pursue a review by applying for an order setting aside the impugned Judgment. Having exhausted the review mechanism without success, he now seeks leave to pursue the alternative mechanism of an appeal. Regrettably, that alternative mechanism of an appeal is no longer available to him. What the applicant is now engaged in is an abuse of the due process of the court.
12. It is clear from the above analysis that the applicant has failed to satisfy the criteria for enlarging time. The result is that the application dated 8/7/2024 is rejected for lack of merit.
13. On costs, there is no reason why the court should depart from the general principle that costs follow the event. Consequently, the applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF DECEMBER 2024

B M EBOSO

JUDGE

In the Presence of: -

Ms Wanjala for the Applicant

Ms Khadija for the Respondent

Court Assistant: Hinga

