



REPUBLIC OF KENYA



**Muia v King'oku (Environment and Land Miscellaneous Application  
E006 of 2023) [2024] KEELC 13767 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13767 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023  
TW MURIGI, J  
DECEMBER 5, 2024**

**BETWEEN**

**MUKULU MUIA ..... PROPOSED APPELLANT**

**AND**

**JOSEPH MBITHI KING'OKU ..... PROPOSED RESPONDENT**

**RULING**

1. By a Notice of Motion dated 29<sup>th</sup> November 2023 brought under Section 79G and 95 of the [Civil Procedure Act](#) and Order XLIV Rule 5 of the Civil Procedure Rules, the Applicant seeks the following orders:-
  - a. That the proposed Appellant be granted leave to appeal out of time against the whole judgment of the Honourable M. Mutua Senior Resident Magistrate delivered on 29/09/2023 in ELC NO. E013 of 2021.
  - b. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.
  - c. That this Honourable Court be pleased to grant injunction orders against the proposed Respondent, servants, employees or anyone else from crossing into, cultivating, grazing and/or causing any other waste on land parcel Ukia/Nzuuni/18.
  - d. That the costs of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Mukulu Muia sworn on even date.

**The Applicant's Case**

3. The Applicant averred that being aggrieved by the judgment delivered on 29/9/2023 in ELC No E013 of 2021, she embarked on preparing a memorandum of appeal with the assistance of her son since she



could not afford to instruct an Advocate to act on her behalf. She stated that she completed preparing the Appeal on 27/10/2023 but could not file the same on 28<sup>th</sup> or 29<sup>th</sup> October 2023 because both dates fell on a weekend. According to the Applicant, the proposed Respondent will not suffer any prejudice if the orders sought are granted. In conclusion, she urged the court to allow the application as prayed.

### **The Respondent's Case**

4. The Respondent filed a replying affidavit sworn on 6<sup>th</sup> May 2024 in opposition to the application. He averred that the application is frivolous, vexatious and ought to be dismissed for lack of merit.
5. He further averred that ignorance of the law is not a defence for the Applicant as she admitted to having been informed of her right of appeal within 30 days from the date of the judgment. He further averred that the Applicant has not explanation for the delay in filing the appeal on time. According to the Respondent, the application is aimed at frustrating him from enjoying the fruits of his judgment. He contended that he will be prejudiced if the orders sought are granted as he will be restrained from utilising the suit property. In conclusion, he urged the court to dismiss the application with costs.
6. The parties were directed to canvass the application by way of written submissions.
7. As at the time of writing this ruling, the Proposed Appellant had not filed her submissions as directed.

### **The Proposed Respondent's Submissions**

8. The proposed Respondent filed his written submissions dated 27<sup>th</sup> May 2024.
9. On his behalf, Counsel outlined the following issues for the court's determination:-
  - i. Whether the proposed Appellant is entitled to the leave sought?
  - ii. Whether the proposed Appellant is entitled to the orders sought?
10. On the first issue, Counsel submitted that the application is incompetent for the reason that the proposed Appellant failed to file a substantive motion alongside with the application.
11. Counsel further submitted that the proposed Appellant has not given any explanation for the delay in filing the the appeal on time despite being aware of the time frame within which the appeal ought to have been filed. Counsel contended that ignorance of the law is not a valid defence.
12. Counsel further submitted that the proposed Respondent is the registered proprietor of the suit property and added that his proprietary rights will be infringed by the proposed Appellant if the orders sought are granted.
13. Counsel further submitted that the proposed Appellant has not offered security for the due performance of the decree.
14. With regards to the second issue, Counsel submitted on the conditions necessary for the grant of an injunction as set out case in the of *Giella vs Cassman Brown Co Ltd*
15. On the first condition, Counsel submitted that the proposed Appellant has not established a prima facie case with a probability of success as she has not demonstrated her rights over the suit property. Counsel further submitted that the proposed Appellant has admitted in her appeal that the proposed Respondent is the registered proprietor of the suit property. Counsel further submitted that the proposed Appellant has not substantiated the allegations that the Respondent has engaged in acts of wanton destruction.



16. On irreparable loss, Counsel submitted that the proposed Appellant has not shown the injury that she is likely to suffer if the orders sought are not granted.
17. On balance of convenience, Counsel submitted that the Respondent will be greatly inconvenienced if the orders sought are granted as he will be restrained from enjoying his proprietary rights and privileges over the suit property.
18. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

### **Analysis And Determination**

19. Having considered the application, the respective affidavits and the submissions by the proposed Respondent, the issue that arises for determination is whether the Applicant is entitled to the orders sought.
20. The proposed Appellant is seeking leave to file the Appeal out of time.
21. Section 79G of the [Civil Procedure Act](#) provides for the requisite period for filing of appeals from the Subordinate Courts to the High Court 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 the lower court may certify as having been requisite for the preparation and delivery to the Appellant 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.

22. Section 95 of the [Civil Procedure Act](#) goes on to state that: -

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

23. The considerations to be made when deciding upon such an application were set out in the case of *Thuita Mwangi Vs Kenya Airways Ltd* [2003] eKLR where the Court of Appeal held as follows: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

24. Similarly, in the case of *Edith Gichugu Koine Vs Stephen Njagi Thoithi* [2014]eKLR the Court of Appeal held that:-

“There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided



by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others –See FAKIR MOHAMED Vs JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

25. The court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension of time, the court must consider the length of the 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.
26. The Applicant averred that the delay in filing the appeal on time was occasioned by the fact that she is unrepresented.
27. Judgment in the trial court was pronounced on 29<sup>th</sup> September 2023. Any Appeal in respect to the said judgment ought to have been filed on or before the 30<sup>th</sup> October, 2023.
28. I have considered the circumstances of this case and I find that the Applicant has given a reasonable explanation for the delay in filing the appeal on time.
29. The proposed Appellant annexed a draft memorandum of appeal in her supporting affidavit to demonstrate her express intention of appealing the impugned judgement.
30. In the case of Samuel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi & Another [2018] eKLR, the Court held as follows: -

“Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”

31. Lastly, on the prejudice that is likely to be suffered by the Respondent if an appeal is filed out of time, there has been no demonstration that it cannot be adequately compensated by costs. In the case of George Kianda & Another Vs Judith Katumbi Kathenge & Another (2018) eKLR the court held that: -

“The Respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee’s (Uganda) Ltd Vs. Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.”



32. Going by the above considerations, it is clear that the proposed Appellant has sufficiently demonstrated merit in the application for extension of time for filing an appeal.
33. The Applicant is also seeking for an injunction pending the hearing and determination of the appeal.
34. Order 42 Rule 6 (6) of the Civil Procedure Rules grants powers to the court to grant a temporary injunction pending the hearing and determination of an appeal as follows:

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”
35. The principles for the grant of a temporary injunction pending appeal were set out in the case of Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR as follows: -
  - a. “An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
  - b. The discretion should be refused where it would inflict great hardship than it would avoid.
  - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
  - d. The court should also be guided by the principles in Giella vs. Cassman Brown [1973] EA 358.”
36. The principles for the grant of interlocutory injunctions were laid down in the case of Giella vs. Cassman Brown [1973] EA 358 as follows: -First the applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
37. The court is called upon to determine whether the proposed Appellant has established a prima facie case. In Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR the Court of Appeal defined a prima facie case as follows;

“ a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
38. On ground No. 1 of the Appeal, the Appellant faulted the learned Trial Magistrate for making a finding that the suit property is properly registered in the name of the Respondent while it arose from the subdivision of land parcel No Okia/Nzuuni/11 belonging to her late mother, Nthenya Muia Mutio.
39. From the evidence placed before me, it is my considered view that the Appellant has established that she has a prima facie arguable case.
40. On irreparable harm, the proposed Respondent argued that that the Applicant has not demonstrated the harm that she is likely to suffer if the orders sought are not granted.
41. The proposed Respondent contended that in the judgment delivered in Makueni CMELC No. E013 of 2021 on 29/09/2023, the court issued an order of permanent injunction restraining the proposed



Appellant from encroaching onto the suit property. Neither party produced the judgment in Makueni MCELC No. E013 of 2021. That notwithstanding, this court is of the view that the Applicant is likely to suffer irreparable loss if the judgment is implemented.

42. The Respondent contended that the balance of convenience tilts in his favour since he is the registered proprietor of the suit property. The purpose of a temporary injunction is to preserve the substratum of the case pending the hearing and determination of suit. To preserve the suit property, the Respondent is hereby restrained from selling, subdividing or alienating the suit property pending the hearing and determination of the appeal.
43. The upshot of the foregoing is that the application dated 29<sup>th</sup> November, 2023 is merited and is hereby allowed in the following terms:-
  1. The Applicant is hereby granted leave to appeal out of time against the Judgement order and decree issued on 29<sup>th</sup> September, 2023 by Hon. M. Mutua (SRM) in Makueni in ELC Case No. E013 of 2021.
  2. The Memorandum of Appeal and the Record of Appeal shall be filed within a period of Twenty One (21) Days from the date hereof.
    - a. An order of status quo to be maintained pending the hearing and determination of the intended Appeal.
    - b. Each party to bear its own costs.

.....

**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

In the presence of:

Kithuka for the Respondent.

