



Arch-Diocese of Kisumu Catholic Church v Makodiembo (Environment and Land Appeal E08 of 2022) [2023] KEELC 275 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEELC 275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E08 OF 2022
A OMBWAYO, J
JANUARY 27, 2023**

BETWEEN
THE ARCH-DIOCESE OF KISUMU CATHOLIC CHURCH APPELLANT
AND
EUSEBIUS RAMOGY MAKODIEMBO RESPONDENT

RULING

1. The Appellant herein filed a notice of motion application under section 1A, 1B, 1A(2) and 79(G) of the [Civil Procedure Act](#) and order 42 rules 6(2) of the [Civil Procedure Rules](#) seeking for orders that:
 - a. ...spent
 - b. ...spent
 - c. ...spent
 - d. That this honorable court be pleased to grant the appellant/applicant leave to lodge an appeal out of time against the decision delivered on July 21, 2021 in Kisumu ELC No. 426 of 2018; Eusebius Ramogy Makodiembo vs The Arch-Diocese of Kisumu-Catholic Church.
 - e. That upon grant of leave to appeal out of time, the Memorandum of Appeal lodged herein be deemed as duly filed.
 - f. That the costs and incidentals of this application be provided for.
2. The application was based on the grounds that a memorandum of appeal has been filed in the Environment and Land Court at Kisumu vide Kisumu ELC Appeal no. 8 of 2022 against the judgement of the court delivered on July 21, 2022. That the judgment was delivered in the absence of the appellant and that the respondent has extracted a decree and filed an application seeking the implementation of the said judgment which exposes the appellant to execution.



3. That delay in filing the appeal within time is reasonable and excusable and is not meant to defeat the cause of justice and that it has been made without unreasonable delay. That the respondent will not be prejudiced if the orders sought are granted but that the appellant however stands to be prejudiced and suffer irreparable loss if the orders sought herein are not granted. That the appellant is willing to abide by the security conditions this court may deem fit to grant.
4. The application was supported by the affidavit of Rev. Fr. Moses Nicholas Omollo who stated that judgement in the matter was delivered against the appellant on July 21, 2022 in the appellant's absence. He averred that by a letter dated August 16, 2021, the respondent's advocates informed the appellant's advocates of the delivery of the judgment.
5. He also averred that by a letter dated August 17, 2021, the appellant's counsel wrote to the appellant seeking instructions on whether or not to lodge an appeal but that at that time, the appellant had no personnel with authority to give instructions to appeal the said judgment as the Arch Bishop who had the authority to deal with the appellant's classified property was transitioning for a transfer to Nairobi leaving the office vacant pending appointment by the Pope.
6. He averred that the respondent has threatened to execute and has extracted a decree and filed an application seeking to implement the judgement. That the lack of a personnel to instruct the appellant's advocates to appeal occasioned the delay in the lodging the appeal.
7. He averred that the appellant appointed temporary personnel who instructed the Appellant's advocates to lodge the Appeal and that the delay was not deliberate or meant to defeat the cause of justice.
8. He then reiterated the grounds on the face of the application and sought that the appellant's application be allowed as prayed.
9. In response to the application, counsel for the respondent filed a replying affidavit on March 17, 2022. He stated that the application as constituted is defective as it seeks orders of stay of execution pending hearing and determination of the appeal as well as leave to lodge an appeal out of time. That it was not proper for the appellant to lodge an appeal out of time without first obtaining leave to file the same and then moving to court to regularize it and therefore the present application ought to be dismissed with costs.
10. He further stated that judgement in the matter was delivered on July 21, 2021 and that they wrote to the appellant's Advocate the letter dated August 6, 2021 reminding them of the terms of the judgement and seeking confirmation of availability of the suit property for the purpose of enforcement of the judgement. That the appellant's counsel did not respond so they wrote a second letter dated September 28, 2021 forwarding a copy of the decree for approval which also did not elicit any response.
11. He averred that since there was no response from the Appellant, the respondent filed an application dated November 8, 2021 on November 12, 2021 seeking to enforce the terms of the judgement. That the said application was set down for hearing on February 17, 2022 and rescheduled to February 24, 2022 when the appellant filed the memorandum of appeal on February 21, 2022 with the present application seeking for leave to lodge the same out of time.
12. He further averred that the appellant has been aware of the judgment of the trial court from August 17, 2021 when it was informed by its advocates and that the reasons given in the supporting affidavit for failing to lodge an appeal within the prescribed timelines is not logical.
13. He also averred that there being no valid appeal, there is no basis upon which stay of execution can issue under order 42 rule 6 of the Civil Procedure Rules 2010. That the appellant has not given any



reason to explain the inordinate delay of seven months and granting the orders sought in the face of such a delay would be prejudicial to the respondent who has already taken substantial steps in a bid to enforce the judgement of the trial court. That the respondent obtained orders which were granted on March 10, 2022 by the trial court pursuant to its application dated November 8, 2021 permitting it to undertake valuation of the suit property in a bid to enforce the court's decree.

14. In addition to his replying affidavit, the respondent filed the notice of motion application dated March 14, 2022 brought under section 1A, 1B, 3A and 79G of the Civil Procedure Act, section 3 of the Environment and Land Court Act, order 2 rule 15(1)(c) of the Civil Procedure Rules seeking the following orders:
 - a. That the appellant's memorandum of appeal dated and filed in this court on the February 21, 2022 be struck out for having been filed out of time without leave of court.
 - b. That the costs of this application be provided for.
15. The grounds on the face of the application are that the trial court delivered its judgement on July 21, 2021 in Kisumu CM ELC No. 426 of 2018 (Formerly Kisumu ELC No. 725 of 2015). That the Appellant filed the Memorandum of Appeal on 21st February 2022 which was seven months after delivery of the court's judgment contrary to the mandatory provisions of section 79G of the Civil Procedure Act. That no leave has been obtained to lodge the said appeal out of time as required and, in the circumstances, the appeal as lodged is incompetent and bad in law. That the appeal is not brought in good faith as the appellant's sole interest seeks to perpetually frustrate the respondent's efforts to enjoy the fruits of a lawfully obtained judgement.
16. The application was supported by the affidavit of Jude T. Ragot, counsel for the respondent. He reiterated the contents of the replying affidavit filed March 17, 2022 and the grounds on the face of the application.
17. The appellant filed a replying affidavit sworn by Rev. FR Moses Nicholas Omollo who stated that he is advised by his advocates on record that it is procedurally correct to file the appeal before seeking leave to have the appeal deemed to be filed on time. That the power to extend time for filing an appeal is provided for under section 75G of the Civil Procedure Act which also includes power to admit an appeal filed out of time. That the Respondent's application is unmerited and ought to be dismissed with costs to the Appellant.

Appellant's Submissions

18. The appellant in its submissions, submitted on whether or not the appellant has satisfied the conditions for leave to lodge an appeal out of time and whether or not the appellant has satisfied the conditions for grant of stay of execution of the judgement and decree granted in Kisumu ELC No. 426 of 2018; Eusebius Ramogy Makodiembo vs The Arch-Diocese of Kisumu-Catholic Church.
19. The Appellant in its submissions reiterated that Section 79G of the Civil Procedure Act gives the court power to extend time for filing an appeal. That the Respondent alleges that leave ought to have been sought first to appeal out of time before filing the memorandum of appeal but an appeal which is filed out of time can be validated by an application for leave to validate the appeal. It cited the decision in the case of APA Insurance Ltd Vs Michael Kinyanjui Muturi [2016]eKLR in support of its arguments.
20. The appellant submitted that the decision of whether or not to grant leave to appeal out of time or admit an appeal out of time was an exercise of discretion and the court has to consider the length of the delay, chances of appeal succeeding and whether the respondent can adequately be compensated in costs for any prejudice that may be suffered. The appellant relied on the case of Edith Gichugu



Koine vs Stephen Njagi Thoithi [2014] eKLR and submitted that it was informed of the delivery of the judgement but that it did not have personnel with authority to deal with classified property who could give instructions. That the delay was not malicious and that it has an arguable appeal with high chances of success. The appellant also sought for orders of stay of execution of the judgement and decree in Kisumu ELC No. 426 of 2018 and for its application dated February 22, 2022 to be allowed and the Respondent's application dated March 14, 2022 be dismissed with costs.

Respondent's Submissions

21. The respondent in his submissions relied on the cases of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* – Nairobi Supreme Court Appl. No. 16 of 2014, *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR among other cases and submitted that if the appellant was aggrieved by the judgement delivered by the subordinate court on July 21, 2021, it was required to appeal against the decision within thirty days of the delivery of judgement.
30. The respondent further submitted that the appellant was informed of the delivery of the judgement which it does not deny and the reason given for the delay which was that there was no office bearer in replacement of the Arch. Bishop is unreasonable. That the seven-month period is inordinate and that this being a discretionary remedy, the appellant ought to have come to court with clean hands and the application is therefore an afterthought.

Analysis and Determination

31. The appellant herein has sought for leave to lodge an appeal out of time against the judgement delivered on July 21, 2021 in Kisumu ELC No. 426 of 2018 and that upon grant of leave to appeal out of time, the memorandum of appeal lodged herein be deemed as duly filed.
32. The respondent on the other hand seeks that the appellant's memorandum of appeal dated and filed in court on February 21, 2022 be struck out for having been filed out of time and without leave of court.
33. I will first address the application filed by the appellant on February 22, 2022 then I address the respondent's application filed on March 17, 2022.

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.

34. As provided for by section 79G of the *Civil Procedure Act*, any party aggrieved by the judgement of a subordinate court has thirty days to file an appeal to the High Court.
35. It is not disputed that judgement in this matter was delivered by the subordinate court on July 21, 2021 and the memorandum of appeal lodged on February 21, 2022 out of time after a delay of seven months.
36. Any appeal challenging the said judgement ought to have been filed by August 20, 2021. The appellant admits that it was informed by its advocates of the delivery of the judgement but that it did not have substantive holders in office capable of instructing the said advocate to file the appeal.



37. The respondent on the other hand argues that the delay of seven months was inordinate and that the reasons advanced by the appellant for the delay were unreasonable and attributes the filing of the memorandum of appeal to the respondent commencing the execution process.

38. The Court of Appeal in the case of *Edith Gichugu Koine v Stephen Njagi Thoitthi* [2014] eKLR set out the factors the court ought to take into consideration in determining an application for extension of time as follows:

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 v 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.

39. The appellant filed the application under consideration on February 22, 2022 which was seven months after the delivery of judgement. Does the delay of seven months amount to an inordinate delay? The appellant admits that by a letter dated August 17, 2021, its advocates informed it of the delivery of the judgment and sought further instructions from it and as pointed out before, it was not able to instruct its advocates because it did not allegedly have a substantive office holder capable of issuing the said instructions.

40. It is my view that the delay of seven months was inordinate and the appellant admitted that it was aware of the delivery of judgement within the time it could lodge an appeal, but failed to do so. It is further my view that the reasons given for the delay are not sufficient for the court to grant leave to appeal out of time.

41. The respondent argued that the process of execution had commenced and that it had filed the application dated November 8, 2021 before the subordinate court which was allowed and that it would be prejudiced if the application is granted.

42. In conclusion therefore it is my view that the appellant's application dated February 22, 2022 can be dismissed and the memorandum of appeal dated February 21, 2022 be struck out for being filed out of time and without leave of court as sought by the respondent in his application dated March 14, 2022.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 27TH DAY OF JANUARY 2023.

A O OMBWAYO

JUDGE

