



**M’Ikiao v Gitonga & another (Environment and Land Miscellaneous Application  
E016 of 2022) [2023] KEELC 311 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 311 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2022  
CK YANO, J  
JANUARY 25, 2023**

**BETWEEN**

**CONSOLATA KAJUJU M’IKIAO ..... APPLICANT**

**AND**

**GLORIA WANJA GITONGA ..... 1<sup>ST</sup> RESPONDENT**

**NATHAN KIMATHI M’IKIAO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant herein moved this court *vide* a notice of motion application dated May 25, 2022 seeking extension of time to file memorandum of appeal against the judgment in Meru CM ELC No 119 of 2020 which was delivered on November 9, 2021. The application is brought under section 63(3) 65(1) and 79G of the *Civil Procedure Act*, order 42 rule 2 and 6, order 50 rule 7 and order 51 rule 1 of the *Civil Procedure Rules*.
2. The application is supported by the affidavit of Consolata Kajuju M’Ikiao, the applicant sworn on May 25, 2022 and is premised on the grounds that the matter proceeded *ex-parte* and judgment delivered on November 9, 2021 without the applicant’s involvement, that upon discovering the said judgment, the applicant filed an application dated July 19, 2022 seeking to have the said judgment set aside and ruling was delivered on February 16, 2022 in favour of the 1<sup>st</sup> respondent, that the delay was caused by the delay in obtaining a copy of the ruling, that unless the extension is granted, the applicant shall suffer irreparable loss and damage and that the applicant has a formidable appeal which has overwhelming chances of success.
3. The applicant has annexed a copy of the ruling delivered on February 16, 2022 and a draft memorandum of appeal marked “CKM 1” and “2” respectively.
4. When the matter came up before court for *inter partes* hearing on September 26, 2022, only Mr Kirimi Advocate for the 1<sup>st</sup> respondent was present. There was no appearance on the part of the applicant and



the 2<sup>nd</sup> respondent. Mr Kirimi informed the court that they had prepared a replying affidavit on behalf of the 1<sup>st</sup> respondent which had not been signed and assured the court that the same was to be filed by close of business that day. He further proposed that the application be canvassed by way of written submissions to be filed within 7 days each. Consequently the court directed the 1<sup>st</sup> respondent to file and serve her replying affidavit within 7 days from September 26, 2022 and thereafter, the application to be canvassed by way of written submissions to be filed within 7 days each, with the applicant filing hers first. The 1<sup>st</sup> respondent was further directed to issue notice. The matter was then fixed for mention on November 15, 2022 to confirm compliance and to fix a ruling date.

5. When the matter came up on November 15, 2022, only Mr Omari learned counsel for the applicant was present. There was no appearance on the part of the respondents. Further, none of the respondents had filed any response to the application by that time. The court proceeded and fixed the matter for ruling on January 25, 2023. However, in the course of preparing the ruling, I have come across a replying affidavit filed on November 17, 2022 by the 1<sup>st</sup> respondent. That affidavit was filed two days after the matter was last before court. No doubt, the said replying affidavit was filed outside the time granted by the court and without leave of the court. It is not even clear whether the same was served upon the applicant and the 2<sup>nd</sup> respondent.
6. This court is aware of the overriding objective of the Civil Procedure Act and the Rules made thereunder. Section 1A provides *inter alia*, that the court shall, in the exercise of its powers under that Act or the interpretation of any of its provisions seek to give effect to the overriding objective specified in subsection (1) which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. However, subsection (3) provides that “a party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to participate in the processes of the court and to comply with the directions and orders of the court.” In the instant case, the 1<sup>st</sup> respondent and his advocate failed to comply with the directions and orders of the court by filing an affidavit outside the time granted by the court and without leave of the court. In the event the applicant was not served with the said affidavit, then she will be highly prejudiced if the court were to exercise its powers under article 159 (2) of avoiding procedural technicalities and doing substantial justice. This court will therefore not close its eyes and allow a document which has been sneaked into the record and which the other parties may not be aware of. Accordingly, the court proceeds to expunge the replying affidavit filed by the 1<sup>st</sup> respondent on November 17, 2022. The court is guided by the provisions of section 19 (2) of the Environment and Land Court Act which provides that the court shall not be bound by the procedure laid down by the Civil Procedure Act and shall be guided by the principles of natural justice. Therefore if the court were to consider the said affidavit and it turns out that the applicant was not served and therefore not aware of its contents, that would be a breach of the principle of natural justice on the part of the applicant as she would have been condemned unheard with regard to the said affidavit. This is so considering the many annexures thereto.
7. Having considered the application herein, it is my opinion that the issue which this court ought to determine is whether the same is merited. The applicant substantially seeks for extension of time to file an appeal out of time.
8. Under section 79G of the Civil Procedure Act, appeals from the decisions of the lower court to the High Court (and by extension this court) must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.



9. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now settled. The court ought to consider the length of 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. (see *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No Nai 255 of 1997 and *Thuita Mwangi vs Kenya Airways Limited* [2003] eKLR). The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.
10. As for the length of the delay, the ruling of the trial court was delivered on February 16, 2022. The instant application was filed on May 27, 2022. The 30 days’ period within which the applicant ought to have filed the appeal lapsed on March 16, 2022. The application has been brought after a period of over three (3) months. It is my considered view that the application was brought after unreasonable delay.
11. In justifying the said delay, the applicant states that the same was caused by the delay in obtaining a copy of the ruling. I have perused the affidavit in support of the application and note that there is no evidence on which date the copy of the said ruling was obtained by the applicant. The applicant has simply made a bare statement that the delay was caused by the delay in obtaining a copy of the ruling. It is my opinion that the reasons for the delay were not well explained by the applicant. In my view, it was incumbent upon the applicant to explain the date she requested for the ruling and the date the same was supplied to her.
12. As for the chances of the appeal succeeding as alleged by the applicant, at this stage of determining whether to grant leave to file an appeal out of time on the grounds that the appeal has overwhelming chances of success, it is trite that the court is bound to consider whether the said intended appeal raises a *bona fide* issue for determination by the court. The court is not supposed to determine as to the success of the appeal but as to whether the same is arguable. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully, before the court, one which is not frivolous.
13. In the draft memorandum of appeal one of the grounds raised by the applicant is that the learned trial magistrate erred in law and in fact in holding that the applicant’s application was res-judicata. In the ruling, the trial magistrate noted that the subject application appears to be res judicata as the applicant had filed a similar application in Meru Succession Cause No 50 of 2016 which was determined vide a ruling dated August 4, 2021. I am therefore not persuaded that the intended appeal raises a *bona fide* issues for determination by the court.
14. The applicant although having expressed her intention to be heard by this court on appeal, it is my considered opinion that she ought not be given an opportunity to pursue the appeal since the delay is inordinate and no sufficient reason has been given for the delay. In my considered view, the applicant has slept on her rights to challenge the ruling for too long and has failed to explain satisfactorily the reason for the delay.
15. For the above reasons, it is my considered opinion that the applicant has not satisfied the conditions for grant of leave to appeal out of time. Consequently, the notice of motion application dated May 25, 2022 is dismissed with no orders as to costs.
16. It is so ordered.

**DATED SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF JANUARY, 2023**

In presence of

C.A Kibagendi



Thangicia holding brief for Nyambati for applicant

Munene Kiriimi for respondent

**C.K YANO**

**ELC JUDGE**

