



**Njoroge v Githinji & 2 others (Miscellaneous Application  
E026 of 2022) [2023] KEELC 122 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 122 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
MISCELLANEOUS APPLICATION E026 OF 2022  
LN GACHERU, J  
JANUARY 19, 2023**

**BETWEEN**

**KARANJA NJOROGE ..... APPLICANT**

**AND**

**ESTHER WANJIRU GITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MURANG'A ..... 2<sup>ND</sup> RESPONDENT**

**MEDICAL OFFICER OF HEALTH, MURANG'A ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion Application dated 28th October 2022, the Applicant herein Karanja Njoroge sought for the following orders; -
  1. That this Honourable Court be pleased to stay the execution of the Orders issued on 21<sup>st</sup> September 2022, at Kandara in MISC No. 023 of 2022, Esther Wanjiru Githinji v County Government Of Murang'a & 5 Others and all consequential orders thereto pending the hearing and determination of the application or until further orders of this Court.
  2. That the proposed Appellant be granted leave to appeal out of time against the orders of the Ruling and Order of the Senior Principal Magistrate's Court at Kandara, the Hon. M. Sudi delivered on the 21<sup>st</sup> September 2022, in MISC ELC No. E023 of 2022.
  3. That the Memorandum of Appeal annexed hereto to be deemed as duly filed and served.
  4. That the costs of this application be provided for.
2. The Application is premised on the following grounds;
  - 1) That the Applicant has an arguable appeal with a high probability of success.



- 2) That if the said stay of execution is not granted the Applicant's appeal will be rendered nugatory and the Applicant will suffer irreparable damage.
  - 3) The Applicant learnt through his brother, the 5<sup>th</sup> Respondent in the lower Court file MISC No. E023 of 2022 – Kandara Esther Wanjiru Githinji v County Government Of Murang'a & 5 Others, that the court had issued an order directing the exhumation of the body of Dominic Karanja Njoroge(deceased), from land parcel No.Fort Hall Loc.16 Mbugiti/15 (closed on subdivision to Loc.16/Mbugiti/2928, LOC.16/Mbugiti/2929 and LOC.16/Mbugiti/2930).
  4. The Applicant who is the father to the deceased has never been served with any Court document in relation to the lower Court suit as alleged by the 1<sup>st</sup> Respondent.
  5. The Applicant upon learning of the said orders for exhumation issued on 21<sup>st</sup> September 2022, in MISC no. E023 of 2022 – Kandara Esther Wanjiru Githinji Vs County Government Of Murang'a & 5 Others filed a Notice of Motion under certificate of urgency dated 12<sup>th</sup> October, 2022 to set aside, review and/or vary the said orders but the Lower Court pronounced itself as functus Officio and advised the Applicant to Appeal to this Honourable Court.
  6. The Applicant has a very long outstanding legal battle with the 1<sup>st</sup> Respondent's deceased husband at Nairobi in ELC No. 2007 Karanja Njoroge VS Charles Kimani which case is yet to be determined conclusively.
  7. That the Applicant and her compliances have taken loans with the resultant subdivisions with different financial institutions in a bid to further scurry the Applicants right to the suitland.
  8. That this application has been made without unreasonable delay.
  9. That the Application ought to be granted in the interests of Equity and Justice.
3. The Application is also supported by the Affidavit of Karanja Njoroge, the Applicant herein, sworn on 28th October 2022, and which reiterated the contents of the grounds in support of the Application. The Applicant averred that he learnt about the matter on 4th October 2022, when his brother Joseph Waruinge Njoroge, informed him about an Order to exhume the body of his late son Dominic Karanja Njoroge, that had been issued by Kandara Law Courts. He also averred that he had not been served as alleged by Simon Muiruri Kabucho, in his Affidavit of Service. That he immediately instructed his Advocate to file an Application for review on 12th October 2022, but the said application was dismissed by the Court on 19th October 2022.
  4. That he then applied to be supplied with the certified copies of the Proceedings and Ruling of 21st September 2022. Though he was aggrieved by the Ruling of the Court and the subsequent Orders, and wished to appeal, the time to file such an Appeal had lapsed, and thus this application. He urged the Court to allow the application by enlarging such time to file the said Appeal. It was his averments that he has an arguable appeal as envisaged by his Draft Memorandum of Appeal. Further, that it is in the interest of justice and fairness that the prayers sought herein be allowed.
  5. This Application is opposed by the Respondents herein.
  6. Esther Wanjiru Githinji, the 1<sup>st</sup> Respondent filed a Replying Affidavit dated 14th December 2022, and averred that she is the administrator of the estate of Charles Kimani Mwangi, and that the Application herein has been overtaken by events as the orders it seeks to restrain have been fully implemented. Further, that the application herein is scandalous, frivolous,vexatious and abuse of the Court process. It was her avernments that in the Lower Court, the Applicant, his brother Joseph Wairunge Njoroge and his own daughter Margaret Njeri, and the area Chief Virginia Wanjiru Mutua, were parties to the



- said suit, and they used to be all served with the Court documents. Therefore, the Applicant cannot allege being unaware of the Lower Court matter.
7. Further that the Application is not grounded on any provision of law and it lacks merit, is brought with unclean hands and the Applicant is underserving of the orders sought. She urged the Court to dismiss the instant Application.
  8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition dated 21st December 2022, and averred;
    1. The Application is a sham, a waste of the Court's time and does not lie.
    2. The Application is not grounded upon any proper or sound section of the Law.
    3. The Application particularly prayer(b) is spent and has already been overtaken by the event it seeks to restrain.
    4. While the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent are not part to the dispute between the Applicant and 1<sup>st</sup> Respondent, the Applicant has approached this Court with dirty hands and does not deserve the orders sought.
    5. The Applicant has failed to disclose to the Court that exhumation was carried out and orders executed.
  9. This Application was canvassed by way of written submissions.
  10. The Applicant through the Law Firm of Kanyi Kiruchi & Co. Advocates filed his written submissions on 18th January 2023, and submitted that he deserve the orders of stay of execution, even though the said stay has been overtaken by events since the remains of Dominic Karanja Njoroge were removed and taken to unknown place. He also submitted that the said stay of execution was necessary from the onset considering the nature of the case and the lies peddled by the 1<sup>st</sup> Respondent.
  11. On the enlargement of time to file the Appeal, the Applicant relied on Section 79G of the Civil Procedure Act and the proviso thereon which provides;

provided that an Appeal may be admitted out of time if the Applicant satisfies the Court that he had a good and sufficient cause for not filling the Appeal on time”
  12. The Applicant laid down the Chronology of events from the time the lower court ruling was delivered on 21st September 2022, to the time of filing of the current application. He submitted that he has shown good and sufficient cause as to why he did not file the appeal on time.
  13. He urged the Court to exercise its discretion and enlarge time for filing of the Appeal. He relied on the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, where the Court enumerated the factors that should aid Court while exercising such discretion of extending time. These factors are;
    - i. The period of delay
    - ii. The reason for the delay
    - iii. The arguability of the appeal
    - iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted
    - v. The importance of compliance with time limits to the particular litigation on issue and
    - vi. The effect if any on the administration of justice on Public Interest if any is involved”.



14. It was his submissions that the Ruling was delivered on 21st September 2022, and the present application was filed on 1st November 2022, a period of ten (10) days after the lapse of the 30 days period that the appeal ought to have been filed. That there was no unreasonable delay and the said delay has been explained.
15. Further, that the Applicant has an arguable appeal as exhibited by the draft Memorandum of Appeal as the Order of 21st September 2022, was purely based on perjury.
16. It was further submitted that the Respondents will not suffer any prejudice as the deceased body has already been exhumed and buried in unknown grave. However, the 1<sup>st</sup> Respondent lied to Court to obtain the orders of 21st September 2022, and the said orders should be declared null and void ab initio. The Applicant urged the Court to allow the said Application.
17. The 1<sup>st</sup> Respondent filed her written submissions on 16th January 2023, through Njeri Karanja & Associates Advocates and submitted that the Application has already been overtaken by events, and that it is an otherwise abuse of the court process and wastage of the Court's precious time.
18. That the Applicant has not met the threshold envisaged under Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010, for the Court to exercise its discretion.
19. Further, that the present Application is an attempt by the Applicant to perpetuate a certain mischief and steal a march on the 1<sup>st</sup> Respondent. It was further submitted that the Application has no foundation under the law and is fatally defective.
20. The 1<sup>st</sup> Respondent urged the court to dismiss the instant application with costs to the 1<sup>st</sup> Respondent.
21. The Court has considered the pleadings herein and the rival written submissions and finds that it is not in doubt that the Lower Court on 21<sup>st</sup> September 2022, issued an order for exhumation of the body of Dominic Karanja Njoroge on Land Parcel No Forthall Loc.16 Mbugiti/15, within a period of 14 days from the date thereof. An Application for Stay and/or Review of the said Orders dated 12th October 2022, was dismissed on 19th October 2022.
22. The parties herein are in agreement that the deceased body has already been exhumed. Therefore, an Application for stay of execution is not tenable as the Stay Order was meant to stay or arrest the said exhumation. The prayer for stay has been overtaken by event and thus the Court will not make any other findings on it.
23. On whether the Applicant is entitled to an Order of enlargement of time within which to file an Appeal, it is evident that Section 79G of the [Civil Procedure Act](#) provides that the period for filing an Appeal from the Subordinate Court shall be within 30 days from the date of the Decree or Order appealed.
24. The Order that is intended to be appealed from was given on 21st September 2022, and issued on 27<sup>th</sup> September 2022. Therefore 30 days from the date of the Order expired on 21<sup>st</sup> October 2022.
24. The Application was filed on 1st November 2022, which is a period of 10 days after the expiring of the statutory period of filing the appeal. Though Section 79G is couched in mandatory terms, there is a proviso to that Section which states that;  
  
"Provided that an Appeal may be admitted out of time, if the Appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal"



25. Therefore, Courts have discretion to enlarge time within which the Appellant may file an Appeal or it can allow an Appellant to file appeal out of time. The factors to be considered are the ones enumerated in the case of Thuita Mwangi v Kenya Airways Ltd (Supra).
26. Has the Applicant herein met the said threshold?
27. On the period of delay, it is evident that the Applicant herein was late by 10 days. It is also evident that the Applicant had even filed an Application for review of the orders issued on 21<sup>st</sup> September 2022. There is no criteria that is used to determine what period can be said to be unreasonable. However, it is evident that the delay herein is only 10 days and this Court finds and holds that the said period of delay is not unreasonably too long or inordinate at all.
28. The other factor is the reasons for the delay. The Applicant has explained that after getting aware of the orders of the Lower Court on 4<sup>th</sup> October 2022, he filed an Application for review. The Court has seen the said Application for Review which was filed on 12<sup>th</sup> October 2022, and dismissed on 19<sup>th</sup> October 2022. The reasons for delay is well explained and this Court finds no reasons to doubt it.
29. On the arguability of the appeal, the Court has seen the Draft Memorandum of Appeal and indeed finds that the said Appeal is arguable. On the prejudice, it is not in doubt that the body of the deceased has already been exhumed and therefore the Respondents will suffer no prejudice once the time is enlarged to file the intended Appeal.
30. The Applicant alleged that the 1<sup>st</sup> Respondent peddled lies and that enabled her to obtain the orders that were issued on 21<sup>st</sup> September, 2022. The Court finds that it is important for the purpose of administration of justice or for public interest to interrogate the averments made by the Applicant herein.
31. For the above reasons, and for the interest of justice, it is fair and just to allow the Applicant's Application for enlargement of time to file his appeal or be allowed to file the intended Appeal out of time.
32. For the above reasons, the Court finds that the Applicant's Application dated 28<sup>th</sup> October 2022, is merited and the same is allowed entirely in terms of prayers No. (c) and (d).The Applicant is also entitled to costs of this Application, to be borne by the 1<sup>st</sup> Respondent herein.
33. Further the Applicant is directed to file the said Intended Appeal within a period of 14 days from the date hereof.
34. Failure to comply with the timelines directed above, the orders granted herein will lapse automatically.
35. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF JANUARY, 2023.**

**L. GACHERU**

**JUDGE**

**19/1/2023**

**Delivered virtually in the presence of;**

Joel Njonjo - Court Assistant

Mr Wachira H/B Kanyi Kiruchi for the Applicant



N/A for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

N/A for the 3<sup>rd</sup> Respondent

**L. GACHERU**

**JUDGE**

19/1/2023

