



Mungai v Ngugi & another (Environment and Land Appeal E077 of 2024) [2025] KEELC 2966 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E077 OF 2024**

MD MWANGI, J

MARCH 27, 2025

BETWEEN

NELLY NYAMBURA MUNGAI APPELLANT

AND

DAVID WAIGANJO NGUGI 1ST RESPONDENT

EMBAKASI RANCHING COMPANY LIMITED 2ND RESPONDENT

(An appeal from the ruling of the Chief Magistrate Court of Kenya at Milimani Commercial Courts (Honourable Chief Magistrate Lucy Ambasi) dated 8th December, 2023 in CM ELC Suit No. 8818 of 2018)

RULING

(In respect to the Preliminary Objection by the 1st Respondent dated 3rd October 2024 to the effect that the appeal herein was filed out of time without leave of the court)

Background.

1. The appeal herein was filed by way of a memorandum of appeal dated 5th June 2024 filed in court through the court e-filing system on 5th June 2024. The appeal is expressed to be an appeal from the ruling of the Chief Magistrate’s Court (Hon. Lucy Ambasi-CM) dated 8th December 2024 in CM ELC 8818 of 2018. The Appellant being dissatisfied with the whole ruling of the court delivered on 8th December 2023 appealed against the entirety of the ruling on the grounds listed in the memorandum of appeal.
2. The 1st Respondent’s preliminary objection is dated 3rd October 2024 and is premised on 2 grounds, namely;



- a. The appeal is time barred having been presented 6 months after the order appealed from without leave of court.
 - b. The appeal offends Section 79G of the *Civil Procedure Act*.
3. Surprisingly, the Appellant upon being served with the preliminary objection filed on replying affidavit which she swore on 11th November 2024, in response to the preliminary objection. In the replying affidavit, the Appellant attempts to explain the reasons why she filed the appeal 6 months after the date of the ruling appealed from. The main reason advanced is that the ruling had errors that needed to be rectified by the trial court. She summarizes by terming the preliminary objection as a mere technicality aimed at defeating the substantive justice of her appeal.
 4. The Appellant advances the same arguments in her submissions dated 11th November 2024. She argues that the preliminary objection raises matters that go beyond pure points of law. The examination of when time begun to run according to the Appellant involves the examination of various factual issues, including the effect of contradictory orders, the impact of correction, applications and the significance of the consent order, which cannot be correctly determined through a preliminary objection.
 5. The Appellant submits that justice is best served by allowing the appeal to proceed on its merits rather than disposing of it on technical grounds.
 6. On his part, the 1st Respondent submits that the memorandum of appeal speaks for itself; it is an appeal against the ruling delivered on 8th December 2023, which was filed 6 months after the date of the ruling without leave of the court.

Issues for determination

7. The sole issue for determination is whether the preliminary objection by the 1st Respondent is merited.

Determination

8. It is not in dispute that an appeal to this court from a subordinate court is mandatorily required to be filed within thirty (30) days from the date of the decree or order appeal from. Sections 79G of the *Civil Procedure Act* and 16A of the *Environment and Land Court Act* are clear on the issue. In the computation of time within which an appeal is to be instituted, there shall be excluded such time as the subordinate court or tribunal may certify as having been necessary for the preparation and delivery to the Appellant of a copy of the decree or order.
9. An appeal to this court as provided under Order 42 rule 1 of the Civil Procedure Rules shall be in the form of a memorandum of appeal signed in the same manner as a pleading setting forth concisely and under distinct heads the grounds of objection appealed against.
10. The preliminary objection by the 1st Respondent makes direct reference to the memorandum of appeal filed by the Appellants pointing out that the appeal is filed out of time without leave of the court.
11. The preliminary objection by the 1st Respondent in my opinion is a proper preliminary objection which is sufficiently particularized and detailed enough to enable the Appellant and the court know exactly the nature of the points of law being raised therein. It raises pure points of law. Indeed, time bar is one of the examples given in the Mukisa case (Mukisa Biscuits Manufacturing Limited –vs- West End Distributers (1969) EA 696), as a proper issue to be raised as a preliminary objection.



12. An objection that a pleading has been filed outside the statutory timelines just like an objection based on the statute of limitation is not concerned with merits of the case. As Lord Greene M.R. observed in the case of Hilton –vs- Sultan S. Team Laundry (1946) LKB 61,

“...the statute of Limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.”

13. The 1st Respondent is within his rights to raise the preliminary objection as he has done. The arguments advanced in the replying affidavit by the Appellant would have served her well in an application for extension of time or for admission of the appeal out of time; not against the preliminary objection by the 1st Respondent.

14. As it is, the memorandum of appeal by the Respondent speaks for itself;– ‘res ipsa loquitor’. It is against a ruling delivered on 8th December 2024, nothing more nothing less. The preliminary objection by the 1st Respondent is therefore merited.

15. The appeal by the Appellant offends Section 76G of the *Civil Procedure Act* and Section 16A of the *Environment and Land Court Act*. It is hereby struck out with costs to the 1st Respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 27TH DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kimathi for Mr. Onsare

Mr. Njuguna for the 1st Respondent

N/A by the 2nd Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

