



**Samuel v Agricultural Finance Co-operation & another (Miscellaneous Application E008 of 2021) [2023] KEELC 16028 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16028 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
MISCELLANEOUS APPLICATION E008 OF 2021  
EC CHERONO, J  
FEBRUARY 28, 2023**

**BETWEEN**

**PETER MURIITHI SAMUEL ..... APPLICANT**

**AND**

**AGRICULTURAL FINANCE CO-OPERATION ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MURIUKI KIRAGU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant has approached this honourable court vide a Notice of Motion application dated October 14, 2021 seeking the following orders;
  1. That this Honourable court be pleased to grant the applicant herein leave to appeal against the orders issued by Hon. E.o Wambo (PM) on April 12, 2021 in CMCC (Kerugoya) No. 93 of 2016 out of time.
  2. That costs be provided for.
2. The application is supported by the affidavit of the applicant sworn on even date.

**Applicants Summary Of Facts.**

3. In the supporting affidavit, the applicant deposed as follows;
  1. That I was the plaintiff in CMCC NO. 93 of 2016
  2. That I had sued the 1<sup>st</sup> Respondent seeking specific reliefs.
  3. That before the matter could be heard and determined, the 2<sup>nd</sup> respondent came in as an interested party.



4. That this application was allowed (Annexed a copy of Ruling marked 'PMS1').
5. That during the Ruling, the court did not notify the parties or their Advocates on record.
6. That then corona came and court operations were paralyzed.
7. That on or about 4<sup>th</sup> day of September 2021 and 2<sup>nd</sup> September called me and informed me that he had been issued with title deed for my property land parcel No. Inoi/Kerugoya/985, the subject matter in this suit.
8. That my enquiries at the court registry went unanswered as the file could not be traced.
9. That it was not until Friday of October 2021 that my Advocate on record was able to peruse the court file.
10. That it emerged that the 2<sup>nd</sup> Respondent had an application in my suit to have the 1<sup>st</sup> Respondent issue a certificate of discharge and transfer my property to him (Annexed copy of application marked PMS-3).
11. That this application was not served upon me or my Advocate on record and therefore was heard in my absence
12. That I have learnt that the 2<sup>nd</sup> Respondent is actively looking for a purchaser for my property now registered in his name.
13. That I do reasonably suspect that there was collusion between the two (2) Respondents and the Court to dispossess me of my property
14. That the order issued on 12<sup>th</sup> day of April 2021 basically terminated my suit without me being heard and issues raised being determined (annexed copy of order marked 'PMS-3)
15. That the time allowed for appeal elapsed while I was still in the dark.
16. That if I do not challenge the orders before this Honourable court, then the orders shall stand, the 2<sup>nd</sup> Respondent may alienate my property now registered in his name and I shall suffer irreparably.
17. That it is only just and fair that this honourable court extends the time for me challenge the orders issued on April 12, 2021 on appeal to this Honourable court.

## **2<sup>Nd</sup> Respondents Summary of Facts**

4. The 2<sup>nd</sup> respondent opposed the application vide a Replying affidavit sworn on November 17, 2021 and filed in court on November 29, 2021 and deposed as follows;
  1. That the application before court is incompetent, bad in law and an abuse of the court process
  2. That there has been an inordinate delay in filing the instant application and the same should therefore be dismissed
  3. That the applicant has not appealed against the substantive orders made by the court on January 16, 2020 and therefore the instant application lacks foundation.
  4. That the Applicant did not seek the leave of the lower court to appeal against the orders made on April 12, 2021 and therefore the application before court is incompetent.
  5. That I presented my application before the lower court lawfully and regularly.



6. That the allegation that there was collusion between me, the court and the 1<sup>st</sup> Respondent is malicious and false.

### **Analysis and Determination**

5. I have considered the Notice of motion application dated October 14, 2021, the supporting affidavit and the replying affidavit by the 2<sup>nd</sup> respondent. I have also considered the annexures to the two affidavits, the submissions and the applicable law. The applicant has invoked the provisions of section 79(G) and 95 of the *Civil Procedure Act*. An order whether or not to extend the time for appealing is a discretionary power. In exercise of that discretion, the court takes into account the following factors;
  - a. Whether there is a good and reasonable explanation for the delay;
  - b. Whether the application has been brought without undue delay;
  - c. Whether the proposed appeal is arguable, and
  - d. Whether any prejudice will be suffered by Respondent
6. As to whether the application has been brought without undue delay, the order which the applicant seeks leave to appeal out of time was allegedly issued on April 12, 2021 while the application under review was filed on October 19, 2021, almost six months later. A period of six (6) months without explanation is unreasonable delay. A copy of the alleged Ruling delivered on April 12, 2021 was not annexed to the Supporting Affidavit but instead, a Ruling delivered on January 16, 2020 was annexed which has no correlation whatsoever. The applicant did not also annex a copy of the proceeding before the trial court which gave rise to the alleged Ruling delivered on April 12, 2021. Without annexing the alleged Ruling or copies of proceedings, it would be difficult to know whether the Applicant or his Advocate on record were notified of the Ruling date.
7. At paragraph 7 of the supporting Affidavit, the applicant stated that when Corona was reported in the country, court operations were paralyzed. That cannot be correct as court operations continued under the guidelines issued by the Ministry of Health in conjunction with the office of the Chief Justice through Gazette Notices.
8. At paragraph 10 & 11 of the supporting affidavit, the applicant further stated that his inquiries at the court Registry went unanswered as the file could not be traced and that it was not until Friday the 8<sup>th</sup> day of October 2021 that his Advocates on record were able to peruse the court file. That cannot be further from the truth as no letter from the court registry confirming that the court file could not be traced and no official court receipt was availed showing that the applicant's advocate indeed perused the court file.
9. There is also no documentary evidence that there was collusion between the respondents on one hand and the court on the other to dispossess the applicant of his property.
10. The third issue is whether the proposed appeal is arguable. An application for leave to file appeal out of time under section 79G contemplates a scenario where an appeal has already been filed on record and the applicant is seeking to have it admitted for hearing. This position has been held in a number of cases. In the case of *Ndungu Mubindi James & another v Cecilia Wanjiku Waweru* (2020) eKLR the court stated as follows;

“



“ 13. There has been a long line of High court decisions to the effect that a party should first file an appeal then seek leave to precede with that appeal, if filed out of time. In other words, that the appeal should be filed and on record as the party seeks it be admitted for hearing out of time. I can do no better than cite the case of *James Njai Githu v Equity Bank Limited* (2020) eKLR thus

“ 17 Coming back to the law, it is clear that no appeal has been filed. The applicant intends to file an appeal. That scenario is not foreseen by Section 79G of the *Civil Procedure Act*. The proviso foresees a situation where an appellant has filed an appeal, then seeks to have it admitted out of time by an application seeking extension of time and explaining the reason for delay. Hence I find the words of Emukule J in the Gerald Limbine case above necessary.

My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period of time. To do so would actually be an abuse of the court’s process under section 79B which says;

“ Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient grounds for interfering with the decree, part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily’.

11. It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be “admitted” not to be filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”
12. I need not belabour the point as this decision is in line with numerous other decisions of this court on the requisite process when filing an appeal out of time. See *APA Insurance Limited v Michael Kinyanjui Muturi* (2016) eKLR where the judge observed;

“This court as correctly submitted by Mr. Ochieng, has had on many occasions to decide on the same issue and has plainly, overtly and authoritatively pronounced itself that an appeal which is filed out of time can be validated by an application for leave to validate the appeal and that is what the proviso to Section 79G of the *Civil Procedure Act* stipulates. The decisions by Honourable H.M. Okwengu j (as she then was) in HCC 322/2008 *Michael Kinyanjui Mbutia v John Kamau Nganga*; Honourable R.V.P Wendoh J in *Richard Ngetich & another v Francis Vozena Kidiga* HCCA 75/2012; and Honourable Mary Kasango J in *Asma Ali Mohamed v Fatime Mwinyi Juma* HCCA 75/2014 (Mombasa) among others all positive attestations to that pronouncement and so far there is no contrary decision from the court of Appeal on that line of interpretation of Section 79G of the *Civil Procedure Act* proviso.



13. It follows that the prayers for an appeal to be filed out of time and for stay pending the determination of that yet to be filed appeal will fail in view of the jurisprudence pronounced in the above case James Njau Githui (supra).”
14. I agree entirely with the above judicial interpretation that the proviso to Section 79G *Civil Procedure Act* envisages that a substantive appeal be filed first followed by one seeking to admit the Appeal out of time. It is not open for a party to seek leave of the court to admit a non-existent appeal out of the statutory period. Before exercising its discretion whether to allow the application for leave to file appeal outside the statutory period or not, this honourable court must satisfy itself that there is no sufficient ground for interfering with the decree, part of a decree, or order appealed against. This court can only satisfy itself by perusing an appeal that is already filed and not one yet to be filed as contemplated under section 79B *Civil Procedure Act*.
15. In view of the matters aforesaid, I find the Notice of Motion dated October 14, 2021 lacking merit and the same is hereby dismissed with Costs.
16. It is so ordered

**READ AND DELIVERED VIRTUALLY AT BUNGOMA THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2023**

**E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr Mugo H/B for Nduku Njuki for Applicant

Respondent/Advocate-absent

