



**Muriithi v Kanyingi (Environment & Land Miscellaneous Case
E012 of 2022) [2023] KEELC 819 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND MISCELLANEOUS CASE E012 OF 2022**

YM ANGIMA, J

FEBRUARY 20, 2023

BETWEEN

LEONARD GITHUI MURIITHI APPLICANT

AND

JENIFFER WAMATHA KANYINGI RESPONDENT

RULING

A. Introduction

1. By a judgment dated and delivered on May 18, 2022 in Nyahururu MC ELC No 121 of 2019 – Jeniffer Wamaitha Kanyingi v Leonard Githui Muriithi the trial court allowed the Respondent’s suit against the Applicant and at the same time dismissed the latter’s counterclaim. The Respondent was also awarded costs of the suit.
2. It is evident that from the material on record that the Applicant did not lodge an appeal against the said judgment and decree within the stipulated period hence the instant application for leave to appeal out of time.

B. The applicant’s application

3. By a notice of motion dated August 30, 2022 expressed to be grounded upon Order 1 of the *Civil Procedure Rules*, and Section 79G of the *Civil Procedure Act* (Cap.21) the Applicant sought leave of court to lodge his appeal against the said decree out of time. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on August 30, 2023 and the exhibits thereto.
4. The Applicant contended that although he applied for copies of the judgment on May 25, 2022 and of the proceedings on June 21, 2022 the same were only supplied on August 25, 2022 after expiry of



the period prescribed for lodging an appeal. He further contended that he was unable to file his appeal because he was unwell during the relevant period.

5. The Applicant also filed a supplementary affidavit sworn on October 24, 2022 in which he stated that he had an arguable appeal and that it would be just and fair to grant the application. He also annexed a copy of a draft memorandum of appeal and medical treatment notes to the affidavit.

C. The Respondent's Response

6. The Respondent filed a replying affidavit sworn on November 29, 2022 in opposition to the application. It was contended that the application had not been filed without unreasonable delay and that the delay had not been adequately explained. The Respondent further contended that no medical report had been provided and that the medical notes did not provide sufficient details on when the Applicant fell sick, the nature of the illness and when he recovered.
7. The Respondent further contended that the Applicant had not demonstrated that he had a good or arguable appeal and that the supplementary affidavit was filed without leave of court. The court was consequently urged to strike out the supplementary affidavit and dismiss the application for extension of time.

D. The Parties Submissions

8. When the application was listed for inter partes hearing it was prosecuted orally by the Applicant whereas the Respondent opposed the same. The Applicant relied upon the grounds set out in the notice of motion and the contents of the supporting affidavit and the supplementary affidavit and urged the court to allow the application. The Respondent, on the other hand, opposed the application on the basis of the grounds set out in her replying affidavit and urged the court to dismiss the same with costs.

E. The Issues for Determination

9. The court has perused the Applicant's notice of motion dated August 30, 2022 together with the supporting affidavit, the Respondent's replying affidavit, the Applicant's supplementary affidavit as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Applicant's supplementary affidavit should be struck out.
 - b. Whether the Applicant has made out a case for extension of time sought.
 - c. Who shall bear costs of the application.
- E. Analysis and Determination
 - a. Whether the Applicant's supplementary affidavit should be struck out
10. The Respondent contended that since the Applicant filed the supplementary affidavit sworn on October 24, 2022 without leave of court, the same ought to be struck out. The Applicant did not specifically respond to this issue at the hearing. The court has, however, noted that the supplementary affidavit was filed before the Respondent filed her replying affidavit. In fact, the Respondent was able to respond to the two annexures to the supplementary affidavit in her replying affidavit. The court is thus of the opinion that the Respondent has not suffered any prejudice by the Applicant's action of filing his supplementary affidavit without leave of court. Accordingly, the court hereby declines to strike out the supplementary affidavit and hereby deems it as having been filed with leave.



- b. Whether the Applicant has made out a case for the extension of time sought
11. The Applicant advanced two reasons for his failure to lodge his appeal within the prescribed period. Firstly, it was contended that despite applying for copies of the judgment and proceedings on May 25, 2022 and June 21, 2022 respectively, there was delay on the part of the trial court in supplying the same until August 25, 2022. Secondly, that he was prevented from filing the appeal on account of ill health for which he annexed some treatment notes in his supplementary affidavit.
 12. The court has noted, however, that the Applicant did not annex the two letters of May 25, 2022 and June 21, 2022 as claimed in his supporting affidavit. The court has further noted from the application that he did not exhibit any medical report to demonstrate the nature of his illness, the period of incapacitation, if any, and the time of recovery. There is very scanty information in the two medical notes which were exhibited by the Applicant.
 13. The medical note dated August 20, 2022 simply shows that the Applicant had pain on the left leg for which pain killers and a gel were prescribed. The note of June 17, 2022 shows that the Applicant had a complaint on poor hearing for which ear drops were prescribed. There is absolutely no medical evidence on record to demonstrate that the Applicant was incapacitated in any manner or to the extent that he could not file a memorandum of appeal within the prescribed period. On the contrary, by the Applicant's own evidence, he was able to file a letter requesting for the judgment of the trial court on May 25, 2022 which was 5 days after prescription of analgesics for pain on his left leg. The question which remains unanswered is why the Applicant did not lodge his memorandum of appeal at the time or at any time before expiry of the prescribed period.
 14. There is no legal requirement under Order 42 of the *Civil Procedure Rules* for a party to file copies of the judgment or proceedings at the time of lodging the appeal. All that an aggrieved party needs to file is a memorandum of appeal and a certified copy of the decree. If the decree is not available at the material time, the law allows a copy thereof to be lodged at a later date. The court finds no justification on the part of the Applicant to blame the trial court for delay in supplying him with copies of the judgment and proceedings whereas the same were not required for the purpose of filing an appeal.
 15. Order 42 rule 1 of the *Civil Procedure Rules* stipulates that:
 - i. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - ii. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
 16. The factors to be considered in an application for extension of time were considered by the Court of Appeal in the case of *Thuita Mwangi v Kenya Airways* [2003] eKLR where the court quoted the following passage from the case of *Mutiso v Mwangi* [1997] KLR 630:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; firstly, the length of the delay; secondly, the reason for the delay; third (possibly) the chances of that appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”



17. The court has considered the period of delay from the date of judgment on May 18, 2022 until August 31, 2022 when the instant application was filed. The period of delay is about 3 months which is not very lengthy or inordinate. The court has also considered the reasons for the delay. The court is not satisfied that the Applicant has tendered a plausible explanation for the delay. Although there is some evidence on record to show that the Applicant sought medical attention at some point, there is no evidence on record to demonstrate that he was incapacitated hence incapable of filing a memorandum of appeal.
18. The court is, however, satisfied that the intended appeal is not entirely frivolous. It is evident from the draft memorandum of appeal annexed to the supplementary affidavit that the Applicant intends to raise some arguable issues in the intended appeal hence he should be accorded an opportunity to ventilate his grievances on appeal.
19. The court has also considered the issue of possible prejudice to the Respondent. The Respondent did not contend in her replying affidavit that she stood to suffer prejudice which could not be compensated by an award of costs if the application was allowed. Accordingly, the court is of the opinion that whatever prejudice the Respondent may ultimately suffer can be compensated by a suitable award of costs. Accordingly, the court is inclined to allow the application.
 - c. Who shall bear costs of the application
20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Although the court is inclined to allow the application for extension of time, the court has found that the Applicant did not render a reasonable explanation for the delay. The instant application was consequently occasioned by the Applicant's own default. In the premises, he shall bear costs of the application.

E. Conclusion and Disposal Order** ___

21. The upshot of the foregoing is that the court is inclined to allow the application for extension of time. Accordingly, the court makes the following orders for disposal thereof:
 - a. The Applicant is hereby granted leave to file his memorandum of appeal within 14 days from the date hereof.
 - b. The Applicant shall pay the Respondent costs of the application in the sum of Kshs.20,000/ = within 14 days from the date hereof.
 - c. In the event of the Applicant defaulting in compliance with either (a) or (b) hereof, the leave granted shall lapse automatically.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF FEBRUARY, 2023.

In the presence of:

Applicant – present in person

N/A by the Respondent

C/A - Carol



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Y. M. ANGIMA
JUDGE

