



**Oanya & another v Onywere (Suing as Personal Representative and Administrator of the Estate of Aloys Machini Nyangeri) (Miscellaneous Application 7B of 2022) [2023] KEELC 732 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 732 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
MISCELLANEOUS APPLICATION 7B OF 2022**

**M SILA, J**

**FEBRUARY 15, 2023**

**BETWEEN**

**CalLEN KWAMBOKA OANYA ..... 1<sup>ST</sup> APPLICANT**

**OLIPHA NYABOKE OANYA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**NYABOKE ONYWERE (SUING AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ALOYS MACHINI NYANGERI) ..... RESPONDENT**

**RULING**

1. The application before me is that dated 26 August 2022 seeking orders to file an appeal out of time from the judgment in Kisii CMCC/ELC No. 155 of 2019, which judgment was delivered on 6 July 2022. The application is supported by the affidavit of Callen Kwamboka Oanya, the 1<sup>st</sup> applicant. She has deposed that the respondent sued her and her co-applicant in the suit before the subordinate court and judgment was entered against them on 6 July 2022 and decree issued on 19 July 2022. She deposes that they were never notified about the proceedings by their erstwhile counsel on record, who they came to discover had been indisposed. Owing to the lack of communication they did not participate and judgment was delivered without their knowledge. She avers that they are aggrieved by the judgment and wish to appeal against it. She has attached a copy of the judgment and a draft memorandum of appeal.
2. The application is opposed by the replying affidavit of Nyaboke Onywere. She has given the history of the case where she avers that she filed suit on 11 November 2019 and the applicants entered appearance and filed defence through M/s Reuben Masese & Company Advocates. The case proceeded for hearing on 16 June 2021 and she closed her case. It was then fixed for defence hearing at which point the applicants had changed counsel to M/s Ocharo Kaba & Company Advocates. She states that the



applicants applied for adjournment when the case came up for defence hearing on 20 January 2022 but this was denied. She states that directions were given for filing of submissions but none were forthcoming from counsel for the applicants and judgment was delivered on 6 July 2022. She contends that the reason that the applicants did not participate owing to illness of their counsel is a falsehood and that their counsel actually participated in the case. She avers that the applicants only wish to deny her the fruits of the judgment.

3. I invited both counsel for the applicants and counsel for the respondent to file written submissions, which they did, and I have taken these into account before arriving at my decision.
4. What is before me is an application for extension of time to lodge an appeal. The operative law is section 79G of the *Civil Procedure Act*, cap 21, which provides as follows :-

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

5. It will be seen from the above that generally an appeal is supposed to be lodged within 30 days of the order appealed from. A court may however admit an appeal out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal within the specified time. In our case, the judgment was delivered on 9 July 2022. The appeal therefore ought to have been filed on 8 August 2022. I note that this application was filed on 26 August 2022 about 18 days thereafter. The reason given by the applicants, for not filing their appeal within time, is that their erstwhile advocates were indisposed which is of course contested by the respondent.
6. I am prepared to give benefit of doubt to the applicants especially given that they have filed their application to appeal out of time not too late after the judgment. I allow the prayer to file appeal out of time. I direct the applicants to file and serve their memorandum of appeal within the next seven (7) days. I will subsequently give a date for directions and hearing of the appeal.
7. I also think that in the circumstances of this case, it is prudent that there be a stay of execution of the judgment pending appeal. I observe that in the plaint, the respondent had sued over the land parcel Nyaribari Chache/B/B/Boburia 3295 which she claimed is the property of the estate of one Aloys Machini Nyangeri (deceased). She contended that the deceased died in the year 2001, and that without succession being done, the land was transferred to one Onywere Machini (also deceased), then subdivided into the parcels Nyaribari Chache/B/B/Boburia 9340 and 9341. The parcel No. 9340 was then transferred to one Aloys Kenani Okemwa, who was sued as 1<sup>st</sup> defendant. The applicants, who were sued as 2<sup>nd</sup> and 3<sup>rd</sup> defendants are transferees of the parcel No. 9341. Judgment was entered for the plaintiff so that the parcels of land revert back to the parcel No. 3295 in the name of Aloys Machini Nyangeri. The applicants are of course aggrieved by this judgment hence the intention to appeal. If the judgment is executed then the appeal may very well be rendered nugatory. That is why I am persuaded to order that there be a stay of execution of the judgment pending the hearing of the appeal.
8. The only issue left is costs. It is the applicants who were late in filing the appeal and they will shoulder the costs of this application in any event.



9. Orders accordingly.

**DATED AND DELIVERED THIS 15 DAY OF FEBRUARY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

AT KISII

