



**Kinaga v Githinji (Environment and Land Miscellaneous Application  
1 of 2020) [2023] KEELC 16732 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16732 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2020**

**JG KEMEI, J**

**MARCH 29, 2023**

**BETWEEN**

**MILLICENT MUTHONI KINAGA ..... APPLICANT**

**AND**

**FREDRICK NDUNGU GITHINJI ..... RESPONDENT**

**RULING**

1. Aggrieved with the Trial Court's Judgment delivered on October 15, 2019 in Kiambu CMCC Case No 211 of 2014 against the Applicant, the Applicant filed the instant Motion seeking leave to file an appeal out of time and stay of execution of the said Judgment pending the hearing and determination of the intended appeal. The Motion is premised on the grounds thereat principally that failure to file the appeal in time was occasioned by the Applicant's former erstwhile Advocate's inadvertent mistake.
2. Supporting the Motion, Millicent Muthoni Kinaga the Applicant swore her Supporting Affidavit of even date and inter alia deponed that she is dissatisfied with the findings of the impugned Judgment marked as MMK1 where it was held that she did not have any claim over the suit land. She blames her former Advocates, Anyango Ogutu & Co Advocates for the late release of her file that was allegedly missing. See MMK2 letter dated January 8, 2020 from the said firm of Advocates. That she has a meritorious appeal as evidenced by the grounds in the draft Memorandum of Appeal annexed as MMK3 and unless the instant Application is allowed, she stands to be greatly prejudiced. That she is ready and willing to abide by any orders of this Hon. Court to safeguard the interests of all parties.
3. The Application is opposed. The Respondent, Fredrick Ndung'u Githinji filed his detailed Replying Affidavit sworn on March 10, 2020. Relevantly he averred that the Applicant is guilty of inexcusable and inordinate delay in seeking leave to appeal. That the reasons proffered by the Applicant are devoid of merit and in any event the intended appeal does not raise serious issues of law. That if the Court is however minded to allow the Motion, the Applicant be ordered to first deposit security of costs in Court.



4. On February 15, 2023 directions were taken in presence of parties' Counsel to prosecute the Application by way of written submissions. At the time of writing this Ruling, none of them had complied. Be that as it may the Court will consider the Motion on its merit.
5. Before delving into the merits of the Application, it is imperative to address the competency of the instant Motion. It is filed pursuant to the provisions of Order 42 Rule 6(2), Order 51 Rule 6 Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act by the firm of Mathi & Co Advocates on behalf of the Applicant. It is expressly stated and averred that the firm of Anyango & Ogutu Advocates acted for the Applicant until delivery of the impugned Judgment in the trial Court and it occasioned the delay in timeous filing of the appeal. There is no evidence of compliance with the provisions of Order 9 Rule 9 Civil Procedure Rules by the firm of Mathi & Co Advocates.
6. This Motion was initially dismissed for want of prosecution and non-appearance of parties on October 5, 2021. Vide an application dated May 27, 2022, the current Applicant's Counsel Wangui Kuria Advocates *inter alia* sought an order for reinstatement of the instant Application. There is no prayer for leave to come on record by the said firm. In the Supporting Affidavit, the Applicant averred that she had instructed the said firm to act for her as shown by annexure MMK 1- an unfiled Notice of Change of Advocates dated October 2, 2020.
7. Order 9 Rule 9 Civil Procedure Rules provides;
  - “9. Change to be effected by order of Court or consent of parties When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
    - a upon an application with notice to all the parties; or
    - b upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
8. The language in the above provision is couched in mandatory terms and in absence of such compliance by way of filing a consent or applying to Court, the Applicant's Counsel (initially Mathi & Co Advocates) were improperly before this Court so that the instant firm of Wangui Kuria Advocates taking up the appeal was void *ab initio*. Reliance is placed on the case of *Macfoy Vs United Africa Co Ltd* [1961] 3 All E R 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;
 

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
9. This Court has previously pronounced itself on this subject in the case of Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR that;
  - “12. Article 50 (2)(b) of the Constitution protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules



to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties...”

10. Similarly, the Court of Appeal in the case of *Symposia Consult Limited Vs George Gikere Kaburu & 2 Others* [2019] eKLR the Court dismissed an application seeking extension of time to file a notice of appeal out of time that was filed by Advocates who were improperly before Court.
11. The upshot of the foregoing is that the instant Application is improperly before Court and the same is struck out.
12. I make no orders as to costs because Respondent did not heed to directions on filing submissions.
13. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29<sup>TH</sup> DAY OF MARCH, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

**Applicant – Absent**

**Ms Mbuyu HB Muturi Njoroge for Respondent**

**Court Assistant – Lilian**

