



REPUBLIC OF KENYA



KENYA LAW
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**Okumu v Wawala & another (Environment & Land Miscellaneous Case
E018 of 2022) [2023] KEELC 16471 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E018 OF 2022**

AY KOROSS, J

MARCH 23, 2023

BETWEEN

ROSEMARY AUMA OKUMU APPLICANT

AND

RAYMOND OUMA WAWALA 1ST RESPONDENT

MARTIN OMONDI WAWALA 2ND RESPONDENT

RULING

Introduction

1. The application for consideration is the applicant's notice of motion dated November 9, 2022 in which this court has been moved pursuant to the provisions of article 159 (2)(d) of the *Constitution* of Kenya, sections 1A, 1B, 3A and 79G of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*. She sought the following reliefs;
 - a. That the applicant be granted leave to appeal out of time against the judgment of Principal Magistrate Honourable J. P. Nandi delivered in Bondo ELC Case Number E30 of 2021 given on May 18, 2022;
 - b. That the applicant be granted leave to file a memorandum of appeal out of time; and
 - c. That the costs of the application do abide the outcome of the appeal.
2. The motion is based on the grounds set out on its face and on the supporting affidavit sworn by the applicant Rosemary Auma Okumu on November 9, 2022.
3. The affidavit deposed inter alia, there were challenges in obtaining consent from her previous advocates for her current advocate to come on record which consent had since been obtained; in addition, she was financially constrained and was unable to secure the services of an advocate in good time; she was keen



- in prosecuting the appeal; the delay was not inordinate; she had tendered good and sufficient reasons why the appeal was not filed in time and she had availed a draft memorandum of appeal to this court.
4. Despite evidence of service, the respondents did not file any document in opposition to the motion and as it is, the motion is unopposed.

Applicant's Submissions

5. Mr. Oduol, counsel for the applicant, filed his written submissions dated November 28, 2022. Counsel asserted that by section 79G of the *Civil Procedure Act*, this court had the power to exercise judicial discretion and admit an appeal out of time if an applicant had satisfied the court she had good and sufficient cause for not filing the appeal on time.
6. He submitted the reason the applicant did not appeal in good time was because of extenuating circumstances that were explained in her affidavit. He urged this court to exercise its discretion and allow the reliefs sought in the motion. To buttress his position, counsel placed reliance on the cases of *Agip (Kenya) Limited v Highlands Tyres Limited* [2001] eKLR and the Supreme Court of Kenya decision of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR where the apex court in paragraph 26 of its judgment stated:-

‘Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.’

Analysis and determination

7. I have carefully considered the motion, grounds, affidavit and submissions and the single issue for determination is whether the applicant had met the threshold to warrant grant of leave to appeal out of time.
8. The legal framework for admitting an appeal out of time is governed by sections 79G and 95 of the *Civil Procedure Act* and Section 16A (2) of the *Environment and Land Court Act*. These provisions of law resonate with some of the provisions of law that have been relied upon by the applicant's counsel.
9. Within the provisions of section 16A (1) of the *Environment and Land Court Act*, the period of time for filing an appeal from a judgment of the subordinate courts and local tribunals to the ELC is 30 days. This provision of law is echoed section 79G of the *Civil Procedure Act*.
10. Section 16A (2) of the *Environment and Land Court Act*, Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules give this court discretion to extend time to appeal and such discretion must be exercised judiciously.
11. In order for an applicant to succeed in such a motion, she must demonstrate she had a good and sufficient cause for not filing the appeal in time. See section 79G. Further, this court has discretion to enlarge such period, even though the period originally fixed or granted may have expired See section 95. Section 16A (2) of the *Environment and Land Court Act* provides as follows;

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



12. The Court of Appeal decision of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR cited with approval the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), where the court expressed itself thus:

‘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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.’

13. The Supreme Court of Kenya decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR expanded these principles of law. Generally, in exercise of its judicial discretion, a court has to consider these principles. The list is non-exhaustive because even at times, the court may in exceptional circumstances and in the interests of justice, invoke section 3A of the *Civil Procedure Act*.
14. In spite of the motion being unopposed, the applicant needed to establish the provisions and principles of law had been met.
15. The main reason for the delay was that the applicant had challenges instructing an advocate to act for her on appeal and she needed a consent from her previous advocate to enable her current advocate come on record. She tendered a consent which affirmed this position. Her then financial status has not been refuted and this court has no reason to doubt her. This court is satisfied with the reasons advanced by the applicant. See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
16. The judgement was rendered on May 18, 2022 and instant motion filed on November 20, 2022; a period of 6 months. This court does not consider it inordinate. See *County Executive of Kisumu v County Government of Kisumu & 8 others* (Supra) and *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR where Munyao J stated: -

‘The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir* Eldoret E&L 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.’

17. The applicant has availed to this court a draft memorandum of appeal and in my considered view it raises arguable grounds of appeal. In the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR the court expressed itself as follows on arguability:

‘An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.’

18. I find the reason for the delay reasonable, plausible and sufficient. It would be in the interest of justice if the applicant was given an opportunity to ventilate her case on appeal.



19. Ultimately, I find that the motion is merited. It is trite law that costs follow the event and the costs of this motion shall abide the outcome of the appeal. This court makes the following disposal orders:
- a. The applicant is hereby granted leave to appeal out of time against the decision of Hon. PM J. P. Nandi in Bondo ELC Case Number E30 of 2021.
 - b. Applicant to file and serve a memorandum and record of appeal within 30 days from today.
 - c. Lower court record to be availed to this court.
 - d. Costs shall abide the outcome of the appeal.
 - e. The file is marked as closed.

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

23/03/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Oduol for the applicant

N/A for the respondents

Court assistant: Ishmael Orwa

