



**Oduor (Suing as the administrator of the Estate of Lucas Oduor Omondi) v Awino & 2 others (Environment & Land Miscellaneous Case E015 of 2022) [2023] KEELC 16309 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16309 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E015 OF 2022  
AY KOROSS, J  
MARCH 16, 2023**

**BETWEEN**

**CHRISPINE OCHIENG ODUOR (SUING AS THE ADMINISTRATOR OF THE ESTATE OF LUCAS ODUOR OMONDI) ..... APPLICANT**

**AND**

**MAURICE ALOO AWINO ..... 1<sup>ST</sup> RESPONDENT**

**SILVANUS MAROKO OWOKO ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, UGENYA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application for consideration is the applicant's notice of motion dated 17/10/2022 in which this court has been moved pursuant to the provisions of articles 22 (3) and 159 (2)(d) of the Constitution of Kenya, sections 1A, 1B, 3A and 79G of the Civil Procedure Act and Order 22 Rule 22 of the Civil Procedure Rules. He sought the following reliefs;
  - a. Spent.
  - b. That the applicant be granted leave to appeal out of time against the decision of the Principal Magistrate Hon. P. Sindani in Ukwala ELC No. 5 of 2018 delivered on 22/03/2022.
  - c. That the honourable court do grant an order for stay of execution of the decree and costs in Ukwala ELC No. 5 of 2018 pending the hearing and determination of the appeal.
  - d. This honourable court do review, set aside, recall and lift the warrants of attachment and sale herein for cancellation for having been issued irregularly.
  - e. The plaintiffs bear the auctioneers costs.



- f. That the costs of the application do abide the outcome of the appeal.
2. The motion is based on the grounds set out on the face of it and on the supporting affidavit sworn by Derrick O. Odhiambo dated 09/11/2022.
  3. The affidavit deposed *inter alia*, the impugned judgment was rendered in the absence of the applicant and without notice; he was dissatisfied with the judgment of the trial court and had availed a draft memorandum of appeal to this court. A notice to show cause and warrant of arrest had been issued and execution put in motion. He annexed several documents.
  4. In opposition, the respondent's counsel Joseph Vitalis Juma filed a replying affidavit sworn on 30/11/2022. He made several depositions. In brief, the supporting affidavit was sworn by a stranger who had failed to disclose the nature of authority that was donated to him. Notice of judgment was duly issued to all the parties by the trial court. Counsel had always been alive to all proceedings post judgement. The appeal was not arguable. Counsel supported his assertions with several documents he attached to his affidavit.

### **Applicant's Submissions**

5. The applicant's counsel Mr. Odhiambo filed his written submissions dated 16/12/2022. He identified the two issues for determination (a) whether the applicant had met the threshold to warrant grant of leave to appeal out of time and, (b) whether the applicant had demonstrated sufficient grounds to warrant orders for stay of execution pending appeal.
6. Counsel asserted by section 79G of the [Civil Procedure Act](#), the court had the power to exercise judicial discretion and admit an appeal out of time if an applicant satisfied the court he had good and sufficient cause for not filing the appeal on time.
7. He submitted the reason the applicant did not appeal in good time was because he was not privy of the judgment date and the delay was not inordinate.
8. Counsel argued the motion was not an afterthought and it would be in the interests of justice if the applicant was not locked out from the sit of justice. To buttress his position, counsel relied on several authorities including the Supreme Court of Kenya decision of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR which laid down the principles for leave to appeal out of time. In it, the apex court expressed itself as follows: -

‘the under-lying principles that a Court should consider in exercise of such discretion: 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; 5. Whether there will be any prejudice suffered by the respondents if the extension is granted; 6. Whether the application has been brought without undue delay; and 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.’

9. On the 2<sup>nd</sup> issue, counsel submitted by order 42 rule 6(1) of the [Civil Procedure Rules](#), this court had fettered discretion on 3 grounds; establishment of sufficient cause, satisfaction of substantial loss and provision of security. Further, by section 1A (2) of the [Civil Procedure Act](#), this court could breathe life



into the overriding objective of the same Act which were founded in section 1B. Counsel argued the appeal would be rendered nugatory if stay was not granted.

### **Respondent's submissions**

10. The respondent's counsel filed his written submissions dated 30/01/2023 and contended the applicant's suit was dismissed with costs. Counsel also relied on depositions contained in his affidavit. Counsel contended the motion was filed with inordinate delay and if at all discretion should issue, then the decretal sum should be deposited in court.

### **Analysis and determination**

11. I have carefully considered the motion, grounds, affidavit and submissions and I will adopt the issues identified by the applicant's counsel.
  - a. Whether the applicant had met the threshold to warrant grant of leave to appeal out of time.
  - b. Whether the applicant had demonstrated sufficient grounds to warrant orders for stay of execution pending appeal.

#### **a. Whether the applicant had met the threshold to warrant grant of leave to appeal out of time**

12. 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 that have been relied upon by the applicant's counsel.
13. In order for an applicant to succeed in such a motion, he must demonstrate he 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.’
14. Section 3A of the *Civil Procedure Act* donates to this court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. However, this discretion must however be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment.
15. Being guided by the provisions of law and judicial precedents which have been well articulated in the applicant's counsel's submissions, I shall now proceed to consider the merits or otherwise of the motion before me.
16. It appears the applicant's supporting affidavit was sworn by his counsel on record. The only reason the applicant has proffered for the delay was the absence of a judgment notice.
17. The respondent has countered this and tendered a notice that was issued by the trial court to all parties; notice was issued through both counsels' email by the trial court on 28/04/2022. The email address of the applicant's counsel in the trial court's communication is the same email address that the applicant's counsel has remitted to this court.
18. Additionally, the respondent's counsel who was acting for the defendant before the trial court went out his way and reminded the applicant's counsel of the judgment notice. The respondent's counsel's assertions and evidence have not been refuted. The applicant's reasons for delay fell on all fours.



19. From the evidence on record, it appears the applicant's suit in the trial court was dismissed with costs to the respondent. Counsel for the respondent put the process of execution of costs into motion. The respondent's counsel painstakingly notified the applicant's counsel of all steps he was undertaking towards execution of the decree.
20. This included serving him with a bill of costs, taxation notice, notice to show cause and even extended an olive branch on propositions of settlement; these did not elicit any response. It follows no good and sufficient reason for the delay has been advanced before this court.
21. This court must also consider the length of delay. In the instant case, judgment was rendered on 22/03/2022 and the instant motion filed on 15/11/2022. There was a delay of a close to 8 months. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR 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.’
22. Considering the peculiar circumstances of this case where the court and respondent's counsel kept the applicant's counsel abreast on various steps being undertaken during the course of the proceedings, I consider the period of 8 months to be inordinate. There was no basis upon which the appeal was not filed within the stipulated timelines or from 28/04/2022 which was the 1<sup>st</sup> date post judgment the respondent's counsel notified the court and applicant's counsel that he was filing his bill of costs. In my humble opinion, the motion was an afterthought. This relief fails.

**b. Whether the applicant had demonstrated sufficient grounds to warrant orders of stay pending appeal.**

23. Notwithstanding the 1<sup>st</sup> issue has settled the 2<sup>nd</sup> issue. It is paramount I address this issue. From the evidence on record, the trial court merely dismissed the applicant's suit.
24. The import of the trial court's judgement was that parties were to remain in the same position they were in prior to the suit being filed. A negative order is incapable of being executed or stayed.
25. If at all there is an order capable of execution, it would only be on costs which in my considered view, is not capable of being stayed. I find the motion not merited. I am persuaded by the decision of *Raymond M. Omboga v Austine Pyan* Maranga Kisii HCCA No 15 of 2010, where Makhandia, J (as he then was) stated thus:

‘The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay.’

This relief fails.

26. Ultimately and for the reasons herein above stated, I find the motion unmerited. It is trite law that costs follow the event. The costs of this motion are awarded to the respondent. This court makes the following disposal orders:
  - a. The notice of motion is hereby dismissed with costs to the respondent



**DELIVERED AND DATED AT SIAYA THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**16/03/2023**

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

**In the Presence of:**

N/A for the parties.

Court assistant: Ishmael Orwa

