



REPUBLIC OF KENYA



KENYA LAW
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**Wasi v Mosioma (Environment and Land Miscellaneous Application
E14 of 2022) [2023] KEELC 17067 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17067 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E14 OF 2022
GMA ONGONDO, J
APRIL 27, 2023

BETWEEN

MICHAEL ORINDA WASI APPLICANT

AND

DAVID OCHEGE MOSIOMA RESPONDENT

RULING

1. In an application by way of a notice of motion dated October 20, 2022 and filed herein on November 14, 2022, the applicant, Michael Orinda Wasi through the firm of J.O Soire and Company Advocates, is seeking the orders infra;
 - a. That leave be granted to the applicant to file an appeal against the decree/judgment in Oyugis Environment and Land case number 44 of 2021 out of time.
 - b. That costs of this suit (I think meant application) be provided for.
2. The anchorage of the application is as captured on grounds (a) to (e) set out on the face of the same and the applicant's affidavit of twelve paragraphs sworn on even date. In a nutshell, the applicant's complaint is that the trial court delivered judgment dismissing his case and allowing the respondent's counter claim without his knowledge due to an oversight on the part of his counsel. That he is dissatisfied thereby and intends to lodge an appeal against the judgment hence, generating this application.
3. By a replying affidavit of fourteen paragraphs sworn on February 9, 2023, the respondent through the firm of G.M Nyambati and Company Advocates, opposed the application and deposed that the applicant has not demonstrated that he would suffer substantial loss if the orders sought in the application are not granted. That the applicant was represented by counsel and was aware of the judgment date. That the allegation that the advocate of record for the applicant never followed up



- the matter is blatant falsehood that is contradicted by exchange of correspondence between the parties including the respondent's bill of cost and taxation notice attached to the affidavit.
4. The respondent further deposed that the delay in commencing the application is not explained herein. That the delay is inexcusable and that application has been brought in bad faith and only aimed at delaying the process of recovering the respondent's cost, among other things.
 5. Hearing of the application was by way of written submissions further to this court's orders of February 23, 2023.
 6. So, by the submissions dated March 1, 2023, learned counsel for the applicant relied on section 79G of the *Civil Procedure Act* Chapter 21 Laws of Kenya and the case of *Godfrey Sangura-vs-Jacob Rituyi Muyengani* Bungoma HCC Misc. Application 178 of 2002. Counsel urged the court to allow the application and grant the orders sought therein.
 7. In the submissions dated March 14, 2023, learned counsel for the respondent referred to the background of the matter, termed the application a sham and urged the court to dismiss it with costs. Counsel cited the case of *Nicholas Kiptoo Arap Korir Salat-vs-IEBC and 7 others* (2014) eKLR and *Mugo and others-vs-Wanjiru and another* (1970) EA 482, among others, to fortify the submissions.
 8. I have duly considered the entire applicant's case as well as the respondent's case. So, has the applicant shown good and sufficient cause to deserve the orders sought in the application?
 9. This court is aware of order 50 rules 1, 2, 3, 6, 7 and 8 of the *Civil Procedure Rules*, 2010 regarding time and enlargement of the same.
 10. Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya provides for matters on which an appeal lies.
 11. Further, section 79G (supra) governs time for filing appeals from subordinate courts. In the proviso thereof, an applicant has to demonstrate good and sufficient cause for not filing the appeal in time; see also *Nicholas Salat and Godfrey Sangura* cases (supra).
 12. It is the contention of the applicant that he did not file an appeal in time due to mistake of his counsel who represented him at the trial court. It must be noted that mistake of counsel should not be visited on a client as held in *Shabir Din-vs-Ram Parkash Anand* (1955) EACA Volume 22 page 48.
 13. Furthermore, the applicant has the right to be heard in respect of the prospective appeal before an adverse decision is reached in the same. The right is unlimited, fundamental and permeates the entire justice system; see articles 48, 50 (1) and 25 (c) of *the Constitution* of Kenya, 2010 and the case of *James Kanyita Nderitu and another-vs-Marios Philotas Ghikas and another* (2016) eKLR.
 14. To that end, it is the finding of this court that the applicant has advanced good and sufficient cause for not filing the appeal in time. The application has merit.
 15. A fortiori, this application is allowed in terms of prayer (a) therein and as set out in paragraph 1 (a) hereinabove.
 16. Costs of the application to abide the prospective appeal.
 17. The applicant to lodge the prospective appeal within twenty-one days from this date failing which these orders to lapse automatically.
 18. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 27TH DAY OF APRIL 2023.



G. M. A. ONGONDO

JUDGE

Present

- 1. Mr. J. Soire learned counsel for the applicant**
- 2. Terrence and Edith, court assistants**

