



Akumu v Ogutu (Sued as the legal representative of the Estate of Japheth Otieno Akumu) (Environment & Land Miscellaneous Case E013 of 2022) [2023] KEELC 16867 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E013 OF 2022**

AY KOROSS, J

APRIL 20, 2023

BETWEEN

EZEKIEL ONYANGO AKUMU APPLICANT

AND

SELINE OGUTU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAPHETH OTIENO AKUMU) RESPONDENT

RULING

1. Pursuant to sections 1A, 1B and 2A of the *Civil Procedure Act* and sections 79G of the Civil Procedure Rules, the applicant filed a notice of motion dated October 5, 2022 against the respondent seeking the following reliefs:
 - a. That leave be granted to the applicant to appeal out of time against the decision made on July 31, 2019 by Hon. T. M. Olando in Siaya PMCC Number 37 of 1998;
 - b. That costs be in the cause.
2. The application is based on the grounds set out on its face and on the supporting affidavit sworn by the applicant on October 5, 2022. He deposed inter alia, he had sought leave to appeal out of time against the impugned decision; before leave was granted, the original respondent Japheth Otieno Akumu ('deceased') was substituted by the respondent after limited grant was issued on January 12, 2022; leave to appeal against the impugned ruling was eventually granted; an initial application for leave to appeal was withdrawn on July 28, 2022; there was no inordinate delay and he had an arguable appeal.

The respondent's case



3. The respondent filed grounds of opposition dated November 22, 2022 on grounds inter alia, the motion was brought with inordinate delay and without reasonable excuse, litigation must come to an end and a successful litigant must be allowed to enjoy the fruits of her judgment.

The applicant's submissions

4. Mr. Kowinoh, counsel for the applicant, filed written submissions dated February 10, 2023. Counsel submitted on 4 grounds; delay, prejudice, arguable appeal and public interest.
5. On the 1st and 2nd grounds, counsel submitted the reasons for delay had been satisfactorily explained. Counsel asserted that the period of delay was only 2 months; his initial application for leave was withdrawn on July 27, 2022 and the instant one was filed on October 9, 2022. Additionally, the respondent had not demonstrated any prejudice would be occasioned to her if such leave was allowed.
6. On the 3rd and 4th grounds, counsel submitted that the appeal raised arguable grounds and of public interest; whether a judgment could expire after 12 years if there was an order for stay of execution or status quo order issued pending appeal.
7. Counsel relied on the decision of *Wanjobi Mathenge v. Duncan G Mathenge* [2013] eKLR where the court stated that the guiding principles were; the period of delay, the reasons for the delay, the degree of prejudice to the respondent, whether the issues raised were of public importance and the exercise of discretion was unfettered.

Respondent's submissions

8. Counsel for the respondent, Mr. Que, filed written submissions dated February 28, 2022. This appears erroneous. It ought to be dated 2023. Counsel submitted on the 3 grounds of opposition.
9. Counsel submitted that the applicant had not satisfactorily explained the reasons for the delay for two reasons. Firstly, he sought leave to appeal from the impugned ruling on September 2, 2019 and no action was taken until the instant motion was filed; a period of close to 3 years after the ruling was rendered. Lastly, the original respondent died in 2021 and nothing hindered the applicant from pursuing his appeal.
10. Counsel submitted that the applicant's actions contravened the provisions of article 159 of the *Constitution* since cases were to be dealt with without unreasonable delay. He relied on *Dickson Miriti Kamonde v Kenya Commercial Bank Limited* [2006] eKLR which held that delay could not be excused and an indolent party must reckon with consequences of inaction. Counsel also placed reliance on the case of *Machira T/A Machira & company advocates v East African Standard (No. 2)* [2002] KLR 63 which held that a successful party was entitled to the fruits of his judgment and abuse of the process of the court was prohibited.

Analysis and Determination

11. At the outset, I must admit that I had a difficulties in understanding the gist of the applicant's supporting affidavit. It was bereft of material facts and inconsistent. The averments in his supporting affidavit made references to several documents allegedly annexed to it. A close reading of the annexures demonstrate that most of the documents were either not attached to it or if at all they were attached, he attached documents that had no correlation whatsoever to the particular averments. In some instances, some pages were missing. I do not know if this was intended to delude this court.
12. Nevertheless, I have carefully considered the parties' pleadings and rival submissions. I shall be guided by provisions of law and authorities cited. The only issue falling for determination is whether the motion has merit.



13. The applicant has alluded that the nature of the subject matter of the impugned ruling required leave of the subordinate court before he could lodge an appeal to this court. I have scouted his bundle of annexures and I have not come across such an application or issuance of an order allowing such leave as envisaged by Order 43 Rules (2) and (3) of the [Civil Procedure Rules](#). On that basis alone, I would dismiss this motion.
14. Even assuming for a moment that such leave was not required, I would have been guided by the provisions of section 79G of the [Civil Procedure Act](#) and section 16A of the [Environment and Land Court Act](#).
15. An appellant must file an appeal against decisions of the subordinate courts within a period of 30 days from the date of the decree. However, for good and sufficient reason, his appeal can be admitted out of time.
16. The Supreme Court of Kenya in the case of [Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR laid down several non-exhaustive principles that guide courts when faced with an application 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.’
17. In applying these principles, it is not in doubt that this motion was filed with inordinate delay. The impugned ruling was delivered on July 31, 2019 and the instant application is dated October 5, 2022; 3 years after the ruling was delivered.
18. The applicant indicated he had erroneously filed a similar application in the lower court which he ostensibly withdrew on July 28, 2022. Except for his assertions, he never produced any shred of evidence to prove the existence of such a motion or its proceedings. I agree with the respondent’s counsel that there was inactivity for close to 3 years.
19. The applicant needed to tender plausible and satisfactory reasons for delay since those were the keys that would unlock the court’s flow of its discretionary favour. In other words, there had to be valid and clear reasons upon which discretion could be favourably exercised.
20. The only reason the applicant specified for the delay was that he required leave to appeal and by extension, the deceased died during the pendency of such an application.
21. As earlier stated, this court was not satisfied that such leave was obtained. The deceased’s demise was tied to this reason. The provision of Order 43 Rule 3 of the [Civil Procedure Rules](#) provides that such an application for leave must be made either orally at the time when the order is made or within 14 days from the date of such an order.
22. Such an application for leave ought to have been filed by August 14, 2019 which was 14 days from the date of the impugned ruling. From the limited grant, it is evident the deceased died on July 2, 2021 which was close to two years after the impugned ruling. The applicant has not satisfactory satisfied



this court why an application for leave was not filed and prosecuted during the statutory timelines and during the lifetime of the deceased. The reasons for the delay do not hold water.

23. The respondent will be highly prejudiced if the motion is allowed. Siaya PMCC Number 37 of 1998 was determined several years ago and the applicant who was the successful party had not taken steps to execute his judgment within the statutory timelines.
24. Does the appeal have a chance of succeeding? My answer is in the negative. I have looked at the ruling of Kisumu ELCA No.1 of 2016 which was between the deceased as the appellant and the applicant herein as the respondent. It is evident nothing barred the applicant from executing the judgment in respect of Siaya PMCC Number 37 of 1998 within the statutory timelines. See section 4 (4) of the [Limitation of Actions Act](#) and [Koinange Investments and Development Company Limited v Ian Kabiu Ngethe & 3 others](#) [2015] eKLR.
25. Consequently, it is my ultimate finding the motion is not merited. I hereby dismiss it with costs to the respondent.

Delivered and Dated at Siaya this 20th day of April 2023.

HON. A. Y. KOROSS

JUDGE

20/04/2023

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

No appearance for the applicant

Mr. Dick Osala holding brief for Mr. Que for the respondent

Court assistant: Ishmael Orwa

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