



REPUBLIC OF KENYA



**Abayo v Rege (Environmental and Land Originating Summons
36 of 2021) [2023] KEELC 18056 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 36 OF 2021
GMA ONGONDO, J
JUNE 19, 2023
FORMERLY MIGORI ELC NO. 103 OF 2017**

BETWEEN

SILVANCE ODHIAMBO ABAYO PLAINTIFF

AND

MARTIN ONYANGO REGE DEFENDANT

RULING

1. By a Notice of Motion Application dated 19th August 2022 and filed on even date brought under, inter alia, Article 159 of the *Constitution* of Kenya, 2010, Section 7 of the *Appellate Jurisdiction Act*, Sections 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya and order 51 rules 1 and 2 of the *Civil Procedure Rules*, 2010 (the application herein), the applicant, Martin Onyango Rege through Edward Kisia and Company Advocates is seeking the following orders;
 - a. Spent.
 - b. That leave be granted to the applicant to file notice of appeal against judgment and decree of Hon. Ong'ondo J delivered on 27th July 2022.
 - c. That costs of this application be provided for.
2. The application is founded upon grounds (i) to (iv) stated on the face of the same. It is further anchored on the applicant's supporting affidavit of twelve paragraphs.
3. The applicant's complaint is that following judgment in the main suit delivered on 7th July 2022 by this court, he instructed his advocate to lodge an appeal but the advocate failed to do the same. That mistake on the part of an advocate ought not to be visited on a litigant. He avers that he has a good appeal with high chances of success and that the respondent shall suffer no prejudice should the instant application be allowed. That the instant application has been lodged without inordinate delay.



4. The respondent, Silvanice Odhiambo Abayo, through the firm of O. M. Otieno and Company Advocates, opposed the application by way of his replying affidavit sworn on 17th February 2023 and duly filed herein on 27th February 2023. He deposed, *inter alia*, that this court is devoid of jurisdiction to entertain the instant application as the same seeks leave to appeal out of time, which can only be granted by the Court of Appeal. That besides, there has been unreasonable delay of over 3 weeks in lodging the application, which delay has not been explained. That in any event, the prospective appeal is frivolous and merely calculated to defeat and delay the realization of the judgment of this court. That therefore, the instant application ought to be dismissed with costs.
5. The application was heard by way of written submissions further to this court's directions of 26th September 2022; see Order 51 Rule 16 of the [Civil Procedure Rules](#), 2010 and [Practice Direction number 33 of the Environment and Land Court \(ELC\) Practice Directions](#), 2014.
6. Accordingly, learned counsel for the applicant filed submissions dated 28th February 2023 on even date and identified two issues for determination thus: whether the application herein has any merits and therefore the orders sought should be granted and who should bear the costs of this application. Briefly, counsel submitted that the instant application has met the requirements for granting the relief sought. Reliance was placed on Section 7 of the [Appellate Jurisdiction Act](#), order 50 rule 6 of the [Civil Procedure Rules](#), 2010 and Article 159 (2) (d) of the [Constitution](#) of Kenya, 2010. To reinforce the submissions, counsel relied on various authorities including the case of [Board of Governors, Moi High School, Kabarak and another v Malcolm Bell](#) (2013) eKLR.
7. By the submissions dated 3rd April 2023 and filed herein on 4th April 2023, learned counsel for the respondent identified four issues for determination, to wit: whether the applicant has made out a case for the grant of leave to file notice of appeal, whether the application was brought without unreasonable delay, whether there exists an arguable appeal and who should bear costs.
8. Briefly, learned counsel submitted that there was delay in filing the present application. That although the applicant contends that the intended appeal has high chances of success, he has failed to furnish this court with a copy of the memorandum of appeal hence, this court is not in a position to determine whether or not there is an arguable appeal. Thus, counsel urged this court to dismiss the instant application with costs. Counsel relied on various authoritative pronouncements, including the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) (2014) eKLR, to buttress the submissions.
9. I have anxiously considered the application, the replying affidavit and the rival submissions in their entirety. The following issues fall for determination:
 - i. Whether the Court has jurisdiction to extend time for filing a Notice of Appeal.
 - ii. Whether the Applicant should be granted leave to file a Notice of Appeal out of time.
10. On the first issue, order 50 rule 6 of the [Civil Procedure Rules](#), 2010 stipulates that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”



11. Section 7 of the [Appellate Jurisdiction Act](#), Chapter 9 Laws of Kenya provides that:

Section 7 Power of High Court to extend time:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

12. As can be gleaned from the above provisions of the law, this court has the power to extend time for filing a Notice of Appeal. In the case of [Edward Njane Nganga & Another v Damaris Wanjiku Kamau & Another](#) (2016) eKLR, the court adopted the judgment of Munyao J in the case of [Loise Chemutai Ngurule & Another v Winfred Leshwari Kimung'en & 2 Others](#) (2015) eKLR in which he observed as follows:

“... It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of *Simon Towett Martim v Jotham Muiruri Kibaru*, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004) eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time ... with respect I disagree with the above decision...”

13. The learned judge Munyao J. further noted thus:

“...Section 7 is explicit, that the High Court (which now in light of the [Constitution](#) of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law ...

Neither am I of the view that there is any conflict between the above provision and the provisions in the [Court of Appeal Rules](#). Rule 4 of the [Court of Appeal Rules](#) also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned ... ”

14. So, has the applicant demonstrated that he is entitled to the orders sought?

15. The Court of Appeal in the case of *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi*, (1999) 2 EA 231, laid down the parameters in extending time and stated 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 ...”

16. In the instant case, the applicant contends that he instructed his advocate to lodge an appeal but the advocate failed to do the same. That mistake on the part of an advocate ought not to be visited on a litigant. He avers that he has a good appeal with high chances of success and that the respondent shall suffer no prejudice should the instant application be allowed. That the instant application has been lodged without inordinate delay.
17. However, the respondent insists that there has been unreasonable delay of over 3 weeks in lodging this application, which delay has not been explained. That in any event, the applicant has omitted to attach a memorandum of appeal thus, the court has no way of assessing whether the prospective appeal is arguable.
18. It is noted that the applicant has a right of appeal; see Articles 48 and 50 of the *Constitution* of Kenya, 2010. The position was set in the case of *Richard Nchapi Leiyagu v IEBC & 2 Others* [2013]eKLR; *Mbaki & Others v Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; where it was held inter alia that:
 - a. The right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - b. The right to be heard is a valued right; and
 - c. That the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;
19. It is appreciated that no draft memorandum of appeal is annexed. That default notwithstanding, the principle of law set out under rule 4 of the *Court of Appeal Rules* indicates clearly that in the absence of a draft memorandum of appeal, the court can gauge the arguability of an intended appeal from other supportive evidence. Herein, the applicant intends to challenge the judgment of this court that the respondent has acquired, by way of adverse possession, ownership over land reference numbers Kanyada/K/Kalanya 4708 & 4340, measuring approximately zero decimal five five hectares (0.55 Ha) and zero decimal five three hectares (0.53 Ha) in area and contained in Registry Map sheet numbers 18 and 26 respectively. In my view, that in itself is arguable as it raises a bona fide issue for determination by the court.
20. Indeed, the court must balance the rights of the respondent who is entitled to the fruits of his judgment against the applicant’s right of appeal. Considering the circumstances of this case, I am inclined to exercise my discretion in favour of the applicant although the respondent will be compensated by costs. Besides, the delay of 3 weeks in lodging the instant application cannot be said to be inordinate.
21. Accordingly, I find merit in the application and allow it. The applicant shall file and serve his Notice of Appeal within 14 days from the date of this ruling.
22. The costs of the application shall be borne by the applicant.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 19TH DAY OF JUNE 2023.



G.M.A ONGONDO

JUDGE

Present

1. Ms. P. Odhiambo holding brief for O. M. Otieno, learned counsel for the plaintiff/respondent
2. Okello and Mutiva- Court Assistants

