



REPUBLIC OF KENYA



KENYA LAW
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**Ndoro v Omar (Environment and Land Miscellaneous Application
56 of 2022) [2023] KEELC 18060 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 56 OF 2022**

EK MAKORI, J

JUNE 15, 2023

BETWEEN

JACLINE MHENZO NDORO APPLICANT

AND

KHAMIS KALAMA OMAR RESPONDENT

*(Application for leave to appeal out of time the decision in Land
Case No E131/2021 before the Chief Magistrate Malindi.)*

RULING

1. The applicant in this matter seeks to appeal out of time.
2. She stated in her application that she was never accorded a hearing in the Lower Court and was surprised upon being evicted without one. She claims she was never served with suit papers.
3. On reasons for the late appeal she averred that she was unaware of Land Case No. E131/2021 before the Chief Magistrate Malindi – since she was never served with the plaint and summons to enter an appearance.
4. She stated that her appeal is meritorious and ought to be heard citing the decisions in *Athman Nasura Juma v Ajwa Mohammed Romadhan* Court of Appeal No 227 of 2015 (unreported) and *Muchungi Kiragu v James Kiragu and Another* [1998] eKLR, which decisions hold that where there is an arguable appeal courts have usually granted an extension of time to appeal out of time.
5. The respondent has filed grounds in opposition stating that the appeal is a none started and dead on arrival. Service in the Lower Court was satisfactory. Besides the appellant had recourse to apply to set aside the ex parte Judgment or have it reviewed as provided under Order 10 rule 11 of the *Civil Procedure Rules*. What we have is an application to set aside not an appeal.



6. The issue for determination is whether this Court should grant the applicant extension of time to appeal out of time.
7. The court has the discretion to do so based on whether the applicant has good reasons for being late and that the appeal is arguable. I agree with the authority cited by the applicant - *Muchungi Kiragu v James Kiragu and Another* [1998] eKLR where the Court of Appeal set out the principles to consider before granting an extension of time as follows:

“Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted an extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it. If the learned single judge had considered this issue which was raised in the applicant’s application, and in his supporting affidavit including the annexures thereto, we venture to say that he may probably have come to a different conclusion than the one he came to.”

8. The applicant contended that she was never heard in the Lower Court. Service of summons and plaint was never effected on her. She came to learn of the matter when eviction took a toll on her.
9. She stated that she was late to appeal because she was not aware of the matter before the Lower Court. It is the execution process that made her realize there was a suit against her to deal with.
10. Pursuant to Article 50(1) of the *Constitution* on the right to be heard, and that, the matter proceeded *ex parte*, whereas counsel for the Respondent argues that this is more of setting aside *ex parte* judgment under Order 10 Rule 11 of the *Civil Procedure Rules*, there is a judgment in place that is against the intended appellant. She needs a second chance. The reasons for being late are genuine she is an unrepresented litigant who came to learn of the matter at the execution stage. If it will become known, in the intended appeal that she was properly served, the appeal will fail. Nevertheless, for now, it is my view that she be granted leave to appeal out of time.
11. That being the case, I will allow an extension of time within which to file an appeal as follows:
 - i. That the applicant does serve the appeal bundles within 21 days hereof.
 - ii. That the respondent replies within 14 days after service.
 - iii. Costs in the intended appeal.

DATED, SIGNED, AND DELIVERED AT MALINDI IN OPEN COURT ON THIS 15TH DAY OF JUNE 2023

K. MAKORI

JUDGE

In the presence of:

Intended Appellant

Court Clerk: Happy

In the absence of:



Mr. Mouko for the Respondent

