



**Suter v Somek (Environment and Land Appeal 2 of 2016)  
[2023] KEELC 20244 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20244 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL 2 OF 2016  
JM ONYANGO, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**PATRICK KENNEDY SUTER ..... APPELLANT**

**AND**

**JOSEPH KOMEN SOMEK ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated January 13, 2023 brought pursuant to Article 50 of the [Constitution of Kenya](#), Sections 1A, 1B, 3A, 79 and 95 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya, Order 9 Rule 9, Order 42 Rule 6 and Order 51 of the [Civil Procedure Rules](#), the Applicant filed an application seeking the following orders:
  - a. Spent.
  - b. That the firm of Seneti & Oburu Associates Advocates be granted leave to come on record for the Appellants herein.
  - c. That the Honourable court be pleased to grant the Applicants leave to file a Notice of Appeal out of time against the judgment in Eldoret Environment and Land Court ELC Appeal No. 2 of 2016 delivered on February 9, 2018.
  - d. That upon grant of leave to appeal out of time, the draft Notice of Appeal annexed herewith be deemed as duly filed.
  - e. That pending the hearing and determination of the appeal the Honourable Court be pleased to order a stay of execution of the judgment herein.
  - f. That the costs of and incidental to this application be costs in the intended appeal.



2. The application is based on the 12 grounds enumerated in the Notice of Motion and the Applicant's Supporting affidavit sworn on the January 13, 2023. Primarily the Applicant avers that he was not aware of the judgment delivered on February 9, 2018 until November 2022 when he visited his advocates' office to make inquiries about his case. He is of the view that the mistake of his advocate should not be visited upon him. He claims that he has an arguable appeal with high chances of success.
3. The application is strenuously opposed by the Respondent through his Affidavit sworn on April 4, 2023 in which he deposes that the applicant is not being truthful as he was aware of the judgment since he was represented by counsel. Furthermore, he was removed from the suit property in 2020 and on 22.11.22 he attended court on a Notice to Show Cause why he should not be committed to civil jail for failure to pay the Respondent's costs.
4. It is evident from the Replying affidavit and annexures that execution has taken place as a title was issued in the Respondent's name on June 28, 2018 and there is therefore nothing to stay. The Respondent adds that he would be prejudiced if an order of stay is granted as he has since developed the suit property. He contends that the Applicant has not come to court with clean hands and he does not deserve the discretionary orders that he is seeking.
5. The application was disposed of through written submissions and both parties filed their submissions which I have carefully considered.
6. The main issues for determination are whether the court should extend the time for filing a Notice of appeal and whether a stay of execution should be granted. The issue of change of advocate will depend on whether the application is allowed.
7. Section 7 of the *Appellate Jurisdiction Act* provides for extension of time by the High court and by necessary implication, the Environment and Land Court. The said section provides as follows:

S.7 Power of High Court to extend time

“The High Court may extend time for giving notice of intention to appeal from a judgment of the High Court or for making an application 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 issuance of the warrant for execution of that sentence”

8. The principles that guide the court in the exercise of its discretion to extend time for filing an appeal out of time were laid down by the Supreme Court in the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR, as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
  5. whether there will be any prejudice suffered by the respondents, if 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” [emphasis supplied]
9. In the present case, the judgment was delivered way back in February 2018. Although the Applicant claims that he was not aware of the judgment, the record clearly shows that he was represented by counsel and he was aware of the ensuing execution proceedings beginning with his eviction in 2020 and culminating in his committal to civil jail for 30 days on November 22, 2022. It is therefore dishonest of him to feign ignorance and blatantly lie to the court.
10. In an application for extension of time the Applicant must explain the delay in filing the appeal to the satisfaction of the court.
11. In the case of *Odera Obar & Co Advocates v Acquva Agencies Limited* (2021) eKLR where the court held as follows:
- “The law does not set out any minimum or maximum period of delay. All it states is that the delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”.
12. The Applicant has placed the blame on her former advocate for failing to promptly inform him of the outcome of the case. However, he does not explain why it took him almost 5 years to check on the progress of his case and what action he took after he learnt of the judgment.
13. In the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR the Court of Appeal observed as follows:
- “It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.
14. Applying the principles in the above-mentioned authorities to the instant case, I am not persuaded that the applicant has given a satisfactory explanation for the delay in filing the appeal. I am constrained to agree with counsel for the Respondent that the applicant is guilty of laches and that he has not come to court with clean hands. I therefore decline to exercise my discretion in his favour.
15. The upshot is that the application lacks merit and it is dismissed with costs to the Respondent.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023.**



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**J.M ONYANGO**

**JUDGE**

**Ruling delivered virtually in the presence of:**

1. Dr. Chebii for the Plaintiff/Respondent
2. No appearance for the Defendant/Applicant

Court Assistant: A. Oniala

