



**Salim v Ouya (Environment and Land Appeal E106 of 2022)  
[2023] KEELC 21403 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21403 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E106 OF 2022**

**JA MOGENI, J**

**OCTOBER 23, 2023**

**BETWEEN**

**RUKIA AHMED SALIM ..... APPELLANT**

**AND**

**DAISY W. GITHINJI OUYA ..... RESPONDENT**

*(Being an Appeal of the Judgment of Hon. Magistrate Mr. H.M Nyaberi  
delivered on 16th June 2022 in Milimani CMCC ELC Cause No. E1479 of 2020)*

**RULING**

1. There are two applications for determination before this court. In the first application dated 19/07/2023, the Respondent seeks to strike out the Appellant's memorandum of appeal filed on 04/11/2022 on the ground that it was filed out of time. The second application dated 31/08/2023 was brought by the Appellant.
2. The court will first consider both applications together. The Appellant seeks leave to lodge an appeal out of time against the decision delivered in Milimani CMCC ELC Case No. E1479 of 2020 by the Honourable Mr. H.M Nyaberi delivered on 16/06/2022. She also sought orders that upon grant of leave to appeal out of time, the memorandum of appeal she had filed be deemed to be duly filed and for the costs of the application to be provided for. The applicant's application is based on the grounds set out therein and supported by the applicant's affidavit.
3. The gravamen of the application is that the applicant (as plaintiff) filed Milimani Chief Magistrate's Civil Case No. E1479 of 2020 against the respondent (as defendants) seeking various orders with respect to apartment No. LH12 as a portion of LR 1870/VI/85/IR85012/. In a judgment delivered on 16/06/2022, the applicant's suit was dismissed with costs. Being dissatisfied with the said judgment, the applicant filed an Application for Stay dated 13/07/2022.



4. While the application for stay was pending before the court the plaintiff (applicant) filed an application dated 22/11/2022 seeking leave of court to file appeal out of time which however was withdrawn after the parties consenting to the withdrawal 03/07/2023. However, a fresh application seeking leave of court to file appeal out of time was filed on 31/08/2023.
5. In response to the application the respondent in an application dated 31/08/2023 filed an application dated 19/07/2023 to strike out the plaintiff's application seeking leave to file appeal out of time dated 31/08/2023 and Grounds of Opposition dated 19/09/2023. The respondent has stated that the plaintiff's action of filing the appeal without seeking leave is a gross abuse of the court system, it is frivolous and vexatious. Further that the applicant has filed a myriad of cases.
6. On her part, the applicant/plaintiff herein filed a replying affidavit to the respondent's application dated 19/07/2023 and to the Grounds of Opposition terming the application and the grounds of opposition as misconceived, misplaced, frivolous and vexatious and asked the court to dismiss it. Further the applicant/plaintiff attached copies of correspondence apparently from Counsel of the applicant/plaintiff seeking for copies of typed proceedings and a copy of the certificate of delay.
7. On 04/10/2023 it was agreed that this application be canvassed by way of written submissions which have now been filed by the firm of Nyachoti & Company Advocates for the plaintiff/applicant dated 17/10/2023 and Wainaina Ileri Advocates LLP for the respondent dated 11/10/2023.
8. I have considered the application, the supporting affidavit, the grounds of opposition as well as the submissions by counsel.
9. Section 79 G of the Civil Procedure Act provides as follows: -

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time”. Emphasis added.

10. It is clear therefore that the Court may, for “good and sufficient cause” admit an appeal out of time. In the case of Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission (I.E.B.C) And Others 2014 E K.L.R, the Supreme Court laid down the following principles that should guide the Court in considering such an application: -
  1. Extension of time is not a right but an equitable remedy and is only available to a deserving party and at the discretion of the Court.
  2. A party who seeks for extension of time has the burden of laying the basis to the satisfaction of the Court.
  3. Discretion to extend time is a consideration to be made on a case to case basis.
  4. Where there is a reasonable reason for the delay, it should be explained to the satisfaction of the Court.
  5. Whether there will be any prejudice suffered by the respondent if the extension is granted.
  6. Whether the application has been brought without undue delay.



7. Whether in certain cases, like elections, public interest should be a consideration for extending time.
11. Bearing the above principles in mind, it is clear that the judgment of the subordinate Court having been delivered on 16/06/2022, the applicant had thirty (30) days within which to file her appeal. That period may be extended where the applicant obtains from the trial Court a certificate of delay within the meaning of section 79 G of the *Civil Procedure Act* indicating any period that was required to prepare “a copy of the decree or order”. Section 79 G of the *Civil Procedure Act* was considered by the Court of Appeal in the case of *Kyuma Vs Kyema* 1988 K.L.R 185 where it held that:

“But in order to set a foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order..... This period may be extended provided he obtained from the magistrate’s Court a certificate of delay within the meaning of section 79 G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the “decree or order of the Court”. As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal not only the order of the Court, but also a certificate of delay”. Emphasis added
12. It is clear therefore that whoever intends to file an appeal must obtain an order or decree which must be filed together with the memorandum of appeal and a certificate of delay certifying the time taken to prepare and deliver the order or decree if the appeal is to be admitted outside the thirty days allowed by law. The applicant herein has annexed a Memorandum of Appeal dated 4/11/2022 as well as the judgment and proceedings in Milimani CMCC ELC Cause No. E1479 of 2020. The certificate of delay attached does not relate to the judgment issued on 16/06/2022 but to the decree apparently issued on 30/08/2022. The law envisages the obtaining of a certificate of delay confirming that it took time to obtain certified copies of the proceedings and the judgment for purposes of lodging an appeal.
13. However, a copy of the proceedings shows that they were certified on 21/7/2022 and the judgment was certified similarly on 21/07/2023. If the plaintiff intended to lodge the appeal this would have been a delay of only five (5) days within the allowable window of 30 days. There is no explanation as to why it took the applicant upto 04/11/2022 to file this application for the first time and then 31/31/08/2023 and in any event, guided by the decision in the case of *Kyuma Vs Kyema* (supra) which is binding on me, there is really no appeal before me which can be “admitted out of time” as envisaged by the provisions of section 79 G of the *Civil Procedure Act* which, in my view connotes both the act of allowing an appeal to be filed out of time as well as allowing an appeal already filed to be admitted out of time. The applicant herein seeks leave to file the Memorandum of Appeal out of time but as is now obvious, without the certificate of delay from the subordinate Court, this application must fail.
14. I must also consider whether the applicant has demonstrated “good and sufficient cause for not filing the appeal in time” as provided under section 79 G of the *Civil Procedure Act*. As indicated earlier, judgment herein was delivered on 16/06/2022 and so the appeal ought to have been filed within 30 days from the date of delivery of that judgment. The applicant depones that he only obtained copies of the proceedings and judgment after sending a letter dated 28/06/2022 and one dated 15/09/2022. This application was filed on 04/11/2022 (two and half months later). The period in between I note that the applicant was busy filing a several applications relating to the same suit property and same parties. I have counted three applications instead of filing the appeal.
15. Going by the fact that the proceedings and judgment were certified on the same day there seems to be no excuse for the applicant not having filed an application for leave immediately upon obtaining the said proceedings. The further delay that I now note for the application dated 31/08/2023 is in-



excusable and un-reasonable in the circumstances bearing in mind that the applicant was aware about the delivery of the judgment on 16/06/2022. As was stated by the Supreme Court of India in *Parimal vs Veena* 2011 3 SCC 545:

“Sufficient cause means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the fact and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently’ or ‘remaining inactive’. However, the facts and circumstances of each case must afford sufficient grounds to enable the Court concerned to exercise discretion for the reason that wherever the Court exercises discretion, it has to be exercised judicially”.

16. The court is of course alive to the principle laid down in the *Nicholas Sala* Case (supra) that the power to extend time is not a right but an equitable remedy available only to deserving parties at the court’s discretion. Considering all the above, I am not persuaded that this is a proper case in which to exercise my discretion in favour of the applicant.

### **Disposal Orders**

17. The up-shot of the above is that the two applications are disposed as follows:
- a. The applicant’s Notice of Motion dated 31/08/2023 is dismissed with costs to the respondent.
  - b. For avoidance of doubt, the respondent’s Application dated 19/07/2023 is upheld as prayed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER 2023.**

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**MOGENI J**

**JUDGE**

**In the virtual presence of:**

Mr. Nyachoti for the Appellant

No appearance for the Respondent

Caroline Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

