



**Ochieno v Nganya (Miscellaneous Application 38 of 2022)
[2023] KEELC 20848 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS APPLICATION 38 OF 2022
SO OKONG'O, J
OCTOBER 19, 2023**

BETWEEN

ASCAR AUMA OCHIENO APPLICANT

AND

CHRISTOPHER OWINO NGANYA RESPONDENT

RULING

1. The applicant has sought leave of the court to file an appeal out of time against the judgment of Hon RK Ondieki SPM delivered on September 28, 2021. The application was filed on November 18, 2022 more than 1 year after the delivery of the judgment sought to be appealed.
2. The applicant has contended that she was not aware of the judgment of the lower court until November 7, 2022. The applicant has averred that the advocate who was acting for her in the lower court did not inform her of the judgment. The applicant has averred that she is dissatisfied with the judgment and wishes to appeal against the same to this court. The applicant has averred that her intended appeal raises serious issues and that she should be given an opportunity to argue the same. The applicant has averred that she stands to suffer irreparable harm unless the leave sought is granted.
3. The respondent has opposed the application through a Notice of Preliminary Objection dated May 2, 2023. The respondent has contended that he has been improperly joined in the application as a respondent in that he is not the administrator of the estate of William Nganya Otiende-deceased. The respondent has averred further that the application is res judicata, and that the subject matter of the lower court suit namely; Kisumu/Pandpieri/1558 is not in existence.
4. In her submissions in support of the application, the applicant reiterated that she was not aware of the judgment of the lower court until the time the respondent came to evict her from the property that was in dispute in the lower court.



5. On his part, the respondent's advocate submitted that the applicant was represented in the lower court by an advocate and that the court had not been told why the said advocate did not file the intended appeal. The respondent submitted further that the delay in bringing the application was inordinate. The respondent urged the court to dismiss the application.
6. I have considered the applicant's application together with the supporting affidavit. I have also considered the respondent's Notice of Preliminary Objection and the submissions by the parties. Section 16A (1) of the *Environment and Land Court Act*, 2011 provides that all appeals from subordinate courts and local tribunals shall be filed within a period of 30 days from the date of the decree or order appealed against. Section 16A (2) of the said Act provides that:

' An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.'
7. Sufficient cause was defined in *Attorney General v Law Society of Kenya & another [2017]eKLR* as follows:

' Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Black's Law Dictionary, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.'
8. This court's power to extend the time to file an appeal from the decision of the lower court is discretionary. A party approaching the court for an extension of time must demonstrate that he deserves the exercise of the court's discretion. The judgment sought to be appealed was delivered on September 28, 2021. The appeal against the same should have been filed by October 28, 2021. The present application was filed on November 18, 2022. The application was brought after a lapse of over 1 year from the time when the applicant was supposed to file the appeal.
9. I am in agreement with the respondent that a delay of over 1 year is inordinate. The applicant has not given a reasonable explanation as to why the appeal was not filed within time and why the application before the court was not brought earlier. I am of the opinion that failure by the applicant's advocate to notify her of the judgment assuming that was the case, without more, is not a reasonable explanation why the applicant took 1 year before taking steps to pursue the intended appeal. Suits belong to the parties and not their advocates. Parties have a responsibility to follow up on their cases. A party who takes 1 year without finding out the position of his case is indolent. Equity does not aid the indolent. For the foregoing reasons, I find no merit in the application before me.
10. I equally find no merit in the respondent's Preliminary Objection. The applicant brought the application against the Plaintiff in whose favour a judgment was made in the lower court. The Plaintiff in the lower court was Christopher Owino & 5 others. Christopher Owino told the lower court that he was one of the administrators of the estate of William Ngaya Otiende, deceased. I do not understand how the said Christopher Owino Ngaya can claim in these proceedings that he is not the administrator of the estate of William Ngaya Otiende, deceased. The rule against approbation and reprobation bars him from doing that. I did not quite get the respondent's res judicata point. There is no evidence that



the applicant had brought an earlier application for extension of time which was heard and determined prior to the filing of the present application.

Conclusion

11. It is my finding that no good and sufficient cause has been shown by the applicant to warrant the granting of the extension of time sought. Consequently, the applicant's application dated November 17, 2022 is dismissed. The respondent's Preliminary Objection dated May 2, 2023 is also dismissed. Each party is to bear its own costs.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

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

The Applicant present in person

Mr. Sala for the Respondent

Ms. J.Omondi-Court Assistant

