



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kimeli v Rotich (Miscellaneous Application E004 of 2023)  
[2023] KEELC 21166 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21166 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
MISCELLANEOUS APPLICATION E004 OF 2023  
L WAITHAKA, J  
OCTOBER 17, 2023**

**BETWEEN**

**RONALD KIPRONO KIMELI ..... APPELLANT**

**AND**

**HOSEA KIPKOECH ROTICH ..... RESPONDENT**

**RULING**

1. The application before the court for consideration is dated 14<sup>th</sup> June 2023 and filed on 15<sup>th</sup> June 2023. It is brought under Order 42 Rule 6, Order 51 Rule 6 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3A and 79G of the [Civil Procedure Act](#), seeking the following orders:
  - (i) Spent.
  - (ii) That this Honourable Court be pleased to grant the applicant stay of execution of the ruling and order delivered in the lower court in Iten MCELC NO.E003 OF 2021 on 26.4.2023.
  - (iii) That this Honourable Court be pleased to grant the applicant leave to file appeal out of time and the draft memorandum of appeal be deemed as duly filed.
  - (iv) That the necessary directions be given.
2. The application is premised on the grounds on its face and is supported by the affidavit of Ronald Kiprono Kimeli, sworn on 14<sup>th</sup> June 2023. He deposes that parties to the suit agreed by consent that the County Surveyor and the Land Registrar do visit the suit property herein to ascertain boundaries. That the County Surveyor and the Land Registrar visited the suit property but the applicant/appellant herein was not satisfied with how the exercise was conducted and instructed his advocate to challenge the report; that he lost touch thereafter with his advocates as he had lost his phone; that subsequently, the report was adopted by the court on its own motion, a fact that he learnt later. The applicant is apprehensive that the surveyor will implement the orders to the detriment of the parties; that he has



been advised by his advocate that his appeal has high chances of success. He and the respondent may imminently levy execution against the applicant.

3. The application is opposed through the replying affidavit of Hosea Kipkoech Rotich, filed on 1<sup>st</sup> September 2023. It is the respondent's contention that the applicant never made an application to challenge the surveyor's report before it was adopted as an order of the court; that the applicant had all the time to challenge the report but never did, that the applicant losing his phone is not a valid reason for being out of touch with the advocate as the physical address of the advocate has not changed; that the applicant's actions were negligent due to his inaction to visit the advocate or court registry for inquiries.
4. He avers that the application lacks merit and sufficient reasons to file an appeal out of time and relied on the case of *Purity Muthoni Kibiru v Selecta Kenya GMBH & Co.* where the court cited with approval the case of *Daphne Parry v Murray Alexander Carson* (1963).
5. When the application came for inter-parties hearing on the 19<sup>th</sup> of September, 2023 Counsel for the applicant and respondents relied on their pleadings and reiterated the contents therein.

### **Analysis and Determination.**

6. I have carefully considered the application before me, the responses thereto and the rival submissions made by the respective counsels. I find the sole issue for determination to be whether the appellant/applicant has made up a case for being granted the orders sought.
7. Section 79G of the *Civil Procedure Act* provides:

“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 a good and sufficient cause for not filing the appeal in time”.
8. It is trite that 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. That discretion however, must be exercised judiciously. In the case of *Edithe Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR the court stated “whenever an application for extension of time is before a court, the court ought to take into account several factors specifically, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”
9. In the case, the order before the court adopting the Surveyor's report was issued on 26<sup>th</sup> April, 2023. The instant application filed on 15<sup>th</sup> June, 2023. 82 days after the order was issued. I find there was inordinate delay in filing in application.
10. The reason advanced by the applicant for the delay was that he lost touch with the advocate after he lost his phone. If the applicant was indeed aggrieved he would have visited the physical address of the advocate immediately he learnt of the order of court and given further instructions. In paragraph 3 of his supporting affidavit, the applicant pointed out that he was not satisfied with the surveyor's verdict pertaining the survey had and instructed his advocate to challenge the same. However, the advocate failed to do as instructed. His advocate submitted that there was a breakdown in communication alluding to the fact that he may not have received such instructions. I have perused the lower court file



to establish what happened in court on the date the Surveyor's report was adopted. Proceedings of 26<sup>th</sup> April, 2023 are recorded as follows;

26. 4.2023

Coram: Before Hon. C. A. Kutwa – SPM

Court clerk – C. Kandie.

Kiplagat for plaintiff.

Barmao for defendant:

Court:

“The report dated 8.3.2023 is adopted and the matter marked as settled.”

It is clear that on the date the report was adopted the applicant's counsel was in court and consented to adoption of the report and to have the matter marked as settled. If these were not the instructions given to counsel, the applicant could have instructed his advocate afresh to have the consent order set aside. This he did not do so.

11. I find the reason stated was not sufficient and satisfactory to this court and therefore I am inclined to deny the extension to file the appeal out of time given the circumstances of this case.

12. I dismiss entirely the application dated 14<sup>th</sup> June 2023 with costs to the respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ITEN THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. N. WAITHAKA**

**JUDGE**

