



REPUBLIC OF KENYA



KENYA LAW
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Onyango v Ogalo (Suing as the Legal Representative of Absalom Angonga Ambok - Deceased) (Environment and Land Miscellaneous Application E003 of 2023) [2023] KEELC 21812 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21812 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2023
GMA ONGONDO, J
NOVEMBER 28, 2023

BETWEEN

CONSOLATA AUMA ONYANGO APPLICANT

AND

WILLIAM ONGONGA OGALO (SUING AS THE LEGAL REPRESENTATIVE OF ABSALOM ANGONGA AMBOK - DECEASED) RESPONDENT

RULING

1. On 7th March 2023, the applicant, Consolata Auma Onyango through the firm of Robert Ochieng and Company Advocates lodged a notice of motion application dated 6th March 2023 under Sections 79G and 95 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, amongst other provisions of the law seeking the following orders;
 - a. The Honourable court be pleased to allow the firm of Messrs Robert Ochieng Advocates to be on record for the Applicant.
 - b. The Honourable court be pleased to grant leave allowing the Applicant to file an appeal out of time.
 - c. The costs of this application do abide by the result of the intended appeal.
2. The application is premised upon the eight grounds stated on its face alongside the applicant's supporting affidavit of nine paragraphs. In a nutshell, the applicant laments that after the trial court delivered its judgment in Homa Bay Chief Magistrate's Court Environment and Land case number E050 of 2021, he suffered severe financial turbulence and was neither able to seek legal redress from her counsel nor afford to seek the services of another counsel. That she was ignorant of the steps to follow after she got aggrieved at the judgment. That her intended appeal is arguable.



3. By a replying affidavit of thirty paragraphs sworn on 28th April 2023, the respondent, William Angonga Ogalo through L.K Obwanda and Company Advocates, opposed the application, termed the same misconceived, an abuse of the process of the court which is bent on denying him the fruits of his judgment and therefore, urged the court to dismiss it with costs. Annexed to his affidavit, are copies of documents marked as “WAO-1 to WAO-7” which include; Summons for confirmation of grant in Homa Bay Chief Magistrate’s Court Succession Cause number E025 of 2021, a ruling on objection to the grant, citation and chief’s letter. He averred, *inter alia*, that the respondent shall be prejudiced by the granting of the prayers in the application since the matter has taken too long in court. That the respondent’s father is currently buried on the land in dispute and had lived thereon for over 50 years. That the applicant has not explained the delay in filing the prospective appeal.
4. On 25th July 2023, the court directed that the application be heard by way of written submissions.
5. Accordingly, the applicant’s learned counsel filed submissions dated 25th September 2023 referring to the application and that the prayer for the firm of Messrs Robert Ochieng Advocates to come on record for the applicant, is unopposed. Counsel identified a single issue for determination namely whether this court has the power to allow the applicant to file appeal out of time. In the analysis of the issue in favour of the applicant, counsel submitted that the applicant instructed a counsel who opted out of her case and that he suffered a series of setbacks that derailed her sources of income possible to instruct and acquire counsel. Reliance was placed on, *inter alia*, Sections 79G and 95 (both *supra*), Article 48 of the [Constitution](#) of Kenya, 2010, the Court of Appeal decisions in [Edith Gichungu Koine v Stephen Njagi Thoitthi](#) (2014) eKLR and [Kamlesh Mansukbalal Damki Patni v Director of Public Prosecutions & 3 others](#) (2015) eKLR, to reinforce the submissions.
6. By the submissions dated 30th August 2023, learned counsel for the respondent referred to the orders sought in the application, the replying affidavit, the background of the case including the trial court’s judgment rendered on 21st July 2022 and delineated triple issues for determination, *inter alia*, whether the applicant ought to be granted leave to appeal out of time. Counsel submitted that nine months’ delay to seek leave to appeal out of time is a long time. That the applicant intends to drag this court to endless litigation and there is no good reason to warrant the court to exercise its discretion in favour of the applicant thus, the application be dismissed with costs. To buttress the submissions, counsel relied on Section 79G (*supra*), the case of [Lawrence Nguthiru Riccardshw v George Ndirangu](#) (2015) eKLR as well as the case of [Paul Musili Wambua v Attorney General & 2 others](#) (2015) KLR and [Paul Njage Njeru v Karija K Mugambi](#) (2021) eKLR, among other authorities.
7. I have carefully considered the application, the reply thereto and the rival submissions in entirety. Therefore, is there merit in the application?
8. Articles 25 (c), 48 and 50 (1) of the [Constitution](#) of Kenya, 2010 provide for unlimited right to fair trial, access to justice and fair hearing respectively. In that regard, the applicant has sought and is entitled to legal representation in the instant application. So, the first order relating to leave for legal representation as sought in the application, is hereby granted accordingly.
9. Notably, Sections 75 and 79G of the [Civil Procedure Act](#) (Cap 21) capture the orders from which appeal lies, that every appeal from a subordinate shall be filed within thirty days from the date of the decree or order appealed against respectively. Section 95 (*supra*) stipulates enlargement of any period fixed or granted by the court for doing of any act prescribed or allowed by the Act from time to time at the discretion of the court.
10. Order 50 of the [Civil Procedure Rules](#), 2010 provides for time. The trial court delivered the judgment on 21st July 2022 and the present application was mounted on 7th March 2023. The applicant



has neither explained reasons for the delay in making the application for extension of time nor demonstrated any extenuating circumstances that can enable the court to exercise discretion in her favour as held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR.

11. It is important to note that failure to observe and adhere to the stipulated timelines is not a procedural technicality, a substantive one that goes to the core of dispensation of justice to all parties concerned. That even Article 159 (2) (d) of the *Constitution* of Kenya, 2010, does not sanitize delay; see *Kimathi and another v Muriuki & 12 others* Civil Appeal Application) no 61 of 2020 (2023) eKLR.
12. The applicant's asserted that she suffered severe financial turbulence after delivery of the judgment by the trial court. However, she has failed to establish it by any other form in this application.
13. As regards mistake of counsel, in the case of *Butt v Rent Restriction Tribunal* (1979) eKLR, the Court of Appeal remarked;

“.....The litigants and their professional advisors are the best judge of their affairs.....”
14. This court is not unaware that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his or her part as already pointed out hereinabove; see Spry VP in *Harman Singh and others v Mistry* (1971) EA 122.
15. In the end, this application is weighed against the factors noted in Koine, Patni, Wambua, Njeru, Salat, Singh and Kimathi cases (*supra*), amongst others. The same is devoid of merit save for the 1st prayer therein as stated in paragraph 8 hereinabove.
16. Thus, the application is hereby dismissed with costs to the respondent.
17. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 28TH DAY OF NOVEMBER 2023

G.M.A ONGONDO

JUDGE

Present;

- a) S. Adoyo instructed by L K Obwanda, learned counsel for the respondent
- b) Luanga, Court Assistant

