



Nyaboke & 5 others v Wanjala (Suing as the Legal Representative of the Estate of Wilfred Wanjala Pilisi - Deceased) (Environment and Land Appeal 35 of 2022) [2023] KEELC 21598 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 35 OF 2022
A OMBWAYO, J
NOVEMBER 16, 2023**

BETWEEN

**JOSPINE NYABOKE B 1ST APPELLANT
JOSEPH WAINAINA KAMAU 2ND APPELLANT
GEOFFREY KARIUKI 3RD APPELLANT
MUKHOMBERO NAMUNYU 4TH APPELLANT
COUNTY GOVERNMENT OF NAKURU 5TH APPELLANT
ST. ANTHONY CATHOLIC CHURCH (THRO' THE CHAIRMAN,
SECRETARY AND TREASURER OF THE CHURCH COUNCIL) 6TH
APPELLANT**

AND

BONIFACE WANJALA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILFRED WANJALA PILISI - DECEASED) RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court (Hon J B Kalo, Chief Magistrate) dated 15th March 2022 in Nakuru Chief Magistrate's court ELC Case No. 385 of 2018)

RULING

1. This is an appeal from the judgment and Decree of the Chief Magistrate Court (Hon J B Kalo, Chief Magistrate dated March 15, 2022 in Nakuru Chief Magistrates Court ELC case No. 385 of 2018. The appeal was filed on October 11, 2022 more than 365 days after judgment.



2. The respondent has approached this court under Certificate of Urgency urging the court to strike out the appeal filed on July 18, 2023 as the same was filed outside the stipulated time without leave of the court and as such it is incompetent *ab-initio*. The application is grounded on facts that Judgment appealed from was delivered by the lower court on March 15, 2022 while the appeal was filed on July 18, 2023. The applicant contends that the law allows such an appeal to be filed within 30 days from the date of delivery of the judgment and therefore there was a delay of 489 days in filing the appeal. That no leave was sought by the applicant to file the said appeal out of time. The applicant argues that since the appeal was filed out of time and without leave the same should be struck out for being incompetent. That no explanation has been given as to why the appeal was filed out of time.
3. In the Supporting Affidavit, Boniface Wanjala states that he is the holder of letters of administration *ad litem* in the estate of the late Wifred Wanjala Pilisi (the applicant herein) and familiar with the facts attendant to this application.
4. He states that the late Wifred Wanjala Pilisi filed a suit against the appellants before the lower court on April 6, 2018 in which I sought of *inter alia* a declaration that he was the lawful owner of all that parcel land known as Big Industry Plot No.1 situated at Banita Trading Centre.
5. The suit was heard by Hon. J.B Kalo where several witnesses testified and the judgment in the matter was delivered four years later on the March 15, 2022, the court entered judgment in his favour as shown in page 202-219 of the appellants Record of Appeal.
6. The respondent filed a Replying Affidavit and blamed the backlog in the typing pool of the magistrates court as the cause of the delay in filing the record of appeal
7. Section 79 G of the [Civil Procedure Act](#) cap 21 Laws of Kenya provides:

79G.

Time for filing appeals from subordinate courts 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.

The supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR considered, for the first and outlined the guiding principles in applications for extension of time in the court, as follows:“

- i) 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;
- ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv). Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;



- v). Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi) Whether the application has been brought without undue delay; and
 - vi) Whether in certain cases, like election petitions, public interest should be a consideration for extending time”; and
8. In this case the memorandum of appeal was filed within time on the October 11, 2022 that was on the 15th day after the grant of the order of extension of time. This court takes judicial notice of the fact that the 10th of October 2022 which was the 14th day was a holiday and therefore the following day was 11th of October 2022.
9. However, the Record of Appeal was filed outside the 90 days given by the court without seeking leave of the court and therefore the same is incompetent. The appellant ought to have obtained leave to file the record of appeal outside the time given by the court. The reason for delay is given in the Replying Affidavit which should not be the case as the respondent should have moved the court for extension of time. The upshot of the above is that the appeal is struck out with costs.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF NOVEMBER 2023.

A. O. OMBWAYO

JUDGE

