



**Kupara v Emirundi (Environment & Land Miscellaneous Case
E010 of 2023) [2023] KEELC 21584 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E010 OF 2023
DO OHUNGO, J
NOVEMBER 15, 2023**

BETWEEN

ARTHUR BARASA KUPARA APPLICANT

AND

WYCLIFFE AGGREY EMIRUNDI RESPONDENT

RULING

1. By Notice of Motion dated 23rd April 2023, the applicant seeks leave to appeal out of time against a judgment that was delivered by the Senior Principal Magistrate's Court at Butali (Hon ZJ Nyakundi) on 21st February 2023 in Butali MCELC No. 63 of 2018. The application is supported by an affidavit sworn by the applicant.
2. The applicant deposed that he was the plaintiff in Butali MCELC No. 63 of 2018 and that judgment in the said matter was not ready on 29th November 2022 when it was scheduled for delivery. That parties were informed that it would be delivered on notice and that he did not know that it was delivered until a neighbour informed him. He blamed his counsel for failure to inform him.
3. The respondent filed a replying affidavit in which he deposed that the application is an afterthought and that Ms Athung'a & Co Advocates who were representing the applicant in the Subordinate Court knew of the judgment date since they were in Butali Law Courts Bar/Bench forum where the date of judgment was communicated. That the applicant did not disclose the name of the third party who informed him of delivery of the judgment and that the delay was inordinate.
4. Parties relied entirely on the material on record and urged the court to render a ruling. I have considered the application and the affidavits. The issue for determination is whether extension of time should be granted.
5. An application for leave to appeal out of time is essentially an application for extension of time. The principles that guide the court while considering an application for extension of time are that such an



order is discretionary, and the applicant has the burden of laying a basis to the satisfaction of the court. The court considers such factors as whether there is a reasonable reason for the delay, whether there will be any prejudice suffered by the respondent if the extension is granted and whether the application has been brought without undue delay. See the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.

6. The applicant intends to appeal against the judgment that was delivered by the Subordinate Court on 21st February 2023 in Butali MCELC No. 63 of 2018. Pursuant to Section 16A (1) of the *Environment and Land Court Act*, 2011, an appeal from the Subordinate Court to this court is to be filed within 30 days of delivery of the judgment or ruling. Consequently, the applicant ought to have filed the appeal by 23rd March 2023. Pursuant to Section 16A (2) of the *Environment and Land Court Act*, 2011, this court has jurisdiction to admit an appeal out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing it on time.
7. The present application was filed on 26th April 2023, a month after the due date for filing the appeal. I do not consider that delay to be unreasonable. The explanation for the delay is that the applicant was not aware that the judgment had been delivered since it was to be delivered on notice. The respondent contends that notice of delivery was given in the Butali Law Courts Bar/Bench forum. Nothing has however been availed to show if and when such a notice was published. Just like courts expect litigants to effect personal service, it is to be expected that where a court finds it necessary to deliver a judgment on notice, the court must see to it that the notice actually gets to the parties or their advocates. That has not been shown to have been the case in this matter.
8. I am persuaded that the applicant has made a case for the orders sought. There is no prejudice that will be suffered by the respondent which cannot be compensated by an award of costs.
9. In the result, I make the following orders:
 - a. Leave is hereby granted to the applicant to appeal out of time against the judgment that was delivered by the Senior Principal Magistrate's Court at Butali (Hon Z J Nyakundi) on 21st February 2023 in Butali MCELC No. 63 of 2018.
 - b. The Memorandum of Appeal be filed and served within 14 (fourteen) days from the date of delivery of this ruling. In default, Notice of Motion dated 23rd April 2023 shall stand dismissed.
 - c. Costs of Notice of Motion dated 23rd April 2023 shall be in the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Applicant present in person

Mr Nyikuli for the Respondent

