



**Adhiambo v Ochiel (Environment & Land Miscellaneous Case
E001 of 2023) [2023] KEELC 22577 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2023**

AY KOROSS, J

DECEMBER 7, 2023

BETWEEN

JAMES AWUOR ADHIAMBO APPLICANT

AND

PHILIP OWINO OCHIEL DEFENDANT

RULING

1. Before me for determination is the applicant's notice of motion dated 19/07/2023 wherein the applicant seeks the following reliefs: -
 - a. That leave be granted to the firm of M/s Oduol Achar & Co. Advocates to come on record for the applicant and for the notice of appointment of advocates be deemed as properly on record.
 - b. That the applicant be granted leave to appeal out of time against the ruling and order delivered on 12/04/2023.
 - c. That the costs of this application abide the outcome of the appeal.
2. The motion is premised on the grounds therein together with depositions made by the applicant James Awuor Adhiambo in his affidavit deposed on 19/07/2023.
3. In them, the applicant avers that even though it is undisputed he is guilty of delay because the motion is filed 3 months after the impugned ruling which was rendered on 12/04/2023, he has tendered plausible reasons as to why the appeal was not filed timeously.
4. According to the applicant, the main reason was that he had suffered ill health, hence financially constrained and unable to afford the services of an advocate. Further, his grounds of appeal were arguable.



Respondent's case

5. The respondent's replying affidavit deposed on 25/08/2023 spiritedly opposed the motion. In it, the respondent avers the applicant ought to have sought for leave to appeal from the trial court since the ruling he is appealing against requires such leave as envisioned by Order 43 of the [Civil Procedure Rules](#).
6. Further, the respondent avers the applicant has previously been guilty of laches and the instant motion is filed with inordinate delay and he has not offered sufficient cause to warrant extension of time. Thus, the motion be dismissed and if at all the court is inclined to allow it, then he should be paid throw away costs.

Parties' submissions

7. The motion is canvassed by written submissions. The firm of Oduol Achar & Co. Advocates who has sought leave to come on record for the applicant did not file any submissions but Mr. Ochanyo from the firm Jesse David, Ochanyo & Kurgat Advocates LLP who are on record for the respondent filed written submissions dated 25/08/2023 in which counsel recognised a singular issue for determination; whether the motion is merited.
8. To support the respondent's arguments, counsel reiterates averments made in the respondent's affidavit and submits the applicant has not met the requirements of good and sufficient cause as envisaged by Section 79G of the [Civil Procedure Act](#).
9. According to counsel, this court should not exercise discretion in favour of a litigant who has deliberately obstructed the course of justice and to support this position, counsel relies on [Jacklyn Wanjira Njeru v Equity Bank \(Kenya\) Limited and another](#) (2020) eKLR.

Issues for determination

10. Having considered the motion, draft memorandum of appeal, affidavits and annexures thereto together with provisions of Order 43 Rule 1 (1)(g) whereby the applicant could appeal against the impugned decision as of right, two issues emerge for this court's consideration: -
 - a. Whether leave should be granted to the firm of M/s Oduol Achar & Co. Advocates to come on record for the applicant.
 - b. Whether the applicant should be granted leave to appeal out of time.

Analysis and determination

11. The issues were earlier identified shall be dealt with simultaneously.
 - a. Whether leave should be granted to the firm of M/s Oduol Achar & Co. Advocates to come on record for the applicant.**
12. On the first issue, Order 9 Rule 9 of the [Civil Procedure Rules](#) provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) Upon an application with notice to all the parties; or



(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

13. A reading of the respondent’s replying affidavit does not demonstrate that he opposes the applicant’s prayer that that having previously acted in person, the firm of M/s Oduol Achar & Co. Advocates be placed on record for him. The prayer is grounded on legal provisions and I see no reason why they should be denied this relief and find it merited. However, I must mention that save for the applicant’s firm of advocates on record filing the instant motion, they did not file a notice of appointment of advocates.

14. Leave to appeal out of time is underpinned within the provisions of Section 16A (2) of the Environment and Land Court Act which is a mirror of Section 79G of the Civil Procedure Act. The former proviso states as follows: -

“(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) 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.”

15. Accordingly, since the applicant is aggrieved against the decision of the trial magistrate that was rendered on 12/04/2023, he ought to have lodged his appeal on or before 13/05/2023 or thereabouts.

16. Nonetheless, he did not comply with statutory timelines hence the instant application in which he seeks this court to exercise its discretion in his favour. The position the applicant finds himself in not new and has been the subject of several court decisions. A recent decision of the Court of Appeal of Oongo v Chore & 2 others (Civil Application E136 of 2022) [2023] KECA 782 (KLR) (23 June 2023) (Ruling) states:

‘A discretion which must be exercised within the parameters set out in *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR;

“...there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso v Mwangi* Civil Appl NAI 255 of 1997 (ur), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl Nai 8/2000 (ur) and *Murai v Wainaina* (No 4) [1982] KLR 38.”



17. From statute and case law, the court’s discretion is anchored on “good and sufficient cause” and these are the two parameters the court will interrogate while considering the motion. If the applicant satisfies these ingredients, the court will exercise discretion in his favour.
18. It follows, the applicant has a duty to satisfactorily explain to this court why he did not file the appeal timeously but before I do that, I will investigate if the applicant is indolent.
19. The motion is filed close to 2 months outside the period allowed for filing an appeal and as a result, I do find the applicant is not guilty of delay. Now, I will turn to the grounds alluded to by the applicant as the reason as to why the appeal was not timeously.
20. The main ground is that he had suffered ill health and consequently constrained from attending court. Further, the ill health depleted his finances and so, he was unable to financially secure the services of an advocate. Further, he has good grounds of appeal.
21. The medical records tendered by the applicant show he is a senior citizen, he has been quite unwell and during the period of between 14/12/2018 to 10/06/2022, he had been in and out of medical facilities including Mikindani Hospital, Portreitz Subcounty Hospital and Siaya County Referral Hospital. No doubt, these illnesses lingered on for a considerate period of time.
22. Nonetheless, all these treatments took place long before the impugned ruling was rendered and, in my view, these illnesses do not advance good and sufficient reasons.
23. Nevertheless, one of the documents attached to his medical records show he has expended colossal sums of money towards his medical treatment. Bearing in mind the applicant is a senior citizen and clearly has long retired and there is no evidence to contradict his averment that at the time he was unable to afford an advocate’s services, I am satisfied this affected his ability to secure the services of an advocate.
24. This is further lent credence by the application dated 7/03/2023 which was the subject of the impugned ruling. In it, the applicant who was apparently acting in person, drew his own pleadings. This court finds and holds this is a conceivable ground. I have also taken a glance at the memorandum of appeal and it raises arguable grounds.
25. Accordingly, I find the motion by the applicant is meritorious. I hereby grant the prayers sought therein and issue the following disposal orders:
 - a. That the applicant is granted leave to file an appeal out of time against the ruling in Chief Magistrate’s Court at Siaya ELC E010 of 2021 delivered on 12/04/2023.
 - b. That the memorandum and record of appeal shall be filed within 14 days hereof.
 - c. That failure to comply with order no. (b) above will lead to an automatic vacation of order no.(a) above.
 - d. That leave is granted to the firm of M/s Oduol Achar & Co. Advocates to come on record for the applicant.
 - e. That in any event, costs are awarded to the respondent.
 - f. That this file is effectively closed.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF DECEMBER 2023.

HON. A. Y. KOROSS



JUDGE

7/12/2023

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

N/A for the applicant

N/A for the respondent

Court assistant: Ishmael Orwa

