



**Chelimo v Chelagat (Environment & Land Miscellaneous Case
3 of 2022) [2022] KEELC 4786 (KLR) (8 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 4786 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND MISCELLANEOUS CASE 3 OF 2022**

L WAITHAKA, J

JUNE 8, 2022

(FORMERLY ELDORET ELC MISC NO. E008 OF 2022)

BETWEEN

CHEBII CHELIMO APPLICANT

AND

ROBERT KIPROP CHELAGAT RESPONDENT

RULING

1. The application for consideration is dated February 14, 2022 brought under Section 79G, 63G, 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders;
 - a) Spent
 - b) That this Honorable court be pleased to grant leave to the applicant to appeal out of time.
 - c) That costs of this application be provided for.
2. The application is premised on the grounds stated on its face and the sworn affidavit of Chebii Chelimo, the applicant. He averred that the lower court in Kabarnet delivered an ex-parte judgment in ELC No. 9 of 2019 which he was dissatisfied with and immediately filed an application seeking to set it aside. The application was dismissed on December 2, 2021. He applied to be supplied with certified typed proceedings on December 17, 2021 which he received on January 24, 2022. By this time, the period to file the appeal had lapsed; that failure to lodge the appeal on time was caused by delay in accessing the proceedings.
3. The application is opposed *vide* a replying affidavit sworn on 8th March, 2022 by Robert Kiprop Chelagat. He averred that there is no justification to grant leave to the applicant to appeal out of time as the delay is inordinate; that the applicant was present with his counsel when ruling was delivered; that the ruling was very short and did not require certified copies of proceedings to prepare the appeal.



- Further, that there was no letter showing that the applicant was keen to follow up the proceedings to beat the time limit given; that the applicant does not have a good appeal or chances of success as title has already passed to the respondent who has since amalgamated the suit parcel with another parcel of land.
4. The application was argued orally and applicant filed two authorities.
 - (i) Nakuru Civil Appeal No. 130 of 2020 *Daniel Kakuta Kavoi V. Tri-Clover Industries (9k) Limited* and
 - (ii) Nairobi High Court Civil Appeal No. E068 of 2021 *Zacheaus Omia Juma V. Nicholas Kirangi* which I have considered together with the application and affidavits. I find the sole issue for determination to be whether the applicant has met the required principles for grant of leave to file appeal out of time.
 5. The statutory provision dealing with the requisite period for filing appeals from subordinate courts to the high court is Section 79G of the *Civil Procedure Act* which 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 good and sufficient cause for not filing the appeal in time.”
 6. Extension of time within which an appeal ought to be filed is a matter of judicial direction. In exercise of that discretion, the court should take into account the length of delay, reason for delay, chances of the appeal succeeding if the application is allowed and degree of prejudice to the respondent, see the case of *Zacheaus Omia Juma Vs. Nicholas Kirangi* (supra) relied on by the applicant which set out the principles to be considered by a court in exercising the discretion whether or not to enlarge time as stated in the case of *first American Bank of Kenya Ltd vs. Gulab P. Shah & 2 others* Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65.

“(i). the explanation if any for the delay; (ii). The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
 7. In the instant case, the ruling appealed against was delivered on 1December 6, 2021. The application requesting for certified copies of typed proceedings was made and paid for on December 17, 2021; proceedings and judgment were certified and ready for collection on January 21, 2022. This took 35 days. The instant motion was filed on February 14, 2022. Although there was delay of 35 days by the court in typing the proceedings there was also delay of 24 days on the part of the applicant in filing the application. Bearing in mind that the Applicant and his counsel were present in court when the Ruling was read and delivered, I find the explanation given for the period and reason for delay on the part of the court convincing and reliable but not on the part of the applicant who has offered no explanation for the delay of 24 days on his part. Under the circumstances, I find there was inordinate delay on the part of the applicant in filing the application especially knowing too well he had lost 35 days in typing of the proceedings and judgement.



8. On whether the appellant has an arguable appeal, I wish to point out that in the ruling delivered on December 16, 2021, the Trial Magistrate in regard to the application stated:

‘The judgment was delivered in 2019 and the subject suit land has been transferred to the respondent. The applicant reneged on consent and the consideration is deposited in court. He can collect it. I see no merit on the application herein. It was brought late in time by a party who ignored summons. The delay is inordinate. I dismiss the application since it is overtaken by events. The Respondent is now the registered owner of the suit land. Title changed. The parcel litigated on has been amalgamated with another. The applicant will suffer no prejudice since the consented amount at family level is deposited in court.’

It is my considered view that the applicant does not have an arguable appeal. He filed the application which is the subject of this appeal 2 years after delivery of the *exparte* judgment. By this time the suit property had been transferred to the respondent and amalgamated with Sacho/Kabasis/37 and the substratum of the suit has changed.

9. On whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the applicant, I return a negative verdict. The applicant took too long to file his application seeking to set aside the *exparte* judgment by which time the substratum of the suit had changed. Further the applicant had the right of appeal against the *exparte* judgement to this court (Environment and Land Court) within the period provided for in Section 79G of the [Civil Procedure Act](#) but he squandered that chance.
10. Consequently, I find the application without merit and I dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 8TH DAY OF JUNE, 2022.

L. N. WAITHAKA

JUDGE

