



**Amuka v Memba & 3 others (Environment and Land Appeal  
E003 of 2022) [2022] KEELC 3870 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3870 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E003 OF 2022  
GMA ONGONDO, J  
JULY 27, 2022**

**BETWEEN**

**PAUL ODHIAMBO AMUKA ..... APPELLANT**

**AND**

**JACOB AMUKA MEMBA ..... 1<sup>ST</sup> RESPONDENT**

**ODERA OBAR KENNEDY ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, HOMA BAY LANDS OFFICE ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(In summary, the applicant's complaint is that he is dissatisfied by a ruling delivered on December 21, 2021 by Honourable TM Olando, Principal Magistrate in Homa Bay Chief Magistrate's Court Environment and Land Case Number 6 of 2020 in favour of the respondents.)*

**RULING**

1. By a notice of motion dated January 28, 2022 filed in court on February 1, 2022 under orders 42, 43 rule 1 and order 51 rule 1 of the [Civil Procedure Rules](#), 2010 (the application herein) through the firm of H Obach and Company Advocates, the applicant is seeking the following orders;
  - a) Spent
  - b) This honourable court be pleased to grant leave to the applicant/appellant to file the appeal against the ruling.
  - c) This honourable court be pleased to enlarge time for the applicant/appellant to file appeal.
  - d) The costs of the application be provided for.



2. The application is premised on grounds 1 to 13 listed on face of the same alongside the applicant's supporting affidavit of thirteen paragraphs sworn on even date. In summary, the applicant's complaint is that he is dissatisfied by a ruling delivered on December 21, 2021 by Honourable TM Olando, Principal Magistrate in Homa Bay Chief Magistrate's Court Environment and Land Case Number 6 of 2020 in favour of the respondents. That he wishes to file an appeal against the ruling but the time within which he can appeal as of right has since elapsed. That the intended appeal is highly merited.
3. The applicant contends that the delay in filing the appeal was occasioned by the lack of typed ruling and due to nature of his work. That he did not get the chance in time to give instructions to his advocates on record to file the appeal as he was away on duty. That the application has been brought without unreasonable delay and the same as well as the intended appeal have high chances of success
4. By a replying affidavit sworn on May 23, 2022 and filed on even date by the 1<sup>st</sup> respondent who appears in person, the application is not opposed. He deposed in part that it is only fair that the application be entertained to enable him plead his case before this court and in the interest of justice.
5. The 2<sup>nd</sup> respondent through Odera Obar and Company Advocates, opposed the application by way of a replying affidavit sworn on February 28, 2022 and filed on April 4, 2022. He deposed, *inter alia*, that the application is incompetent and constitutes a gross abuse of the court process as no leave is required to file such an application. That he is an innocent purchaser for value of the property in dispute and to grant the application would greatly be prejudicial to him.
6. The application was heard by written submissions pursuant to this court's directions of February 23, 2022 and order 51 rule 16 of the [Civil Procedure Rules](#).
7. So, learned counsel for the applicant filed submissions dated March 10, 2022 giving background information of the application, identified an issue for determination namely whether the applicant should be granted the orders sought in the application and discussed the same in favour of the applicant. Counsel relied on, *inter alia*, section 79 G of the [Civil Procedure Act](#), chapter 21 laws of Kenya and the case of [Charles Karanja Kiiru v Githinji Muigwa](#) [2017] eKLR which applied the decision in [Edith Gichungu Koine v Stephen Njagi Thoitbi](#) [2014] eKLR, to reinforce the submissions.
8. In the submissions dated May 23, 2022 and filed herein on even date, the 1<sup>st</sup> respondent gave brief facts of the case and identified twin issues for determination namely whether the prayers for leave and enlargement of time to lodge the appeal, are merited. He relied on the case of [Kamlesh Mansukhalal Damki Patni v Director of Public Prosecutions and 3 others](#) [2015] eKLR, on the right to be heard and urged this court to grant the orders sought in the application.
9. On April 12, 2022, the 2<sup>nd</sup> respondent filed submissions dated March 22, 2022 giving the background of the matter and framed four issues for determination including whether the application is technically competent and whether the intended appeal has any merits. In analyzing the issues, he submitted that the applicant has miserably lay a basis for this court to exercise its discretion his favour. To buttres the submissions, he cited [Joseph Michael Mwenja v Woolmatt Limited](#) [2019] eKLR and [Evans Kiptoo v Reinhard Omwoyo Omwoyo](#) [2021] eKLR, among other authorities.
10. I have thoroughly considered the application, the replying affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the rival submissions in their entirety. In that regard, is the applicant entitled to the leave and enlargement of time to file appeal as sought in the application?
11. This court is conscious of section 75 of the [Civil Procedure Act](#) chapter 21 Laws of Kenya regarding matters on which an appeal lies. Section 79 G (*supra*) sets out the time within which to lodge an appeal from subordinate courts.



12. Further, this court is guided by order 50 rules 4, 6, 7 and 8 of the Rules in respect of time and computation of days.
13. I take into account several factors in this matter as observed in Koine and Patni cases (*supra*). The applicant is entitled to be heard in the prospective appeal as noted in Philip Keipto Chemwolo and another v Augustine Kubende [1986] eKLR.
14. It must be noted that the impugned ruling was rendered by the trial court on December 22, 2021. This application was commenced on February 1, 2022. A delay of forty days to initiate the application which is not inordinate and given the reasons advanced by the applicant, it would hardly be sound to disallow the application.
15. The applicant's memorandum of appeal dated January 28, 2022 and lodged in court on February 7, 2022 contains triable issues including fair hearing. Therefore, the prospective appeal attracts hearing of the same on merit.
16. Articles 48 and 50 (1) of the Constitution of Kenya anchor the rights of access to justice and fair hearing respectively. Article 25 (c) of the same Constitution stipulates that fair trial shall not be limited.
17. Additionally, I subscribe to the Court of Appeal decision in the case of Butt v Rent Restriction Tribunal [1979] eKLR that;  
  
    “.....The appellant has an undoubted right of appeal.....”
18. In the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7-others [2014] eKLR, the Supreme Court of the Republic of Kenya reasoned that extension of time is not a right of a party. That it is discretionary and an equitable remedy to a deserving party. In the obtaining circumstances, the applicant has given good and sufficient reasons for the grant of the orders sought in the application.
19. Accordingly, I find merit in the application dated 28<sup>th</sup> January and lodged in court on February 1, 2022. I proceed to grant prayers 2 and 3 in the application for leave and enlargement of time to file the appeal respectively.
20. The appeal by way of a memorandum of appeal stated at paragraph 16 hereinabove, is hereby deemed duly filed herein.
21. Costs of the application to abide the appeal.
22. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 27<sup>TH</sup> DAY OF JULY 2022**

**GMA ONGONDO**

**JUDGE**

PRESENT

1. Appellant
2. Ms W Amode holding brief for H Obach for the applicant/appellant
3. Angela and Fiona, court assistants

