



**Semo v Owidhi & another (Environment and Land Appeal E014 of 2022)  
[2022] KEELC 12722 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12722 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E014 OF 2022  
A OMBWAYO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**BAHATI MUSIRA SEMO ..... APPELLANT**

**AND**

**CONSOLATA AKINYI OWIDHI ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE ODUOR WAYOMBA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant herein filed a Notice of Motion Application under section 1A and 3A of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#) 2010 seeking the following orders:
  1. That this Application be certified as urgent and be heard on priority basis.
  2. That the Honourable court be pleased to grant to the Appellant /Applicant enlargement of time within which to file the Appeal filed herein out of time on the 17<sup>th</sup> March 2022 and served on the Respondent on the same.
  3. That the Appeal filed herein on the 17<sup>th</sup> day of March 2022 and served on the same day be deemed to be properly filed and served.
  4. That costs of this Application be provided for.
2. The Application was initially certified urgent and later heard by way of written submissions. The same was based on grounds that the delay in filing the suit was occasioned by circumstances beyond the control of the Appellant and after Judgment was rendered, the file was not released to the Registry immediately and the Applicant could not access the file in order to obtain a copy of the Judgment. That it is in the interest of Justice that this Application be granted and the Applicant's Appeal be heard on its merits.



3. The Application was supported by the Affidavit of Amena Amendi who stated that the Appeal herein arises out of the lower court case Kisumu CMCELC No. 472 of 2018 in which the Appellant closed his case and the Defence Counsel requested that he be allowed to file his submissions within 14 days after he was served with the submissions on behalf of the Plaintiff if any. It was stated that the court ordered that the matter be mentioned on 30<sup>th</sup> September 2021 to confirm filing of submissions by both parties. That the Plaintiff Counsel did not serve the Defence Counsel with his submissions until 10<sup>th</sup> November 2021. The Applicant's Counsel subsequently filed his submissions and the matter came up for mention on 24<sup>th</sup> November 2021 when the same was fixed for Judgment on 2<sup>nd</sup> February 2022.
4. He further stated that on 2<sup>nd</sup> February 2022, he sent a clerk to court with instructions to get counsel to hold his brief and take Judgment but the court did not sit that day and there was no communication as to whether Judgment had been delivered. That upon following up, he found out that Judgment had been delivered on 4<sup>th</sup> February 2022 and the Magistrate had said that wanted to make corrections to the printed Judgment and the file was taken back to the registry.
5. That a letter was done immediately requesting for the Judgment and certified copies of the proceedings and effort to get the same were rendered futile. That the Applicant filed a Memorandum of Appeal on 17<sup>th</sup> March 2022 after which the file had been found and his clerk was given a certified copy of the Judgment. It was further stated that at the time of being issued with a copy of the Judgment, the statutory time for filing the Appeal had expired.
6. It is the Applicant's case that failure to Appeal in time was not deliberate and the Applicant had good reasons as to why there was delay in filing the Appeal and that this court has discretionary power to enlarge the time in which to file the Appeal.
7. This matter was placed before me on 18<sup>th</sup> July 2022 and I directed that the Respondents should file a Reply within 14 days and the Applicant to file a Supplementary Affidavit with submissions within 7 days of service and also the Respondents to file submissions within 7 days of service.
8. The Respondents herein filed grounds of opposition on 30<sup>th</sup> August 2022 opposing the Application on grounds that the Application is misplaced, unmerited, frivolous, and vexatious and a total abuse of the process of the court and there are no sufficient grounds that have been advanced to granting of the orders sought.

### **Appellant's Submissions**

9. I have perused the file and do confirm that the Applicant herein failed to file his submissions.

### **Respondents' Submissions**

10. The Respondent herein on 30<sup>th</sup> August 2022 and submitted that where a party seeks to prefer an Appeal against any Judgment and/or Ruling, the said party ought to first seek leave of the court to file an Appeal out of time before filing the Appeal and that the Appellant filed this Appeal without seeking leave of court and therefore this Appeal should be struck out.
11. It was further submitted that no sufficient ground has been given by the Applicant to warrant the granting of the orders sought in the Application as the Applicant's Counsel in the Supporting Affidavit to the Application at paragraph 18 stated that he was cautiously aware that the statutory time for filing the Appeal had expired and that it was his intention to apply for enlargement of time before filing the record of appeal. It was also submitted that no reasons had been given as to why the Applicant failed to apply for enlargement of time before filing the Appeal.



12. It was the Respondent's submissions that the Applicant's Application lacks merit and should be dismissed with costs to the Respondents.

### **Analysis and Determination**

13. Section 79G of the *Civil Procedure Act* provides as follows:

“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.”

Section 95 provides as: -

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

14. In granting an order for extension of time, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine Vs Stephen Njagi Thoitih* [2014] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

15. In the instant Application, the Applicant has alleged that the reason for the delay in filing the Appeal was occasioned by challenges in obtaining the Judgment and certified copies of the proceedings. The lower court fixed the matter for Judgment on 2<sup>nd</sup> February 2022 but the court did not deliver the Judgment on the said date. Judgment was delivered on 4<sup>th</sup> February 2022 and it is not clear whether the Trial Court issued a Notice to parties on delivery of the Judgment.
16. The Applicant made efforts to obtain a copy of the Judgment and the efforts were rendered futile. The Applicant therefore filed a Memorandum of Appeal on 17<sup>th</sup> March 2022 and upon filing the same, a representative from the Applicant's Counsel office was issued with a copy of the Judgment and certified copies of the proceedings. I am convinced that the Applicant has given sufficient reasons for the delay as was unable to obtain a copy of the Judgment and certified copies of proceedings.
17. As regards the degree of prejudice to the Respondent if the Application is granted, the Applicant herein has not demonstrated any prejudice that the Respondent is likely to suffer in the event the orders sought are granted.
18. In the upshot, I do allow the Application and hereby direct as follows:
1. That the Applicant is granted leave to file an Appeal out of time against the Judgment in Kisumu Chief Magistrate ELC Case No. 472 of 2018 delivered on 4<sup>th</sup> February 2022.
  2. That the Appeal filed on 17<sup>th</sup> March 2022 and served on the same e date is hereby deemed to be properly filed and served.



3. That the costs of this Application be in the appeal.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020

