



**Ogaye (Suing as the legal administrator of the Estate of Apudo
Othieno) v Oyugi & 9 others (Environment & Land Miscellaneous Case
E005 of 2021) [2022] KEELC 13365 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E005 OF 2021
AY KOROSS, J
SEPTEMBER 29, 2022**

BETWEEN

**MARY OGAYE (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE
OF APUDO OTHIENO) APPLICANT**

AND

**JAMES OMONDI OYUGI 1ST RESPONDENT
SAMUEL OMOLO APUDO 2ND RESPONDENT
KANJRE NDONJ APUDO 3RD RESPONDENT
MARTIN OKONG'O MAKOKUTO 4TH RESPONDENT
WILFRED WASONGA OCHIENG 5TH RESPONDENT
CHRISTINE ADHIAMBO OJWANG 6TH RESPONDENT
ROSE OGUT OTIENO 7TH RESPONDENT
JOHN OTIENO OKUTO 8TH RESPONDENT
DISTRICT LAND REGISTRAR, UKWALA 9TH RESPONDENT
ATTORNEY GENERAL 10TH RESPONDENT**

RULING

1. The application for consideration is the applicant's notice of motion dated 2/03/2022 brought pursuant to the provisions of Sections 1A, 1B, 2A and 79 (G) of the [Civil Procedure Act](#). She sought the following reliefs;



- a. Leave be granted to the applicant to appeal against the ruling of the trial court in Ukwala P.M. ELC Case No.39 of 2020 dated November 26, 2021;
 - b. There be a stay of taxation and execution of the 2nd, 3rd, 5th, 6th, 7th and 8th respondents' counterclaim and bill of costs dated January 13, 2022 in Ukwala P.M. ELC Case No.39 of 2020;
 - c. There be stay of Ukwala P.M. ELC Case No.39 of 2020 pending hearing and determination of the appeal; and
 - d. Costs be in the cause.
2. The motion is supported by grounds set out on its face and on the supporting affidavit of the applicant Mary Ogaye dated 2/3/2022.
 3. The applicant averred she was the defendant in the trial court. She had filed a defence and counterclaim dated August 20, 2020 in the trial court. The 2nd, 3rd, 5th, 6th, 7th and 8th respondents to the counterclaim filed a notice of preliminary objection dated April 23, 2021 on grounds that her counterclaim contravened the provisions of Orders 4 Rule 1 (2) and 7 Rule 5(a) of the Civil Procedure Rules for failing to be accompanied by a verifying affidavit.
 4. By a ruling of the trial court dated November 26, 2021, the preliminary objection was upheld. For the reason she needed leave of the court to appeal, she was constrained to file the appeal within the requisite timelines. She contended she had an arguable appeal and the motion was filed without undue delay.

Respondent's case

5. Whether by oversight or otherwise, the 2nd to 10th respondents were not joined by the applicant to these proceedings. However, despite this, the 2nd, 3rd, 5th, 6th, 7th and 8th respondents participated in these proceedings by filing grounds of opposition dated April 16, 2022.
6. They asserted that the applicant did not need to seek leave of the court to appeal and pursuant to the provisions of Section 79G of the Civil Procedure Act, the applicant ought to have filed her appeal within 30 days and was thus guilty of inordinate delay. They urged the court to dismiss the motion with costs.
7. The 1st, 4th, 9th and 10th respondents did not participate in these proceedings.

Applicant's submissions

8. As directed by the court, the parties disposed of the motion by way of written submissions. By Counsel Mr. Ochanyo, the applicant filed written submissions dated 5/03/2022. He identified 3 issues for determination; (i) whether the motion was merited and whether the orders sought should be granted (ii) whether the intended appeal was arguable and (iii) whether granting leave to appeal out of time would be in the interests of justice.
9. On the 1st issue, he contended that the appeal was arguable with high chances of success. The applicant inadvertently failed to appeal on time and the respondents would not suffer any prejudice and it was in the interests of justice if the motion was allowed. Counsel relied on the Court of Appeal decisions of Charles Karanja Kuru v Charles Githinji Muigwa CA 71/2016 and Martha Wambui v Irene Wanjiru Mwangi & Another where the court stated that where the law provides for time within which an act ought to be done, if that time lapses, a party needs to seek extension of time.
10. On the 2nd issue, it was Counsel's position that even if there was one arguable ground of appeal, an appeal should be allowed to proceed. In this regard he relied on several authorities including HFCK v



Sharok Kher Mohamed Ali Hirji Nrb CA No 74 of 2015 which cited with approval Reliance Bank Ltd (in Liquidation) v Norlake Investments Ltd CA No. Nai. 93 of 2022.

11. On the last issue, he relied on Section 3A of the Civil Procedure Act and Patrick Maina Mwangi v Waweru Peter [2015] eKLR. None of the authorities cited by the applicant were proffered to this court.

2nd, 3rd, 5th, 6th, 7th and 8th respondents' submissions

12. Mr. Okello, Counsel for the 2nd, 3rd, 5th, 6th, 7th and 8th respondents filed written submissions dated 31/05/2022. Counsel identified one issue for determination; whether the motion was merited.
13. Counsel submitted that Section 79G of the Civil Procedure Act allowed an appeal to be admitted out of time. He relied on the case of Evans Kiptoo v Reinhard Omwoyo Omwoyo [2021] eKLR, which outlined the parameters for determining whether an applicant had met the threshold. In applying these parameters, Counsel stated that the applicant had not proffered sufficient reasons for the inordinate delay and the respondents would be prejudiced. Counsel contended that if this court was inclined to allow the motion, then it should do so pursuant to the provisions of Rule 50(6) of the Civil Procedure Rules and award the respondents' costs.

Analysis and determination

14. I have carefully considered the motion, grounds in support, affidavit, grounds of opposition, rival written submissions and authorities cited and proffered and the issue falling for determination is whether the motion is merited.
15. The legal framework for admitting an appeal out of time is governed by Sections 79G and 95 of the Civil Procedure Act and Section 16A (2) of the Environment and Land Court Act. In order for an applicant to succeed in such a motion, she must demonstrate that she has a good and sufficient cause for not filing the appeal in time. See Section 79G. Further, this court has discretion to enlarge such period, even though the period originally fixed or granted may have expired See Section 95. Section 16A (2) of the Environment and Land Court Act provides as follows;

“ 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.”
16. The main reason tendered by the applicant for the delay is that she needed to seek leave of the court in order for her to appeal. I have had a chance to scrutinise the bundle of documents annexed to the motion and I have been unable to trace any record that such leave was ever sought by the applicant pursuant to the provisions of Order 43 Rule 3 of the Civil Procedure Rules and that it was either allowed or disallowed by the trial court.
17. It is trite law that she who alleges must prove. It behoved upon the applicant to avail to this court such evidence and in the circumstances of this case, it would have been in the nature of court proceedings or an order; which she did not proffer.
18. The provisions of law that were the subject matter of the ruling that the applicant was aggrieved against were Orders 4 Rule 1(2) and 7 Rule 5 (a) of the Civil Procedure Rules.



19. Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules* provide that there are instances where an appeal does not lie as of right and one has to seek leave of the court. Section 75 reads as follows;

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

- a. An order superseding an arbitration where the award has not been completed within the period allowed by the court;
- b. An order on an award stated in the form of a special case;
- c. An order modifying or correcting an award;
- d. An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- e. An order filing or refusing to file an award in an arbitration without the intervention of the court;
- f. An order under section 64;
- g. An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- h. Any order made under rules from which an appeal is expressly allowed by rules”.

20. Order 43 Rule 1(1)(a) to (aa) sets out Orders and Rules from which appeals lie as of right. Orders 4 Rule 1(2) and 7 Rule 5 (a) that were the subject of the trial court’s ruling do not fall within this paradigm. Order 43 Rule (2) provides that leave of the court must be sought in any other order that was not set out in Order 43 Rule 1(1)(a) to (aa). In the instance such as the circumstances of this case, the applicant needed to seek leave of the trial court by following the laid down procedure as set out in Order 43 Rule (3) . This provision of law provides as follows;

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order”.

21. Order 43 Rule (2) is couched in mandatory terms and the applicant did not have an automatic right of appeal against the order made on November 26, 2021. She breached the provisions of law. As demonstrated, the 2nd, 3rd, 5th, 6th, 7th and 8th respondents’ argument that such leave to appeal was not a prerequisite is not legally sound.

22. In the absence of evidence of such leave, whether the applicant would have filed the appeal within the requisite timelines or sought leave to appeal out of time as she has done in the circumstances of this motion, any application that she would have ever made to an appellate court would be doomed to fail.

23. In upshot, I find the motion fatally incompetent and hereby strike it out. Because it is trite law that costs follow the event and in accordance with the provisions of Section 27(1) of the *Civil Procedure Act*, I award the costs of this motion to the 2nd, 3rd, 5th, 6th, 7th and 8th respondents.



DELIVERED AND DATED AT SIAYA THIS 29TH DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

29/9/2022

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

In the Presence of:-

N/A for the applicant

Mr. Okello for the 2nd, 3rd, 5th, 6th, 7th, and 8th respondents

Court assistant: Ishmael Orwa

