



REPUBLIC OF KENYA



Prime Alms Limited v Makau & 3 others (Environment and Land Miscellaneous Application E005 of 2020) [2022] KEELC 4849 (KLR) (19 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2020
CA OCHIENG, J
SEPTEMBER 19, 2022**

BETWEEN

PRIME ALMS LIMITED APPLICANT

AND

JOHN NZIOKA MAKAU 1ST RESPONDENT

JANE MBITHE NZIOKA 2ND RESPONDENT

MBUKONI HOLDINGS LTD 3RD RESPONDENT

REGISTRAR OF TITLES 4TH RESPONDENT

RULING

1. What is before court for determination is the applicant's notice of motion application dated the November 26, 2021 brought pursuant to section 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution*. The applicant seeks the following orders:
 1. The applicant be granted leave to file notice of intention to appeal out of time.
 2. That costs be in the cause.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Eva Musa who is an advocate in conduct of the matter on behalf of the applicant where she deposes that the applicant had filed an application for judicial review *vide* a notice of motion dated the October 19, 2020 seeking orders of *Certiorari*, *Mandamus* and *Prohibition* which was dismissed on the October 8, 2021. She avers that the applicant being dissatisfied with the judgment, intends to appeal the decision. She explains that on October 19, 2021, she gave the notice of intention to appeal dated the October 18, 2021 to one of the clerks' in their offices for filing but he failed to do so. Further, on the account of the confusion resulting from the court being on transfer, they hesitated to file the said notice of intention to appeal. She claims the parent file in this matter, Machakos ELC No 55 of 2017 was transferred to



Nairobi to be placed before Hon. Justice Angote and once this was done, their clerk revealed he was unable to file the notice of intention to appeal by which time the fourteen (14) days period had lapsed. She reiterates that the instant application is presented at the first opportunity after clarification of the status of the parent file. Further, that it would be contrary to the ends of justice to allow the applicant herein to suffer prejudice to its rights for the mistake of the clerk who has subsequently been subjected to disciplinary procedure. She states that the respondents will not suffer any prejudice if the present application is allowed. Further, that it is in the interest of justice that the application herein be allowed.

3. The respondents did not file any response to oppose the instant application.
4. The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant notice of motion application including the supporting affidavit and submissions, the only issue for determination is whether the applicant should be granted leave to file its notice of intention to appeal out of time.
6. The applicant in its submissions reiterates its averments in the supporting affidavit and contends that this court has unfettered discretion to enlarge time for filing a late appeal. Further, that the delay was not inordinate or unreasonable hence the court should not lock the door of justice against the applicant. To support its arguments, it relied on the case of *Stecol Corporation Limited v Susan Awuor Mudemb (2021) eKLR* that favourably cited the case of *Kamlesh Mansukhalal Damki Pattni v Director of Public Prosecution & 3 Others (2015) eKLR*.
7. On extension of time to file a notice of intention to appeal, section 7 of the *Appellate Jurisdiction Act* Cap 9 provides *inter alia*:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

8. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No Nai 251 of 1997* the Court of Appeal stated;

It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

9. The applicant has explained the reason for the delay in filing the notice of appeal and stated that the confusion arose as a result of the transfer of the court file to the trial judge which culminated in their lawyer’s clerk failing to file the said notice of intention to appeal within the requisite time. I note the instant application was filed on November 26, 2021 while the impugned judgement was delivered on October 8, 2021. From this time line, I find that the delay was not inordinate.
10. Based on the facts as presented while relying on the legal provisions cited above and associating myself with the quoted decision, it is my considered view that the applicant has made out a case for extension of time to file the notice of intention to appeal. Further, noting that Article 159 of the *Constitution* allows



justice to be dispensed without procedural technicalities and since granting of leave is discretionary, I will allow the orders as sought.

11. It is against the foregoing that I find the notice of motion application dated the November 26, 2021 merited and will allow it in the following terms:
 - a. The applicant is granted leave of fourteen (14) days to file and serve the notice of intention to appeal.
 - b. Costs of the application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

