



**Kipyengo & another v Kipyuk (Environment and Land Miscellaneous Application 9 of 2022) [2022] KEELC 13508 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13508 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 9 OF 2022  
L WAITHAKA, J  
OCTOBER 12, 2022**

**BETWEEN**

**ISAAC KIPYENGO ..... 1<sup>ST</sup> APPLICANT**

**COLLINS CHOGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KIMOI TAMINING KIPYUK ..... RESPONDENT**

**RULING**

1. By a ruling delivered on 20<sup>th</sup> April, 2021 Obaga J., allowed an application by the applicants dated 24<sup>th</sup> March 2021. In the application, the applicants inter alia sought leave of the court to lodge, file and serve appeal out of time against the judgment delivered on 27<sup>th</sup> January 2021 in Iten SRMCC ELC Case No.29 of 2018-Kimoi Tamining Kipyuk vs. Isaac Kipyengo and another.
2. In allowing the application, the judge inter alia observed:-

“It is common knowledge that Covid 19 led to down scaling of court business. There was also lock down which restricted movement of people. I therefore find the delay of above 4 months has been satisfactorily explained. The applicants have arguable appeal....The applicants have been on the suit property since 2010. They have put up their homes and business premises. There will therefore be no prejudice suffered by the respondent if time to appeal is extended.”
3. Having so found, court determined that the applicants’ application is merited and allowed it in the following terms:-
  - i. Time to appeal against the judgment of Senior Resident Magistrate’s court in Iten Environment and Land Case No.29 of 2018 delivered on 27<sup>th</sup> January 2021 is extended for 14 days from today’s date;



- ii. The said appeal shall be filed before Iten Environment and Land Court;
- iii. A stay of execution pending the hearing and determination of the appeal is hereby granted;
- iv. The applicants shall jointly deposit a sum of Kshs. Two hundred thousand as security for costs before iten court within 90 days failing which the stay shall automatically lapse;
- v. The costs of the application shall be in cause.

**Notice of motion dated 18<sup>th</sup> October, 2022**

4. By a notice of motion dated 18<sup>th</sup> July, 2022 and filed on 21<sup>st</sup> July, 2022, the applicants filed the instant application seeking enlargement of the time within which they ought to have complied with orders of Hon. E.O Obaga J, cited herein above.
5. The application brought under Order 50 Rule 1 and 6 of the *Civil Procedure Rules* and Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act* is premised on the grounds that the applicants were not aware of the ruling; that the applicants got to know about the ruling which was delivered in their absence and in the absence of their counsel, on 10<sup>th</sup> June 2022; and that upon learning about the ruling they immediately filed the instant application.
6. The applicants have further deposed that they did not deliberately fail to comply with the order of the court and arguing that the respondent will not suffer any prejudice incapable of being compensated by way of costs if the orders sought are granted, urged the court to allow the application.
7. The application is supported by affidavit of the 2<sup>nd</sup> applicant, Collins Choge, sworn on 18<sup>th</sup> July 2022 in which the grounds on the face of the application are reiterated. The applicants have also annexed to the affidavit a copy of the ruling delivered on 20<sup>th</sup> April 2022 marked CC-1; an extract of a copy of email communication forwarded to their advocate, marked CC-2, and draft Memorandum of Appeal, marked CC-3.
8. The application is opposed through the replying affidavit of the respondent, sworn on 27<sup>th</sup> July, 2022 on the grounds that the applicants have not shown any persuasive reason(s) as to why they should again be allowed extension and/or enlargement of time to file appeal and there has been unexplained inordinate and inexcusable delay in filing the appeal. The respondent contends that the application has been made in absolute bad faith; that she will suffer prolonged litigation periods if such indolence is allowed. For those reasons, the respondent urges the court to deny the orders sought in order for her to realize the fruits of her justice.
9. When the application came up for hearing, counsel for the applicants relied on the grounds on the face of the application and the affidavit sworn in support of the application. He submitted that what the law requires in such an application is for the applicant to explain the delay, which the applicants have done; the ruling was rendered in the absence of the applicants; no notice of delivery of the ruling had been served on the applicants; ruling had been slated for an earlier date, 31<sup>st</sup> March 2022, when court was not sitting; applicants moved with speed to file the instant application after they got to know of the orders of the court.
10. Terming the failure to comply with the court directions excusable and properly explained, the applicants' counsel urged the court to allow the application as the respondent can be compensated by way of costs. He informed the court that the respondent had already been cushioned by the Kshs.200,000/= deposited in court as costs of the appeal.



11. According to the counsel for applicants, the issues raised in the respondent's replying affidavit are not sufficient to deny the applicants the orders sought.
12. The respondent relied on her replying affidavit sworn on 17th October, 2021 and filed on 21<sup>st</sup> October, 2021. She urged the court to dismiss the application. However, she informed that she amenable to payment of costs.

### **Determination**

13. I have carefully considered the circumstances leading to the filing of the instant application and the explanation offered by the applicants for failure to comply with orders earlier given by the court. I have also considered the sentiments of the respondents concerning the application.
14. The ruling of the court on which the application is premised shows that the ruling was delivered in the absence of the applicants; the ruling had been slated for delivery on 31<sup>st</sup> March, 2022. The court record shows that on that date, the court was not sitting. There is nothing in the court record to show that the applicants were notified of the new ruling date.
15. As per the order of the court, the appeal was to be filed before this court. The court file was received by this court on 8<sup>th</sup> June, 2022.
16. The applicants have stated that they did not get to know about the ruling until 10<sup>th</sup> June 2022 when they perused the court file.
17. In the circumstances of this case, where the ruling was delivered in the absence of the applicants; there was an order of transfer of the court file to this court, where the court found that the applicants' intended appeal is arguable and that no prejudice incapable of being compensated by way of costs will be occasioned on the respondent if the applicants are granted an opportunity to appeal out of time, I am inclined to exercise my discretionary power under Order 50 Rule 6 of the Civil Procedure Rules in favour of the applicants.
18. For the foregoing reasons, I allow the notice of motion dated 18<sup>th</sup> July 2022 in terms of prayer 1 and 2.
19. To address the concerns raised by the respondent, I direct the applicants to file the intended appeal within seven days from the date of delivery of this ruling, failing which the application dated 18<sup>th</sup> July 2022 shall stand dismissed with costs to the respondent upon lapse of the time given by the court.
20. Orders accordingly.

**DATED, SIGNED AND DELIVERED, AT ITEN THIS 12<sup>TH</sup> DAY OF OCTOBER, 2022.**

**L. N. WAITHAKA**

**JUDGE**

Ruling read virtually in the presence of:

Ms. Martin holding brief for Mr. Arusei for the applicant

Kimoi Tamining Kipyok – respondent

Christine Towett: Court Assistant

