



REPUBLIC OF KENYA



KENYA LAW
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**Gomba v Owuor (Miscellaneous Application 12 of 2022)
[2022] KEELC 15523 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
MISCELLANEOUS APPLICATION 12 OF 2022
GMA ONGONDO, J
DECEMBER 19, 2022**

BETWEEN

RICHARD ONG'OU GOMBA APPLICANT

AND

JOHN ODHIAMBO OWUOR RESPONDENT

RULING

1. This ruling is in respect of an application by way of a notice of motion dated October 13, 2022 and lodged in court on October 14, 2022 under, inter alia, sections 1A, 1B, 3 and 3A and 79G of the *Civil Procedure Act* chapter 21 laws of Kenya and order 50 rules 6 and 8 of the *Civil Procedure Rules, 2010*. The applicant, Richard Ong'ou Gomba through the firm of Gogi and Associates Advocates, is seeking the following orders;
 - a. Moot
 - b. Moot
 - c. The Honorable court is pleased to extend time to appeal and admit the applicant's appeal out of time.
 - d. Costs of this application be provided for.
2. The application is founded on the applicant's supporting affidavit of sixteen paragraphs sworn on even date and a draft memorandum of appeal marked as "ROG 1" annexed thereto. The application is further based on grounds (a) to (i) set out on the face of the same.
3. In summary, the applicant laments that he is aggrieved by the trial court's judgment delivered on July 13, 2022 in Oyugis Senior Principal Magistrate's Court Environment and Land Case Number 102 of 2018. Thus, he intends to lodge an appeal out of time from the said decision. That he was not aware of the said judgment which was caused by mistake of his counsel who failed to notify the applicant



- of the judgment. That the prospective appeal has salient issues of law and facts thus, the same has overwhelming chances of success.
4. The respondent through Kisaka and Associates Advocates, opposed the application by way of a replying affidavit of five paragraphs sworn on November 1, 2022 and filed on November 8, 2022. He deposed in part that the application is frivolous, vexatious, an afterthought and meant to defeat justice. That the applicant was made aware of the judgment through the area chief one Joseph Mboga and that the applicant is using his former counsel as a scapegoat to get away with his indolence.
 5. Further, the respondent deposed that he is bound to suffer irreparable damage if the orders sought in the application are granted. That the application lacks substance and ought to be dismissed with costs.
 6. The application was heard by way of written submissions further to this court's orders and directions made on October 17, 2022; see also order 51 rule 16 of the [Civil Procedure Rules, 2010](#) and Practice Direction Number 33 of the Environment and Land Court Practice Directions, 2014.
 7. In that regard, the applicant's counsel filed submissions dated November 15, 2022 on even date and framed three issues for determination, inter alia, whether there was unreasonable delay in mounting the application. Counsel urged the court to allow the application and relied on authorities including [Edith Guichugu Koine v Stephen Njagi Thitbo](#) (2014) eKLR and [JMM v PM](#) (2018) eKLR, to fortify the submissions.
 8. By the submissions dated November 23, 2022 and filed on November 25, 2022, the respondent's counsel provided a summary of facts and referred to the three issues for determination as identified in the applicant's submissions. To buttress the submissions, counsel relied upon section 79 G of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya and the case of [Kwale International Sugar Company Ltd v Joshua Manthi Mani](#) (2021) eKLR.
 9. I have carefully gone through the entire application, the replying affidavit and the parties' rival submissions. On that account, has the applicant established that he is entitled to extension of time to appeal and admission of his appeal out of time herein?
 10. The applicant deposed at paragraphs 2 and 11 of his supporting affidavit that the respondent sought eviction against him at the trial court. That the respondent is likely to commence execution any time against him and that the application is brought in the interest of justice.
 11. It is important to note that extension of time sought in the application is not a right of a party but an equitable discretionary remedy to a deserving party. However, it depends on factors including whether there is undue delay on the part of the applicant and the explanation there of as noted in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others](#) (2014) eKLR.
 12. This court is conscious of order 50 rules 6, 7 and 8 of the [Civil Procedure Rules, 2010](#) on power to enlarge time, enlargement of time and computation of days respectively. The applicant has stated that the delay in commencing the application was due to mistake of counsel who failed to notify him of the judgment. In the case of [Shabir Din v Ram Parkash Anand](#) (1955) EACA Volume 22 at page 48, it was held that the mistake of counsel should not be visited upon a client.
 13. In the circumstances, the applicant has given a plausible and satisfactory explanation for the delay of 90 days to mount the application as held in [Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet](#) (2018) eKLR. He has shown good and sufficient cause for not filing the appeal in time as stipulated in the proviso to section 79G (*supra*).



14. Moreover, article 48 of the *Constitution of Kenya, 2010* provides for access to justice while articles 50 (1) and 25 (c) of the same Constitution anchor unlimited right to fair hearing of matters inclusive of the applicant's intended appeal.
15. Furthermore, the applicant deserves the orders sought in the application in view of the decision in the case of *Butt v Rent Restriction Tribunal* (1979) eKLR, where the Court of Appeal held thus;

“....The appellant has an undoubted right of appeal...”
16. In the foregone, the applicant has proved that he has unlimited right to file and pursue the prospective appeal. The application is meritorious.
17. *A fortiori*, this application, be and is hereby allowed in terms of extension of time and admission of appeal as set out at paragraph 1 (c) here in above.
18. Taking into account order 50 rule 4 of the *Civil Procedure Rules, 2010*, the applicant shall file and serve the prospective appeal within seven days from this date.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 19TH DAY OF DECEMBER 2022.

G M A ONGONDO

JUDGE

PRESENT

D. Gogi, learned counsel for the applicant

Ms Ochieng instructed by Kisaka, learned counsel for the respondent

Okello, court assistant

