



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oduol v Adinda & another (Environment & Land Miscellaneous Case  
E008 of 2021) [2022] KEELC 15219 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15219 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E008 OF 2021**

**AY KOROSS, J**

**DECEMBER 8, 2022**

**BETWEEN**

**JOSEPH OKOTH ODUOL ..... APPLICANT**

**AND**

**HESBON ODUOL ADINDA ..... 1<sup>ST</sup> RESPONDENT**

**JARED JUMA ADINDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for consideration is the applicant's notice of motion dated 26/05/2022 in which this court was moved pursuant to the provisions of article 159 of *the Constitution* of Kenya and sections 3A, 79G and 95 of the *Civil Procedure Act*. He sought the following reliefs;
  - a. Spent;
  - b. That this court be pleased to grant the applicant leave to appeal out of time against the judgment of the Principal Magistrate Hon. Lester Simiyu in Siaya ELC Case Number 28 of 2018;
  - c. That the honourable court be pleased to issue an order of stay of execution of the judgment delivered on 16/06/2021 pending the hearing and determination of the intended appeal;
  - d. That the memorandum of appeal annexed thereto be deemed as duly filed and served upon payment of the requisite filing fee; and
  - e. That costs of the application be costs in the cause.
2. The motion is supported by grounds set out on its face and on the supporting affidavit of applicant Joseph Okoth Oduol dated 26/05/2022.



3. The applicant deposed inter alia; the he was aggrieved by the judgment of the trial court rendered on 16/06/2021 and intended to appeal against it; the delay was not inexcusable; he had been ailing hence could not file the appeal on time; execution was eminent; he had an arguable appeal which would be rendered nugatory if stay was not granted; he was willing to abide by any reasonable and just consideration that the court may impose; he would suffer irreparable loss if the orders sought were not granted and no prejudice would be occasioned to the respondents if the orders sought were granted.
4. The motion was unopposed. However, this court is called upon to determine it on merits.
5. Whereas the applicant's Counsel stated that he had filed his written submissions on 5/10/2022, the copy is not in the court record. The court's email address does not bear the said submissions.

### **Analysis and determination**

6. I have carefully considered the motion, grounds and affidavit in support and the issues falling for determination are;
  - i. Whether the applicant should be granted leave to appeal out of time;
  - ii. Whether the applicant has met the threshold to warrant stay of execution; and
  - iii. What orders should this court issue.

### **Whether the applicant should be granted leave to appeal out of time**

7. 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, he must demonstrate that he had 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.” Emphasis added.

8. The motion has been filed close to one year from when the judgement was rendered. Judgment was delivered on 16/06/2021 and the present application was filed on 26/05/2022.
9. The main reason tendered by the applicant for the delay was that he had been unwell and was not able to file an appeal in good time. The applicant proffered evidence which indeed confirmed that he had been ailing. The medical report was issued by a government body, it is duly stamped, dated and signed and I have no doubt that the applicant could have filed the appeal in time save for the impediment of ill health which he had no control over. This court is satisfied with the reason advanced by the applicant. See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
10. The applicant has availed to this court a draft memorandum of appeal. A cursory glance at the memorandum of appeal demonstrates that the applicant has raised arguable grounds of appeal. In the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR the court expressed itself as follows on arguability:

‘An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.’



11. I find that the reason for the delay is reasonable, plausible and sufficient. This court has to balance the interests of the respondents who have a judgment in their favour against the interest of the applicant who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate his dispute against the need to ensure timely resolution of disputes. It would be in the interest of justice if the applicant was given an opportunity to ventilate his case on appeal. I find that though the motion was filed inordinately late, the applicant has met the criteria to warrant an order for extension of time to file an appeal. It is my finding on the 1<sup>st</sup> issue that the prayer sought is merited.

**ii. Whether the applicant has met the threshold to warrant stay of execution**

12. The legal framework for stay of proceedings is governed by order 42 rule 6 of the Civil Procedure Rules and the criteria for exercising such discretionary powers is "sufficient cause". The judgement rendered by the trial court merely dismissed the applicant's suit with costs. It was a negative order. The import of the judgement is that parties were to remain in the same position they were in prior to the suit being filed. Substantial loss and the appeal being rendered nugatory could not suffice. If at all there is an order capable of execution, it would only be on costs which in my considered view, is not capable of being stayed. It is on this basis that I find the prayer is not merited. I am persuaded by the decision of *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, where Makhandia, J (as he then was) stated thus:

"The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay.

13. Ultimately, I find that the motion is partially merited. It is trite law that costs follow the event and the costs of this motion shall abide the outcome of the appeal. This court makes the following disposal orders:
- a. The applicant is hereby granted leave to appeal out of time against the decision of Hon. L.Simiyu in Bondo PM ELC No. 28 of 2018.
  - b. The applicant to file and serve a record of appeal within 30 days from today;
  - c. Costs shall abide the outcome of the appeal.
  - d. This case is hereby marked as closed.

**DELIVERED AND DATED AT SIAYA THIS 8<sup>TH</sup> DAY OF DECEMBER 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**8/12/2022**

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

N/A for the applicant

N/A for the respondents

Court assistant: Ishmael Orwa

