



**Registered Trustees of Christ’s Co-Workers Fellowship Church  
(Chrisco) v Grey Harts Limited & 4 others (Environment & Land Case  
44 of 2021) [2022] KEELC 15330 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15330 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 44 OF 2021  
FO NYAGAKA, J  
DECEMBER 6, 2022**

**BETWEEN**

**THE REGISTERED TRUSTEES OF CHRIST’S CO-WORKERS FELLOWSHIP  
CHURCH (CHRISCO) ..... PLAINTIFF**

**AND**

**GREY HARTS LIMITED ..... 1<sup>ST</sup> DEFENDANT  
GRACE ALIVIDZA CHIMWANI ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR KITLAE LANDS OFFICE ..... 3<sup>RD</sup> DEFENDANT  
COUNTY SURVEYOR KITALE COUNTY OFFICE ..... 4<sup>TH</sup> DEFENDANT  
COUNTY PHYSICAL PLANNER KITALE COUNTY ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

(On extension of time to lodge a Memorandum of Appeal and Record of Appeal out of time and deeming a Notice of Appeal filed out of time properly filed)

1. I do not understand why in their wisdom and intellect or lack of them the Applicants had to file this Application, whether in this Court or at all. Be that as it may, before me is an Application by way of a Notice of Motion dated 07/10/2022. It was filed on 14/10/2022. It was brought under Article 159(2) of *the Constitution* (2010) and Sections 1A, 3A, 79G and 95 of the *Civil Procedure Act* and order 42 rules 6, order 50 rule 5, order 22 rule 22(1) and order 51 rule 1 of the *Civil Procedure Rules*, 2010 and “all other enabling provisions of the law.”
2. The Application sought the following specific prayers:
  1. ...spent



2. The Applicants be granted leave to appeal out of time.
3. That the Honorable be pleased to extend time for lodging of a Memorandum of Appeal and Record of Appeal against the ruling of Hon. J. Dr. iur Fred Nyagaka delivered in the Environment and Land Court at Kitale on 17<sup>th</sup> February, 2022.
4. The Notice of Appeal dated 21<sup>st</sup> February, 2022 be deemed as properly filed.
5. The costs and incidentals of this Application abide the result of the Appeal.
3. The Application was based on a number of grounds, namely, that the time within which the Applicant (sic) ought to file his appeal without leave has elapsed; the applicants are desirous of appealing against the Ruling of this Court dated 17/02/2022; they were dissatisfied with the Ruling and instructed its (sic) advocates to institute an Appeal therefrom; it is in the interest of justice that the applicants be allowed to pursue their rights to their full capacity; the application is made in good faith and will not occasion prejudice to the Respondents; and this Court does issue any other directions fit in the circumstances.
4. The Application was supported by the Affidavit of one Gideon Birech. It was sworn at Eldoret on 7/10/2022. He stated that he was a Pastor of the Christ's Co-Workers Fellowship Kitale Branch and was well conversant with the suit land. He deponed that he was informed by their advocates that they filed their Memorandum of Appeal out of time hence leave was required for an appeal filed out of time. He annexed to the Affidavit and marked as CCF-1 a Notice of Appeal dated 21/02/2022 and filed on 4/03/2022 in this Court. Further, he stated that the reason for the delay to lodge the Appeal in time was because Pastor Victor Ogeto who was the trustee of the Church had given instructions to appeal and then traveled out of the Country for quite some time. He then swore that the Pastor was expected in the Country some time "next month" to give full instructions since he had full details with intent to proceed with the appeal. He then deponed that the intended appeal raised pertinent issues and had high chances of success. He summed it that it was in the best interest of justice that the prayers sought be granted.
5. The Application was opposed strongly. The 2<sup>nd</sup> Defendant filed grounds of opposition which were to the effect that the Application was brought under the wrong provisions of the law; this Court lacked jurisdiction to entertain the application since orders relating to Notices of Appeal were governed by the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya; the application was brought after a prolonged period of time given that it was filed 8 months since time the Ruling was delivered; the Notice of Appeal was already filed 7 months earlier yet leave to appeal was sought much later; no good reason had been shown why the delay had been made; that the deponent of the supporting Affidavit had disclosed that instructions to appeal were given in good time but no reason had been given as to why there was a delay of seven months from then to bring this Application; and that it was not clear why the Advocate did not seek leave to appeal before filing the Notice of Appeal.

## SUBMISSIONS

6. The parties were directed to dispose the Application by way of written submissions. The Applicants filed theirs on 3/11/2022 while the 2<sup>nd</sup> Respondent filed hers on 2/11/2022. In summary the Applicants summed the argument on the Application that they had sufficiently explained in the supporting Affidavit the reason for the delay. They stated that the Court had discretion under Section 79G of the *Civil Procedure Act* to extend the time, which provision they reproduced. They relied on the Court of Appeal case of *Paul Musili Wambua vs. Attorney-General & 2 others* [2015] eKLR. They then stated that the granting of the leave to appeal was in the interest of justice as stipulated in Section 3A



of the *Civil Procedure Act*. They relied on the cases of *Vishva Stone Company Ltd vs. RSR Stone* (2006) eKLR; and *Raila Odinga & others vs IEBC and 3 Others* (2013) eKLR among others, which they did, and I have considered them deeply and systematically. They also relied on the cases of *Stecol Cooperation Ltd. Vs. Susan Awuor Mudemba* E24 of 2021 eKLR (sic) and *Anthony Maina Munyu and another v. Gerald Njuguna Mbugua* (2014) eKLR. They stated that the intended appeal had high chances of success. They relied on the cases of *Kenya Power and Lighting Company Ltd vs. Rose Anyango and Another* (2020) eKLR and the one of *Kinyanjui Muguta v Wotuku Muguta* [2018] eKLR.

7. They also filed supplementary submissions in which they relied on a number of authorities, specifically, four in number, to firm their argument that counsel's mistake and those of their staff should not be visited on innocent clients.
8. The 2<sup>nd</sup> Respondent on the other hand repeated each and every content of their grounds of opposition and submitted that he would be relying on the Court of Appeal Rules as well as the principles of Equity which discourage indolent litigants from moving the Court on such applications brought less timeously. She prayed this Court to dismiss the Application.

### **Analysis, Issues, Determination**

9. This is an Application for extension of time. It is vehemently opposed. I have carefully considered it and the grounds upon which it is brought, the rival affidavits both in support and opposition, the grounds of opposition as well as the submissions by the parties. I have also analyzed the law and case law cited. In my view the issues that commend to me for determination are: -
  - a. Whether the Application is merited
  - b. Who to bear the costs of this Application?
10. First of all, if I begin with commenting on the submissions filed herein, it is that some of those filed by the Applicants were misleading in some respects in regard to their failure to focus on the application in this instance. I know that submissions do not constitute pleadings, evidence or facts of parties and will not necessarily go to the root of determining the issues before the Court but it is worth stating that it is vital that when a party submits, he/she should relate the same to the facts at hand and the law, and not anything outside of them. The supplementary submissions were on the mistake of counsel and his staff which, to the Applicants, should not be visited on the client. To my knowledge, nowhere in both the Application and the response was there an iota of insinuation that counsel committed an error which should not therefore be visited on the client. Nevertheless, let me determine the application on merits or upon analysis.

#### **(a) Whether the Application is merited**

11. It is worth noting that the Application seeks orders which are aimed at extending time to do certain specific things, which I can sum up as, deeming this Notice of Appeal filed on 04/03/2022 as properly filed, and extending the time for filing both the Memorandum of Appeal and the Record of Appeal, as a result of a ruling of this Court. The ruling was delivered on 17/02/2022.
12. Since the Applicants contend that they were dissatisfied with the Order of this Court which was made on 17/02/2022, it follows that an appeal they would prefer could only lie to the Court of Appeal. That being the case, the procedure regarding appeals from this Court to the Court of Appeal is governed by both Statute and the Rules made thereunder. Under Section 19 of the *Environment and Land Court (ELC) Act*, Act No. 19 of 2012, this Court applies the provisions of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and the *Civil Procedure Rules*, 2010. Section 16 of the ELC Act provides



that appeals from the judgments, awards, decrees and orders of this Court lied to the Court of Appeal. Similarly, Section 66 of the *Civil Procedure Act* provides that appeals from this Court lie to the Court of Appeal.

13. The time of appealing to the Court of Appeal is governed by the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya and the Court of Appeal Rules as made thereunder. Section 7 of the *Appellate Jurisdiction Act* is the one that donates power to this Court to extend time for the filing of a Notice to Appeal against the judgment of this Court. It provides that, “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:”
14. The time of filing an appeal to the Court of Appeal, in civil cases, is governed by Rule 75(2) of the *Court of Appeal Rules*. It provides that “Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.” It therefore follows that a party desirous of appealing against a judgment, order or decree of this Court to the Court of Appeal should do so within 14 days of the delivery of that judgment or order or decree by filing and serving a Notice of Appeal to be in the prescribed manner. In case the party does not do so within that time, then he has recourse to this Court to file an application for extension of time to file the Notice. It means that the Applicants had fourteen days, from 17/02/2022 to 02/03/2022, to file the Notice of Appeal herein. Instead they filed it two days later. It was out of time. No wonder they seek time to be extended in regard to the filing.
15. The effect of filing a Notice of Appeal is clearly stated by the *Civil Procedure Rules*. Order 42 Rule 5 (4). “For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.” It therefore means that once a Notice of Appeal has been filed, in accordance with the Rules of the Court of Appeal, there is already an appeal that has been filed before that Court. To my mind, there is no provision in the Rules that deal with extending time to deem a Notice of Appeal filed out of time in this Court duly filed. What this Court has power to deal with is to extend time to file a Notice of Appeal but not to deem one already in the file as proper or otherwise. To do so would be to arrogate myself of a power that I do not have as the Court of this level. That is only the preserve of the Court of Appeal.
16. Further, since the filing of the Notice of Appeal in a matter being handled by this Court is tantamount to the filing of an appeal in the Court of Appeal, the question that follows is, does this Court have jurisdiction to deal with appeals lying in the Court of Appeal? I do not think so. As I have stated in the paragraph immediate above, to do that would mean dealing with the competence or otherwise of an appeal which is before the higher Court. It would amount to this court pronouncing itself on whether an appeal that has been filed in the Court of Appeal is or is not competent. Additionally, this Court does not have power to extend time for filing Memoranda of Appeal or Records of Appeal to the Court of Appeal. It only has the limited window of granting leave to appeal from orders where leave is granted or extending time to file Notices of Appeal. Thus, the prayers sought in respect of the Memorandum of Appeal and Record of Appeal are incompetent and disallowed.
17. I could have said less, but of the instant application but it is my view that even though the application should have been considered on merits, the reasons given by the Applications for failing to move the Court in time are not meritorious at all. By the 21/03/2022, they had instructions to file a Notice of Appeal and they actually drew it. Being aware of the timelines for filing the appeal, they decided to keep quiet until after the time of filing the Notice was past and then filed it. There is no explanation as to why they did not file it within the remaining nine days. They do not explain when Pastor Victor Ogeto gave the limited instructions to file the appeal and why he did not give full instructions before



departing the Country, when he left the Country and what has changed since he left the Country up to the time the application was brought and why it became urgent to file the application just a month before he came back. In any event, in this era of technology wherein the world is a global village, there is absolutely no explanation as to why Pastor Ogeto cannot have given instructions online or via other electronic means. The Applicants' contention goes as if Pastor Ogeto went into a hole or heaven where an individual goes and never comes back. In any event pastor Ogeto has not sworn any affidavit to state that he gave limited instructions. The explanation is absolutely baseless. The period of seven months between the filing the Notice of Appeal and making of the instant application is extremely inordinate a delay. This application is not absolutely unmeritorious.

**(b) Who to bear the costs of this Application**

18. For that reason, the Application dated 07/10/2021 is unmeritorious and hereby dismissed with costs to the Defendants.
19. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 6<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

