



**Agenga v Alango (Environment and Land Appeal E008 of 2023)
[2024] KEELC 627 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E008 OF 2023
GMA ONGONDO, J
FEBRUARY 13, 2024**

BETWEEN

FRANCISCA AKINYI AGENGA APPELLANT

AND

PHOEBE WARIA ALANGO RESPONDENT

RULING

1. By a Notice of Motion application dated 1st November 2023 brought under inter alia, sections 1A, 1B, 3, 3A and 79G of the Civil Procedure Act Chapter 21 Laws of Kenya and Article 159 (2) (d) of the Constitution of Kenya, 2010, the applicant, Phoebe Waria Alango through Oye Ashioya and Company Advocates, is seeking the following orders;
 - a. Spent.
 - b. That, leave be granted to the applicant to file a cross-appeal out of time.
 - c. That, the draft memorandum of cross appeal attached to the supporting affidavit hereto be deemed duly filed and served upon payment of requisite court fees.
 - d. That, upon the orders being granted as above, directions be taken in this matter with regard to the hearing of the appeal and the cross appeal
 - e. That, costs of this application be provided for.
2. Briefly, the applicant's lamentation is she was represented by M/S Neto and company Advocates in Oyugis SPM's Court Environment and Land case No. 70 of 2018 and judgment was delivered in the suit on 18th January 2023. That she was dissatisfied thereby hence, filed the application premised upon the applicant's supporting affidavit sworn on 26th October 2023 and grounds on the face of the application which include;



- a. That such judgment was delivered in the applicant's absence.
 - b. That, at the time, the applicant was represented by M/s Neto and Company Advocates of Kisumu, and that due to inadvertence on the part of counsel's office she was not informed of the judgment in time; she then decided to change advocate.
 - c. That the application for change of advocates was made and allowed pursuant to a consent dated 24th June 2023 and filed in court on 28th June 2023.
3. The appellant/respondent, Francisca Akinyi Agenga through Ochillo and Company Advocates, opposed the application by way of her replying affidavit sworn on 8th November 2023 and implored the court to dismiss the same with costs. Furthermore, he deposed, *inter alia*;
- a. That judgment in the lower court was read and delivered on the parties on 18th January, 2023 in the presence of myself for the Appellant/Plaintiff/Respondent and Madam Neto Advocate for the Defendant /Respondent/Applicant as can be gleaned at Page 9 of the Record of Appeal filed herein.
 - b. That I Verily believe that the above facts show clearly that the Applicant/Respondent herein was well aware of the judgment subject of this appeal and knew what she wanted that she was aggrieved by the same and failure to file appeal against the same within the statutory period, is deliberated and intentional and was not prevented by any disability
 - c. That there are no steps taken by the Applicant/Respondent towards the filing of Appeal.
4. On 7th November 2023, the court directed that the application be heard by written submissions.
5. Accordingly, learned counsel for the applicant filed submissions dated 8th December 8th December 2023 alluding to the application and the judgment of the trial court which shows that the applicant was absent in court on 18th January 2023. That the applicant was dissatisfied at the said judgment and that by the time change of advocates was carried out in the trial court, the time to appeal had elapsed. That the respondent will not suffer any prejudice if the application is allowed in the interest of justice. Counsel relied upon Article 159 (2) (d) (*supra*) and the case of [*Diamond Trust Bank \(K\) Ltd-vs-Galaxy Ventures \(K\) Ltd \(2020\)*](#) KLR, among others, to reinforce the submissions.
6. By the appellant/respondent's submissions dated 22nd November 2023, reference was made to the background of the matter including the record of appeal herein, the application and the replying affidavit. Counsel delineated triple issues for determination, among them, whether the application is meritorious. In discussing the issues, it was submitted that an order for extension of time to file appeal is discretionary. That there are factors to be considered thereof such as reasons for delay in the commencement of application and urged the court to dismiss the application with costs. To buttress the submissions, counsel cited, *inter alai*, the case of [*Aviation Cargo Support Ltd-vs-Mark Freight Services Ltd \(2014\)*](#) eKLR.
7. I have duly considered the application, the replying affidavit and rival submissions herein. Therefore, is the application meritorious?
8. Section 79 G (*supra*) stipulates the period of lodging an appeal from a subordinate court to this court. The proviso thereto is that an appeal may be admitted out of time if the appellant satisfies the court that he or she has good and sufficient cause for not filing the appeal in time.
9. The applicant asserted that she was absent during the delivery of judgment as revealed in the trial court's judgment. That her previous counsel did not notify her of the judgment and that she changed counsel



thereafter. I take into account that mistake of counsel cannot be visited on a client; see *Shabir Din-vs-Ram Parkash Anand* (1955) EACA Volume 22 at page 48.

10. Order 50 of the Civil Procedure Rules, 2010 provides for time. This court is guided by factors for consideration in the instant application which include; the reasons given by the applicant and degree of prejudice to respondent as held in *Leo Sila Mutiso-vs-Rose Wangari Mwangi* (1999) 2 EA 231.
11. The applicant has given plausible and satisfactory explanation for the delay in mounting the application, inter alia, her absence from court during delivery of the trial court's judgment, mistake of her previous counsel and attendant circumstances; see *Andrew Kiplangat Chemaringo-vs-Paul Kipkorir Kibet* (2018) eKLR.
12. It must be noted that a fair opportunity to be heard is a fundamental principle of justice; see Halsbury's Laws of England 5th Edition 2010 Volume 61 at page 639. So, the applicant is entitled to access to justice and fair hearing of the prospective appeal as enshrined in Articles 48, 50 (1) and 25 (c) of *the Constitution* of Kenya, 2010.
13. Furthermore, I subscribe to the Court of Appeal decision in the case of *Butt-vs-Rent Restriction Tribunal* (1979) KLR, where it was held thus;

“the appellant has an undoubted right of appeal.....”
14. In the premises, the application is merited and the same is hereby allowed in terms of prayers 2 and 3 as stated in paragraph 1 (b) and (c) hereinabove.
15. Further, the applicant shall file and serve record of the cross appeal within the next seven (7) days from this date as prayer 4 of the application is granted accordingly.
16. Costs of the application to be borne by the applicant.
17. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 13TH DAY OF FEBRUARY 2024.

GEORGE M.A ONG'ONDO

JUDGE

Present;

- a. Mr. Oye Ashioya learned counsel for the Applicant
- b. Mr. J O Bunde learned counsel for the Appellant/respondent
- c. T. Luanga and M. Obunga, court assistants

