



**Otsianda v Wanaswa (Environment & Land Miscellaneous Case
E014 of 2023) [2024] KEELC 549 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E014 OF 2023
DO OHUNGO, J
FEBRUARY 6, 2024**

BETWEEN

GABRIEL OMOLLO OTSIANDA APPLICANT

AND

RICHARD JAPHETH WANASWA RESPONDENT

RULING

1. By Notice of Motion dated 21st June 2023, the applicant seeks leave to appeal out of time against a judgment that was delivered by the Senior Principal Magistrate’s Court at Butere (Hon B Ojoo, SPM) on 12th January 2023 in Butere MCELC No. 23 of 2020. The application is based on the grounds listed on its face and supported by an affidavit sworn by the applicant.
2. The applicant deposed that upon delivery of the judgment, he immediately instructed his then advocate to file an appeal against it and that before the appeal could be filed, he fell ill and was admitted in hospital. He annexed some medical notes and added that upon recovering, he noticed that the advocate had not filed the appeal.
3. The respondent opposed the application through a replying affidavit in which he deposed that the applicant was present in court when the judgment was delivered and that the treatment notes that he annexed show that he was attended in hospital on 7th and 8th February 2023 hence there were 27 days of inactivity after delivery of the judgment. He added that the applicant has not provided a discharge note and that the treatment notes may have been choreographed. That there was a delay of four months and thirteen days and that he had executed decree.
4. The applicant relied entirely on the application and his supporting affidavit while the respondent filed written submissions dated 15th August 2023. I have carefully considered the application, the affidavits, and the submissions. The issue for determination is whether extension of time should be granted.



5. An application for leave to appeal out of time is essentially an application for extension of time. The principles that guide the court are that such an order is discretionary, and the applicant has the burden of laying a basis to the satisfaction of the court. The court considers such factors as whether there is a reasonable reason for the delay, whether there will be any prejudice suffered by the respondent if the extension is granted and whether the application has been brought without undue delay. See the decision of the Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.
6. The applicant intends to appeal to this court against the judgment that was delivered by the Subordinate Court on 12th January 2023 in Butere MCELC No. 23 of 2020. Pursuant to Section 16A (1) of the Environment and Land Court Act, 2011, an appeal from the Subordinate Court to this court is to be filed within 30 days of delivery of the judgment or ruling. Consequently, the applicant ought to have filed the appeal by 12th February 2023. Pursuant to Section 16A (2) of the Environment and Land Court Act, 2011, this court has jurisdiction to admit an appeal out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing it on time.
7. The present application was filed on 21st June 2023, four months and a week after the due date for filing the appeal. The applicant has explained that he immediately instructed his then advocate to file an appeal against the judgment once it was delivered. He was in court and was aware of the delivery of the judgment. He further explains that he fell ill and was admitted in hospital before the appeal could be filed. I have perused the medical notes that the applicant annexed. They are dated 7th February 2023 and 8th February 2023. No discharge note is availed and no evidence of payment for inpatient services has been provided. I also fail to understand why an appeal was not filed despite the fact that the advocate then on record had been instructed. There are serious gaps that the applicant would have done well to explain. Some medical notes and added that upon recovering, he noticed that the advocate had not filed the appeal.
8. The foregoing notwithstanding and despite the delay of four months and a week, I am inclined to let the applicant have his day in the appellate court. In the circumstances of this case, I do not consider the delay herein to warrant shutting the applicant out. I am persuaded that the applicant has made a case for leave to appeal out of time. There is no prejudice that will be suffered by the respondent which cannot be compensated by an award of costs.
9. In the result, I make the following orders:
 - a. Leave is hereby granted to the applicant to appeal out of time against the judgment that was delivered by the Senior Principal Magistrate's Court at Butere (Hon B Ojoo, SPM) on 12th January 2023 in Butere MCELC No. 23 of 2020.
 - b. The Memorandum of Appeal be filed and served within 14 (fourteen) days from the date of delivery of this ruling. In default, Notice of Motion dated 21st June 2023 shall stand dismissed with costs to the respondent.
 - c. In the event that the applicant files the appeal on time as ordered in (b) above, costs of Notice of Motion dated 21st June 2023 shall be in the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



The Applicant present in person

No appearance for the Respondent

Court Assistant: E. Juma

