



**Otieno v Wawala & another (Environment and Land Appeal  
E014 of 2023) [2024] KEELC 3677 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3677 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

**AY KOROSS, J**

**MAY 9, 2024**

**BETWEEN**

**EVALINE AUMA OTIENO ..... APPLICANT**

**AND**

**RAYMOND OUMA WAWALA ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN OMONDI WAWALA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 19/08/2023 that is the subject of this ruling is filed by the applicant and in it, this court is moved under several provisions of law.
2. The applicant has sought leave to appeal out of time against the Judgment of Hon. J P Nandi that was rendered on 18/05/2022 in Bondo ELC Case No. E29 of 2021 and for this court to extend its orders issued on 2/03/2023 in ELC Misc. E016 of 2022 in which it allowed the applicant within 30 days, to file her appeal.
3. The motion is predicated on grounds thereon and it is supported by an affidavit sworn on the same date by the applicant Evaline Auma Otieno.
4. Some of the grounds thereon are replicated in the supporting affidavit and in summary, the applicant avers the timeline for her to file an appeal has lapsed, she has an arguable appeal and is ready to file her record of appeal and that though she filed a memorandum of appeal on 6/04/2023, on 15/08/2023, she was informed the appeal had been summarily dismissed by this court for being filed out of time.
5. Moreover, the applicant states the reason the appeal was summarily dismissed was because she had not attached the order extending the time for her to appeal. Despite being given timelines to file a response, the respondents did not file any and therefore, the motion is unopposed.



6. Having considered the motion, affidavit, and, annexures thereto together with provisions of law, 3 issues emerge for determination which are; whether the prayer for leave to appeal out of time against the decision in Bondo ELC Case No. E29 of 2021 is *res judicata*, whether this court should grant orders extending its orders issued on 2/03/2023 and what about costs. These issues shall be addressed consecutively.
7. On the 1<sup>st</sup> issue of the doctrine of *res judicata*, this is provided for under Section 7 of the [Civil Procedure Act](#) in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”
8. By the applicant’s own admission, a similar order had been issued in her favour, and indeed as seen from the order which she tendered to this court, this court in ELC Misc. Case No.E016 of 2022 granted her leave to file an appeal out of time against the decision of Hon. J P Nandi that was rendered on 18/05/2022 in Bondo ELC Case No. E29 of 2021.
9. No doubt, an analysis of the prayer herein and orders issued on 2/03/2023 in ELC Misc. Case No. E016 of 2022, it is clear parties in the two suits are the same, the subject matter is the same, the title is the same and the matter was determined by a competent court.
10. Therefore, I must conclude, find, and hold the prayer seeking leave to file an appeal out of time against the decision of Hon. J P Nandi that was rendered on 18/05/2022 in Bondo ELC Case No. E29 of 2021 is *res judicata*.
11. The 2<sup>nd</sup> issue is whether this court should grant orders extending its orders issued on 2/03/2023. The invitation to intervene on behalf of the applicant has been invoked by Section 95 of the [Civil Procedure Act](#) and Order 50, Rule 6 of the [Civil Procedure Rules](#) which give this court wide discretionary powers in considering an application for extension of time. However, this discretion must be exercised based on the law, reason and evidence. Section 95 stipulates thus:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

While Order 50 Rule 6 states:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”



12. The non-exhaustive principles for extension of time were settled by the Supreme Court of Kenya decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR in the following manner:-

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

13. Now, turning to the circumstances of the issue at hand, by the orders of this court issued on 2/03/2023 in ELC Misc. E016 of 2022, the applicant was granted leave to appeal out of time against the decision of the lower court and was given 30 days to file her record of appeal.

14. Based on these orders and looking at the calendar for the year 2023 for purposes of calculating the 30 days, the 30<sup>th</sup> day takes us to 1/04/2023 which was a Saturday, and since offices were closed and considering Order 50, Rule 3 of the *Civil Procedure Rules*, the latest date the appeal could be filed was 3/04/2023.

15. Yet, the memorandum of appeal was filed on 6/04/2023 which was 3 days outside the timelines and consequently, the appeal was either struck out or dismissed by this court for being filed out of time.

16. In seeking an extension of court orders as the motion herein seeks, it is expected the applicant would establish good and sufficient reasons for failing to file the memorandum and record of appeal within the time allowed by the court and explain reasonably, the circumstances that occasioned the delay.

17. An examination of the grounds in support of the motion and affidavit shows the only reason posed as to why the appeal was not admitted as envisaged by Section 79B of the *Civil Procedure Act* was because the order extending time to appeal had not been tendered to the court.

18. Nonetheless, and as seen earlier in this ruling, that is not the reason why the appeal was summarily dismissed or struck out and the applicant is silent on why the appeal was not filed timeously.

19. In the absence of the applicant showing sufficient reasons for the delay to the satisfaction of the court, I am not convinced she deserves to be granted the order for extension of the orders of this court that were issued on 2/03/2023. Ultimately and in answering the 3<sup>rd</sup> issue, I find the notice of motion dated 19/08/2023 is not merited and it is hereby dismissed with the applicant bearing her own costs.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 9<sup>TH</sup> DAY OF MAY 2024.**



**HON. A. Y. KOROSS**

**JUDGE**

Ruling delivered in open court virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Applicant

Miss Ohayo for the Respondent

Court assistant: Ishmael Orwa

