



Sang (Suing as the Legal Representative of the Estate of Kipsang Misoi - Deceased) & 2 others v Bengat (Environment and Land Appeal E006 of 2023) [2024] KEELC 3835 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3835 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

LA OMOLLO, J

MAY 9, 2024

BETWEEN

SAMWEL SANG (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIPSANG MISOI - DECEASED) 1ST APPELLANT

REGINA CHEROTICH CHEPKWONY 2ND APPELLANT

PAUL KIPLANGAT MUTAI 3RD APPELLANT

AND

NELSON BENGAT RESPONDENT

RULING

Introduction.

1. This ruling is in respect of the Appellants/Applicants Notice of Motion application dated 27th November, 2023. The said application is expressed to be brought under order 50 Rules 6, 22 & 25, Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act* and Articles 50 and 159 of *the Constitution* of Kenya.
2. The application is filed under certificate of urgency and seeks the following orders;
 - a. Spent.
 - b. That this Honourable Court be pleased to grant an order that the Memorandum of Appeal lodged on 27th November, 2023 without leave, be deemed to have been duly filed.



- c. That in the alternative and absolutely without prejudice to prayer (ii) above, this Honourable Court be pleased to grant the Applicants leave to file appeal out of time against the ruling and order of the subordinate court delivered on 18th October, 2023.
 - d. Spent.
 - e. That there be stay of execution of the judgement and decree of the subordinate court issued in Kericho CM ELC Cause No. E003 of 2022; pending the hearing and determination of the Applicants' appeal.
 - f. That the necessary directions do issue.
3. The application is based on the grounds on its face and the supporting affidavit of Reginah Cherotich Chepkwony the 2nd Appellant/Applicant sworn on 27th November, 2023.

Factual Background.

4. The Appellants/Applicants filed the Memorandum of Appeal dated 27th November, 2023 appealing from the ruling and order of Hon. F.M Nyakundi PM delivered in Kericho CM ELC No. E003 of 2022 delivered on 18th October, 2023.
5. The grounds of Appeal are as follows;
- a. That the Learned Trial Magistrate erred in law and in fact in failing to find that the ex parte Judgment and Decree delivered on 13th May, 2022 was highly prejudicial to the Appellants who had not participated in the proceedings leading to it and, therefore unnecessarily curtailed their right to be heard when he declined their application dated 7 March, 2023.
 - b. That the Learned Trial Magistrate erred in law and in fact in failing to exercise his discretion judiciously in determining the Application dated 7th March, 2023 and in doing so failed to appreciate that he condemned the Appellants unheard despite their annexed Defence that raised triable issues.
 - c. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellants were entitled to, not only enjoy their constitutional right to be heard but to also have it protected.
 - d. That the Learned Trial Magistrate erred in law and in fact in holding that the Appellants chose not to participate in the proceedings whereas there was no such express and/or implied intention by the Appellants.
 - e. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellants application dated 7th March, 2023, seeking to set aside the impugned judgment delivered on 13th May, 2022 thus driving the Appellants' from the seat of justice.
 - f. That the learned trial magistrate erred in law and in fact in failing to analyze the evidence tendered by the parties herein.
 - g. That the Learned Trial Magistrate erred in law by allowing the Respondent's claim as prayed and thus in essence awarding the Respondent remedies that were not legally available.
 - h. That the Learned Trial Magistrate in delivering the impugned judgment failed to appreciate and take into account the glaring discrepancies in the purported sale agreement and irregularities in transmission and subdivision of the suit property.



- i. That the Learned Trial Magistrate erred in law and in fact in that he totally failed to take into account the Appellants' case and placed undue weight on the Respondent's case.
6. The Appellants/Applicants pray that this court sets aside the ruling and order of the subordinate court with costs to them.
7. The application under consideration first came up for hearing on 27th November, 2023 when prayer no. (iv) was granted. Prayer (iv) is as follows;

That there be a stay of execution of the Judgement and decree of the subordinate court issued in Kericho C.M ELC cause No. E003 OF 2022; pending the hearing and determination of this application.
8. On 31st January, 2024 the court gave directions that the application be disposed off by way of written submissions and on 9th April, 2024 the application was reserved for ruling.

The Appellants/Applicants Contention.

9. The 2nd Appellant/Applicant contends that she has the authority of the 1st and 3rd Appellants/Applicants to swear the affidavit.
10. The 2nd Appellant/Applicant also contends that she is the widow of Kipsang Arap Misoi (deceased) who was the registered owner of land parcel No. Kericho/Kebeneti/2599.
11. The 2nd Appellant/Applicant further contends that she together with her family have been in occupation of the suit property and that her deceased husband had sold 0.12 Ha of the suit property to the 3rd Appellant/Applicant herein.
12. It is the 2nd Appellant/Applicant's contention that the 3rd Appellant/Applicant has always been in possession of his portion of the suit property.
13. It is also the 2nd Appellant/Applicant's contention that on 24th February, 2023 a surveyor accompanied by police officers and the Respondent herein descended on the suit property and started surveying the same.
14. It is further the 2nd Appellant/Applicant's contention that upon inquiry, the surveyor showed them a court order issued in Kericho CM ELC no. 3 of 2022.
15. The 2nd Appellant/Applicant contends that since the 1st Appellant/Applicant and herself were illiterate, they sought interpretation and were informed that an ex parte judgement had been entered against them in default of appearance in the said case.
16. The 2nd Appellant/Applicant also contends that she was advised by her advocates on record that the moment she received the summons to enter appearance, she should have taken steps to enter appearance and defend herself.
17. The 2nd Appellant/Applicant further contends that her advocates on record advised her that the process of transmission of the suit property from the name of the deceased to her name and that of the 3rd Appellant/Applicant was irregular.
18. It is the 2nd Appellant/Applicant's contention that in ignorance of the legal process, she had approached a land registrar by the name Grace seeking for legal advice on the transmission process. The said land registrar asked for Kshs. 120,000/= and effected the transfer without following the due process.



19. It is the 2nd Appellant/Applicant's contention that on 7th March, 2023 she filed an application seeking to set aside the ex parte judgment.
20. It is also the 2nd Appellant/Applicant's contention that attached to the application dated 7th March, 2023 was a draft defence which she stated raised triable issues and that the learned trial magistrate dismissed the said application vide the ruling delivered on 18th October, 2023.
21. It is further the 2nd Appellant/Applicant's contention that she was aggrieved by the said ruling and after obtaining a copy of the same, requested for certified copies of the proceedings and judgement for purposes of filing an appeal.
22. The 2nd Appellant/Applicant contends that they were advised that an appeal to this court from the ruling delivered on 18th October, 2023 lay as a matter of right and they had thirty days within which to appeal.
23. The 2nd Appellant/Applicant also contends that they have been advised that in cases where the thirty days have lapsed, leave must be sought.
24. The 2nd Appellant/Applicant further contends that the thirty days lapsed as they were following up on the issuance of certified proceedings and judgement thus necessitating the present application.
25. It is the 2nd Appellant/Applicant's contention that their intended appeal is arguable and it is only fair and just that this court grants them leave to appeal out of time and deem their Memorandum of Appeal to be properly on record or in the alternative, they be granted leave to lodge the appeal out of time.
26. It is also the 2nd Appellant/Applicant's contention that they have an arguable appeal as their defence raises several triable issues which the trial court properly addressing itself, should have allowed their application, set aside the impugned judgement for the suit to be heard on its merits.
27. It is further the 2nd Appellant/Applicant's contention that the impugned judgement should not be allowed to stand as the Learned Trial Magistrate failed to consider the discrepancies in the purported sale agreement and irregularities in transmission and subdivision of the suit property.
28. The 2nd Appellant/Applicant contends that the Respondent has already set in motion the process of execution of the said ex parte judgement and decree and has 1.5 acres of the suit property registered in his name.
29. The 2nd Appellant/Applicant also contends that unless the orders sought are granted, the Respondent may proceed and dispose of the said parcel to third parties thereby rendering their appeal nugatory.
30. The 2nd Appellant/Applicant further contends that she continues to suffer substantial loss as the excision of her land has left her with very little land that cannot sustain her and her family.
31. It is the 2nd Appellant/Applicant's contention that she is willing to deposit in court the title deed to the suit property as security for due performance of the decree pending the hearing and determination of the Appeal.
32. She ends her deposition by stating that she brought the application in the interest of justice and without unreasonable delay.

The Respondent's Response.

33. In response to the application, the Respondent filed a Replying Affidavit sworn on 1st March, 2024.



34. He deposes that the Appellants/Applicants take court processes for granted and have no respect which has affected him immensely.
35. He also deposes that the Appellants/Applicants are not honest as they concealed the genesis of the dispute giving rise to the instant application.
36. He further deposes that in a Kericho High Court Succession cause, the Appellants/Applicants intentionally declined to attend court on several occasions forcing the court to direct the Officer Commanding Sondu Police Station to arrest the 1st Appellant/Applicant to attend court.
37. It is his deposition that upon his arrest and production, the court directed him to produce some documents but he declined to do so and instead went into hiding.
38. It is also his deposition that after the 1st Appellant/Applicant went into hiding, he was forced to file Kericho CM ELC Case No. E003 of 2022 against the Appellants/Applicants herein. Despite being served, they failed to enter appearance and judgement was entered against them.
39. It is further his deposition that the County Surveyor Kericho together with the Officer Commanding Police Station Sondu executed the said judgement.
40. He deposes that the Appellants/Applicants were duly served with all the court processes and orders. The execution is already complete as he has fenced his portion and taken possession which is not disputed by the Appellants/Applicants.
41. He also deposes that the Appellants/Applicants confirmed that they disregarded court processes intentionally and therefore the court cannot assist them.
42. He further deposes that the Appellants/Applicants admit that they committed an illegality in causing sub division and registration of new titles which have now been cancelled and the property reverted into the deceased's name.
43. It is his deposition that the Appellants/Applicants have not impeached the subject land sale agreement.
44. It is also his deposition that he is advised by his advocates on record that the Appellants'/Applicants' application has not satisfied the requirement of granting a stay and what they are seeking to stay has already taken place.
45. He ends his deposition by stating that the Appellants/Applicants having admitted to wrong doing, orders of stay and hearing will not be of any use.

Issues for Determination.

46. The Appellants/Applicants filed their submissions on 5th March, 2024 while the Respondent filed his submissions on 9th April, 2024.
47. The Appellants/Applicants in their submissions submit on whether they are entitled to leave to have the present appeal deemed as duly filed or in the alternative be allowed to appeal out of time.
48. The Appellants/Applicants rely on Section 76G of the *Civil Procedure Act*, the judicial authority of Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR and reiterate that after they became aware of the ex parte judgement delivered by the court on 13th May, 2022 they filed an application to set aside the said judgement on 7th March, 2023.



49. The Appellants/Applicants submit that the Learned Trial Magistrate in his ruling delivered on 18th October, 2023 dismissed their application and they requested for a copy of the ruling and certified proceedings which they have never been supplied with to date.
50. The Appellants/Applicants also submit that in the process of following up on the issuance of the same, thirty days lapsed thereby necessitating the filing of the present application.
51. The Appellants/Applicants further submit that they filed the present application expeditiously in order to avert a situation of being condemned unheard despite having an arguable appeal.
52. The Appellants/Applicants rely on Elisha Jaboya vs Kennedy Odhiambo Nyaoro [2021]eKLR, Stecol Corporation Limited v Susan Awuor Mudemb [2021]eKLR and submit that the delay in filing the appeal was not inordinate.
53. The Appellants/Applicants submit that they have an arguable appeal which they seek to argue fully and rely on Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR.
54. The Appellants/Applicants also submit that the only prejudice the Respondent is likely to suffer is the delay in enjoying the fruits of the impugned judgement which prejudice is lower than that which they will suffer if the application is declined.
55. The Appellants/Applicants rely on Francis Likhabila vs Barclays Bank of Kenya [2020] eKLR and seek that their application be allowed as prayed.
56. The Respondent submits that the Appellants/Applicants filed their appeal out of time without seeking the court's intervention and have failed to demonstrate sufficiently why they did not file their appeal within time.
57. The Respondent also submits that the order of stay of execution has been overtaken by events as execution has already taken place which fact is also admitted by the Appellants/Applicants.
58. The Respondent further submits that the Appellants/Applicants have not demonstrated any substantial loss they are likely to suffer and further, they have also not demonstrated that they have a good defence.

Analysis and determination.

59. I have considered the application, replying affidavit and the submissions. The following issues arise for determination;
 - a. Whether the Appellants/Applicants Memorandum of Appeal lodged on 27th November, 2023 should be deemed as duly filed.
 - b. Whether an order of stay of execution of the judgement and decree issued in Kericho CM ELC Cause No. E003 of 2022 should be granted pending the hearing and determination of the appeal.
 - c. Who should bear costs of the application.

A. Whether the Appellants/Applicants should be granted leave to file the Memorandum of Appeal out of time and whether the Memorandum of Appeal lodged on 27th November, 2023 should be deemed as duly filed.

60. The Appellants/Applicants are seeking orders that their Memorandum of Appeal lodged on 27th November, 2023 be deemed as duly filed. They argue that after the learned trial magistrate delivered



his ruling, they sought for certified copies of the proceedings and ruling to enable them file the Memorandum of Appeal which they are yet to be supplied with. They also argue that the thirty days within which they were to file the Memorandum of Appeal lapsed as they were following up on the certified copies of proceedings.

61. In response, the Respondent submits that the Appellants/Applicants did not give a reasonable explanation as to the delay and seek that the said order should not be granted.

62. Section 79G of the *Civil Procedure Act* provides as follows;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

63. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from the ruling of a subordinate court to the High Court and courts of equal status is thirty days.

64. In the present matter, the ruling sought to be challenged was delivered on 18th October, 2023. It follows that any appeal challenging that decision ought to have been filed on or before 18th November, 2023. Instead, the Appellants/Applicants filed the appeal on 27th November, 2023 which was nine days late.

65. In the judicial decision of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR the court held as follows;

“15. In *Charles Karanja Kiiru Vs Charles Githinji Muigwa* [2017]eKLR where the Respondent had delayed for 41 days before filing an appeal and where the High court enlarged time to enable the respondent file an appeal out of time, the appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same, the Court of Appeal cited this court’s decision in *Wanjiru Mwangi & Another* [2015]eKLR and *APA Insurance Co. Ltd Vs Michael Kinyanjui Muturi*[2016]e KLR in dismissing the appeal.

16. I will therefore entirely rely on the above binding Court of Appeal decision in determining the merits of this application which is two pronged namely:- whether the prayer for extension of time is merited and whether this court can validate an appeal which was filed out of time.

17. Under Section 79G of the *Civil Procedure Act*:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order



Provided that 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].

18. The Court of Appeal in the above Case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine Vs Stephen Njagi Thoithi* [2014]eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

19. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.”

66. As aforementioned, the Appellants filed their memorandum of appeal nine days after the required thirty days had lapsed. The reason given for the delay was that the Appellants/Applicants had requested for a certified copy of the ruling and the proceedings and that the thirty days within which to file the appeal lapsed as they were following up on the same.

67. The Appellants/Applicants annexed to their supporting affidavit a letter dated 6th November, 2023 seeking for certified copies of the proceedings and judgement for purposes of filing an appeal.

68. The Court of Appeal in CA 71/2016 between Charles Karanja Kuru Vs Charles Githinji Muigwa (supra), was faced with a similar situation. i.e whether an appeal filed out of time can be deemed as duly filed. The superior court posed the following question:

“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule J. in the *Gerald M’Limbine Vs Joseph Kangangi* [2009]eKLR stated that:

“my understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court’s process under Section 79B.”

69. I find, therefore, that the order sought to deem an appeal already filed as duly filed are capable of being granted once the conditions for filing an appeal out of time have been met.



70. The Court of Appeal in *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others* [2015] eKLR held as follows;

“40. It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” [Emphasis Mine]

71. The applicants have stated the period of delay as being 9 days and have sufficiently explained the reason for delay. The Respondent has not adduced any evidence to demonstrate the prejudice he is likely to suffer if the said prayer is granted.

B. Whether stay of execution of the judgement and decree issued in Kericho CM ELC Cause No. E003 of 2022 should be granted pending the hearing and determination of the appeal.

72. The Appellants/Applicants are seeking for stay of execution of the judgement and decree issued in Kericho CM ELC Cause No. E003 of 2022.
73. The Respondent opposes the grant of the said stay and argues that he has already executed the said judgement.
74. The law relating to stay pending Appeal is Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows;

“(2) No order for stay of execution shall be made under sub rule (1) unless

- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

75. In *Victory Construction Vs BM (a minor suing through next friend one PMM)* [2019] eKLR, the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the



overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

76. Two things are worth noting
- a. The Appellants/Applicants are seeking for orders of stay of execution of the judgement and decree issued in Kericho CM ELC Cause No. E003 of 2022.
 - b. The Appellants/Applicants are appealing from the ruling and order issued in Kericho CM ELC Cause No. E003 of 2022 on 18th October, 2023.
77. I note that in the pleadings before this court, the Appellants/Applicants have interchangeably referred to the said ruling delivered on 18th October, 2023 as a judgement.
78. In the letter dated 6th November, 2023 annexed to the Appellants/Applicants application, they were seeking for certified copies of proceedings and judgement for purposes of lodging an appeal.
79. The appeal that has been filed is in respect of the ruling delivered on 18/10/2023. That ruling had the effect of dismissing the application that sought orders to set aside the ex parte judgment.
80. It is therefore logical to deduce that the Appellants/Applicants are seeking orders of stay of execution orders against the ruling and order issued on 18th October, 2023. It would be absurd to stay a judgment where no appeal has been lodged.
81. I am guided by Section 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya which obligates this court to administer justice without undue regard to technicalities.
82. Section 1A of the *Civil Procedure Act* provides as follows;

“ 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

83. Section 1B of the *Civil Procedure Act* provides as follows;

“ 1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—



- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

84. Section 3A of the *Civil Procedure Act* provides as follows;

“ 3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

85. In the ruling delivered on 18th October, 2023, the learned trial magistrate dismissed the Appellants/ Applicants application dated 7th March, 2023 which I have stated in preceding paragraphs was seeking orders for setting aside the ex parte judgment. An order of dismissal is a negative order which by its very nature cannot be stayed.

86. In *Joseph Muthuri & 32 others v Cooperative Bank Limited & 15 others* [2018] eKLR the court cited with approval the judicial decision of *Raymond M Omboga v Austine Pyan Maranga Kisii HCCA Number 15 of 2010* where the court expressed itself 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. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order.”

C. Who should bear costs of the application?

87. On the question of costs of the application, the general rule is that cost shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

Disposition.

88. I find that it is in the interest of justice that the Appellants/Applicants be allowed to ventilate his appeal. Consequently, the application dated 23/11/2023 is allowed in the following terms:

- a. Leave is hereby granted to the Apellants/ Applicants to file appeal out of time against the ruling and order of the subordinate court delivered on 18th October, 2023.
- b. The Memorandum of Appeal dated 27/11/2023 and lodged on 27/11/2023 without leave shall be deemed duly filed.



c. Costs of the application shall abide the outcome of the appeal.

89. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 9TH DAY OF MAY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Miruka for the Respondent

Paul Kiplangat Mutai 3rd Appellant/Applicant

Samwel Sang 1st Appellant/Applicant

Regina Cherotich Chepkwony 2nd Appellant/Applicant

Court Assistant; Mr. Joseph Makori.

