



Imoo & another v Ekabten (Environment & Land Miscellaneous Case E003 of 2023) [2024] KEELC 6574 (KLR) (7 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2023**

BN OLAO, J

OCTOBER 7, 2024

BETWEEN

REDEMPTA IGWATAI IMOO 1ST APPLICANT

ERIC IMOO BARASA 2ND APPLICANT

AND

MOSES OMUSE EKABTEN RESPONDENT

RULING

1. The Notice of Motion dated 11th May 2023 was placed before Koross J on 22nd June 2023. The Judge directed that the same be canvassed by way of written submissions.
2. The Respondent filed his submission on 28th December 2023. Prior to that, he had filed a replying affidavit dated 19th September 2023. There is no record of any submissions filed by the Applicant. I have decided to consider the application nonetheless because even when it came up for mention to-day, there was no appearance by either party.
3. The Applicants seek the following orders by their Notice of Motion dated 11th May 2023 and filed under Certificate of Urgency:
 1. That leave be granted to the Applicants to file their Memorandum of Appeal out of time.
 2. That the annexed record of appeal be deemed to have been filed and served within time.
 3. That corollary to the forgoing, the Memorandum of Appeal filed by the Appellants be deemed as properly and duly filed and served thus part of the record.
 4. That costs of this application be in the cause.

The application is premised on the provisions of Order 43 Rule 2 of the *Civil Procedure Rules*, Section 79G of the Civil Procedure Act and Article 152 (2) of the *Constitution*. It is based on the grounds set



out therein and supported by the affidavit of Gona Joyce Salama counsel for the Applicants. In the seven (7) paragraph supporting affidavit, counsel has basically deposed that the judgment of the lower Court for which leave to appeal is sought was delivered on 4th February 2009. That the Applicants are still interested in pursuing the appeal. No reasons, if any, have been proffered as to why the appeal was not filed within the 30 days period set out in Section 79G of the Civil Procedure Act.

4. The application is opposed and the Respondent has filed a replying affidavit dated 19th September 2023 in which he has deposed, inter alia, that the application dated 11th May 2023 has not been served upon him, that the Applicant is forum shopping and a similar application was filed in Civil Case No 40 of 2009 and Petition NO 2 of 2017 and is therefore res judicata. Finally, and most crucially, that the Applicants have not advanced any reasons why the appeal was not lodged in time.
5. The Respondent also filed his submissions dated 22nd December 2023.
6. I have considered the application, the rival affidavits and submissions by the Respondent.
7. It is common ground that the judgment sought to be appealed was delivered on 4th February 2009. That was 15 years ago. There is no doubt that the law has granted this Court the discretion to extend time within which an appeal can be filed to this Court from a decision of the subordinate Court. Section 79G of the Civil Procedure Act states that:

79G “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.” Emphasis mine.

In her supporting affidavit, counsel has deposed in paragraphs 3, 4 and 5 thus:

3: “That the judgment of the lower Court was entered on 4th February 2009.”

4: “That the Applicants are still interested in prosecuting their appeal.”

5: “That leave of Court is required before the Applicant files and serves the Memorandum and Record of Appeal.”

While leave of this Court is required to file an appeal outside the thirty (30) days set out in Section 79G of the Civil Procedure Act, it is clear from the proviso thereto that such leave can only be granted where “good and sufficient cause” is provided as to why the appeal was not filed within the statutory period provided in the law. It is that “good and sufficient cause” which will enable this Court to exercise its discretion in allowing the Applicant to file the appeal out of time. No such cause has been proffered to enable this Court exercise its discretion in the Applicants favour. The Respondent has rightly deposed in paragraph 9 of his replying affidavit as follows:

9: “That the Applicants have not advanced any reasons why they did not appeal the judgment since February 4th 2009.”

8. The up-shot of all the above is that the Notice of Motion dated 11th May 2023 is devoid of any merits. It is hereby dismissed with costs to the Respondent.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2024



RULING DATED, SIGNED AND DELIVERED ON THIS 7TH DAY OF OCTOBER 2024 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2024

