



REPUBLIC OF KENYA



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Korir v Chepkwony aka Kipngecher & another (Environment and Land Miscellaneous Application E001 of 2024) [2024] KEELC 6474 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6474 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2024
LA OMOLLO, J
OCTOBER 3, 2024

BETWEEN

DAVID KIPSIELE KORIR APPLICANT

AND

SAMWEL KIPKOSKE CHEPKWONY AKA KIPNGECHER .. 1ST RESPONDENT

RICHARD KIPRONO TOGOM (BALIACH) 2ND RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated February 8, 2024. The said application is expressed to be brought under Order 51 Rule 15 of the [Civil Procedure Rules](#), Sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#) and Articles 159 (2)(d) & 48 of the [Constitution](#) of Kenya.
2. The application seeks the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to grant the Applicant leave to appeal out of time against the judgement delivered by Hon. B. Omwansa in Sotik Environment and Land Case Number 1 of 2018 on the 31st July 2019.
 - c. That this Honourable Court be pleased to issue an order for stay of execution of the judgement delivered in Sotik Environment and Land Case Number 1 of 2018 on the 31st July 2019 pending the hearing and determination of the intended appeal.
 - d. That the Honourable Court be pleased to issue a temporary stay of proceedings in Sotik ELC cause 1A of 2018 and/or Sotik ELC Case Number 1 of 2018 between the Applicant and the Respondents herein pending the hearing and determination of the intended appeal.



- e. That the Honourable Court do issue any other directions or orders as will further the cause of justice.
 - f. That the costs of the application be provided for.
3. The application is supported by the grounds on its face and the supporting affidavit of one David Kipsiele Korir sworn on 8th February, 2024.

Factual Background.

4. The application under consideration first came up for hearing on 13th February, 2024 when the Court directed that it be served upon the Respondent.
5. On 24th April, 2024 the Court gave directions that the application be canvassed by way of written submissions. On 19th June, 2024 the application was reserved for ruling.

The Applicant's Contention.

6. The Applicant contends that he sued the Respondents herein in Sotik ELC case No. 1 of 2018 and that judgement was entered against him on 31st July, 2019 by Hon. B Omwansa (PM).
7. The Applicant also contends that in the said judgement, the Trial Magistrate made a declaration that the 2nd Respondent's father was the registered owner of land parcel No. Kericho/Kipsonoi/855 and subsequently issued an injunction restraining him from trespassing onto the said parcel of land.
8. The Applicant further contends that he has always been in occupation of the suit parcel with members of his family.
9. It is his contention that upon delivery of the said judgement, he instructed his Advocates to lodge an appeal which appeal was filed in Bomet High Court as Civil Appeal No. 18 of 2019.
10. It is also his contention that the High Court at Bomet noted that there were errors in the lower Court file and issued an order on 22nd July, 2021 that the lower Court file be returned to Sotik Law Courts and a date be taken after the file has been returned.
11. It is further his contention that he filed an application seeking stay orders which application was placed before Hon. Lady Justice G. Ngenye and she gave directions that the matter be mentioned before the presiding Judge Bomet on 24th January, 2022.
12. He contends that by a consent entered on 9th February, 2022 the parties agreed that interim stay orders be extended until the appeal is heard and determined.
13. He also contends that the parties entered into another consent that the matter be transferred to Kericho Environment and Land Court. The matter was given case No. ELCA No. 8 of 2022 upon transfer.
14. He further contends that upon the said transfer, the Respondents herein filed a preliminary objection challenging the jurisdiction of this Court to entertain the said appeal as it had been filed in a Court that lacked jurisdiction to entertain appeals touching on land matters.
15. It is his contention that on 23rd November, 2023, the Court delivered a ruling in Kericho ELCA No. 8 of 2022 where the preliminary objection was allowed and the appeal dismissed.



16. It is also his contention that as a result, he delayed in lodging an appeal before this Court and that the said delay was as a result of the mistake of counsel.
17. He contends that he filed an appeal within the stipulated time but the same was erroneously filed in a Court that lacked the requisite jurisdiction.
18. He also contends that he could not file a separate appeal against the said decision as the same would have been res judicata should it have been filed before the initial appeal is heard and determined.
19. He further contends that on 1st February, 2024 the Respondents filed an application before the trial Court seeking for eviction orders and an order directing the OCS Sotik Police Station to execute the eviction.
20. It is his contention that the said application was set for mention on 20th February, 2024.
21. It is also his contention that he is apprehensive that he might be evicted from the suit parcel of land as per the judgement delivered by the Learned Trial Magistrate despite having a meritorious appeal.
22. It is further his contention that it is in the interest of justice that he be allowed to file an appeal and stay orders be issued pending the hearing and determination of the said appeal.
23. He ends his deposition by stating that the Respondents will not be prejudiced in any way if the orders sought are granted.

Respondents Response.

24. The Respondents filed a Replying Affidavit sworn on 4th March, 2024 by one Samwel Kipkoske Chepkwony in response to the Applicant's application.
25. He deposes that the Learned Trial Magistrate delivered judgment in their favour and the Applicant being dissatisfied with the said judgement filed an appeal before the High Court at Bomet which appeal was later transferred to the Environment and Land Court at Kericho.
26. He also deposes that since the Court where the appeal was initially filed did not have jurisdiction, the Respondents filed a preliminary objection which succeeded and the appeal was struck out. The ruling was delivered in ELC Appeal No. 8 of 2022.
27. He further deposes that the present application is fatally defective as the Applicant has not met the requisite conditions for stay pending the hearing and determination of an appeal.
28. It is his deposition that the Applicant has not annexed a draft Memorandum of Appeal to enable the Court determine whether the appeal is arguable and whether it raises triable issues.
29. It is also his deposition that he is advised by his Advocates on record that in the absence of the draft Memorandum of Appeal, the Court cannot decipher if the Applicant's appeal raises triable issues.
30. It is further his deposition that the purported draft Memorandum of Appeal annexed by the Applicant was the basis for the dismissal of the impugned suit.
31. He deposes that the said draft Memorandum of Appeal was filed in a Court which did not have jurisdiction as was held by this Court in its ruling delivered in ELC Appeal No. 8 of 2022.
32. He also deposes that the Applicant has not furnished any security as stipulated by law.
33. He further deposes that the consent referred to by the Applicant was not executed and that it is unfortunate that it was not endorsed before the Honourable Court.



34. It is his deposition that the said consent does not meet the threshold required under the *Evidence Act*.
35. It is also his deposition that it is an abuse of the Court process to file an unexecuted consent to prove transfer of jurisdiction and yet the law is clear that jurisdiction cannot be conferred by parties.
36. It is further his deposition that even if the Applicant has explained the occasioned delay, the said explanation is not sufficient.
37. He deposes that the Applicant has always been represented by counsel and therefore his argument that mistakes of counsel should not be visited upon him is not adequate.
38. He also deposes that Counsel is seized with knowledge of the right forum to file a matter and even though the Respondents recognize the plight of the Applicant, he should suffer from his own misgivings.
39. He further deposes that litigation should come to an end and litigants be allowed to enjoy the fruits of their judgement.
40. It is his deposition that the Applicant's application dated 3rd January, 2022 was an abuse of the Court Process as it had no basis in law.
41. It is also his deposition that he is advised by his Advocates on record that if a Court does not have jurisdiction, it should down its tools. It is on this basis that the Applicant's application dated 3rd January, 2022 was dismissed with costs.
42. It is further his deposition that a party who comes before the Court while relying on the doctrines of equity must come with clean hands.
43. He deposes that the first limb of the Applicant's application is premised upon the Court's discretionary powers which need to be exercised judiciously.
44. He also deposes that he is advised by his advocates on record that the order issued on 18th February, 2022 was made contrary to the Provisions of Article 162 (2) of the *Constitution* of Kenya of Kenya, Section 13 of the *Environment and Land Court Act* and Section 18 of the *Civil Procedure Act*.
45. He further deposes that the Court should refer to paragraphs 6, 7 & 8 of the ruling delivered on 23rd November, 2023.
46. It is his deposition that the guiding principles for granting an order of stay of execution pending appeal are provide for under Order 42 Rule 6(2) of the *Civil Procedure Rules*.
47. It is also his deposition that in the unfortunate event that the Applicant's appeal succeeds, the Applicant has not demonstrated that the Respondents are paupers who do not have the capability to 'reinstate' the Applicant.
48. It is further his deposition that he has been advised by his Advocates on record that a litigant cannot be impeded from enjoying the fruits of his judgement.
49. He deposes that it is not enough for the Applicant to put forward assertions of substantial loss. The Applicant has not shown empirical, or documentary evidence to support the contention of substantial loss.
50. He ends his deposition by stating that this Honourable Court should dismiss the Applicant's application with costs.



Issues for determination.

51. The Respondents filed their submissions on 23rd May, 2024 while the Applicant did not file any submissions.
52. The Respondents identify the following issues for determination;
 - a. Whether the Applicant should be granted leave to appeal out of time.
 - b. Whether this Honourable Court should issue an order for stay of execution of judgement.
 - c. Whether this Honourable Court should stay proceedings in the lower Court file.
53. With regard to issue (a), the Respondents rely on Section 79G of the *Civil Procedure Act*, the judicial decision of *Omar Shurie v Marian Rashe Yafar* (Civil Application No. 107 of 2020) UR and submit that judgement in the subordinate Court was delivered on 31st July, 2019.
54. The Respondents also submit that the Applicant filed an appeal in Bomet High Court which appeal was struck out as the High Court did not have jurisdiction to hear and determine it.
55. The Respondents further submit that the Applicant has always been represented by Counsel who are well versed in law.
56. It is the Respondents submissions that even though the Applicant alleges indolence on the part of his counsel, the said allegations are not sufficient reason for the delay.
57. The Respondents reiterate that the Applicant did not annex a copy of a draft Memorandum of Appeal and he has therefore failed to demonstrate that he has an arguable appeal which raises triable issues with high chances of success to enable this Court to grant him an extension of time.
58. The Respondents submit that they should be allowed to enjoy the fruits of their judgement with no further impediments. The Respondents rely on the judicial decision of *Nicholas Kiptoo Arap Korir Salat v IEBC* [2014] eKLR in support of their arguments.
59. With regard to issue (b), the Respondents rely on Order 42 Rule 6 of the *Civil Procedure Rules, Butt v Rent Restriction Tribunal* [1982] eKLR and submit that the Applicant only filed the present application after they sought to evict him from the suit property. Therefore, the application was not filed timeously.
60. It is the Respondents submissions that the Applicant has not demonstrated whether the appeal would be rendered nugatory if orders of stay of execution are not granted.
61. It is also the Respondents submissions that the Applicant has not shown any evidence to demonstrate substantial loss. The Respondents rely on *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012]eKLR and submit that the Applicant has already been evicted from the suit property and therefore his application has been overtaken by events.
62. The Respondents also rely on *RWW v EKW* [2019] eKLR and submit that the Applicant has not met the requirements of Order 42 Rule 6 (2) (a) & (b) of the *Civil Procedure Rules* and his application should be dismissed.

Analysis and determination.

63. Having considered the application, the response thereto and the Respondents submissions, my view is that the following issues arise for determination:



- a. Whether the Applicant should be granted leave to appeal out of time.
- b. Whether an order of stay of execution of the judgement delivered in Sotik ELC Case No. 1 of 2018 should be granted pending the hearing and determination of the appeal.
- c. Whether an order of stay of proceedings should be granted staying the proceedings in Sotik ELC Case No. 1 of 2018 pending the hearing and determination of the appeal.

A. Whether the Applicant should be granted leave to appeal out of time.

64. The Applicant is seeking leave to appeal out of time. He submits that after the Learned Trial Magistrate delivered his judgement on 31st July, 2019, his then Advocates on record filed an appeal before the High Court at Bomet.
65. The Applicant also argues that the said appeal was transferred to the Environment and Land Court at Kericho and was later struck out for being filed before a Court that did not have jurisdiction.
66. The Applicant further argues that the filing of the appeal before the High Court which did not have jurisdiction was a mistake of counsel that should not be visited upon him.
67. In response, the Respondents admit that after the Learned Trial Magistrate delivered his judgement, an appeal was filed before the High Court at Bomet before it was transferred to this Court and later struck out.
68. The Respondents argue that the Applicant has always been represented by Counsel who are aware of the provisions of the law and it is therefore not proper for the Applicant to blame his Advocates.
69. 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.”
70. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from the ruling or judgement of a subordinate Court to the High Court and Courts of equal status is thirty days.
71. In the present matter, it is not disputed that the Learned Trial Magistrate delivered his judgement on 31st July, 2019. It is also not disputed that the Applicant filed an appeal from the said judgement on 27th August, 2019 before the High Court at Bomet.
72. It is further not disputed that the said appeal was transferred to this Court before it was struck out on 23rd November, 2023.
73. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR held as follows on the discretion of the Court to extend time;

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.



This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

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.”

74. In the judicial decision of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal stated as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

75. As stated in the preceding paragraphs, the Learned Trial Magistrate delivered judgement on 31st July, 2019. It follows that any appeal challenging that decision ought to have been filed by 31st August, 2019. The Applicant filed an appeal on 27th August, 2019 but it was filed before a Court that did not have jurisdiction.

76. The said appeal was transferred to this Court before it was struck out on 23rd November, 2023.

77. The Applicant filed the application under consideration on 12th February, 2024 which was four years and six months after the Learned Trial Magistrate delivered his judgement and eighty days after the appeal was struck out.

78. The Applicant blames his Advocates for filing the appeal before the High Court at Bomet which did not have the requisite jurisdiction.

79. In the judicial decision of *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR the Court of Appeal held as follows;

“From past decisions of this Court, it is without doubt that Courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic.



While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the Court in which he practices and even to the other side.”[Emphasis Mine]

80. In the judicial decision of *Almer Farm Limited v National Land Commission & 2 others (Sued as Executrix of the estate of the late David Rono)* [2021] eKLR the Court held as follows;

“27. This Court has observed that the Applicant herein was represented by counsel all through. Nevertheless, it decided to file an application for Judicial Review instead of an appeal. The Applicant deponed and submitted that the procedure (of Judicial Review Proceedings) adopted by counsel was an inadvertent error. It submitted that the error arose due to its counsel mistakenly using “...a similar procedure us used (sic) in appeals against the decisions of the Public Procurement Oversight Board.” What I understand the Applicant to be saying is that learned counsel did not know the law to use. This is sad! I find that deposition ingenious but of no avail to the Applicant. I remind the Applicant the old maxim: ignorantia juris non excusat. Since the shareholders of the Applicant may be laymen in the legal circles, I interpret the maxim for them: ignorance of the law is not an excuse. Even then, there is no single disposition from learned counsel that that was the position. Learned counsel could not have dared to say so...

30. In essence the question the Court is posing here, in its mind as it considers fact that Mr. Yego swore to is, was it not clear all along from early 2019 that the Applicant should have pursued an Appeal but it chose not to? This conduct of the Applicant is what I weigh against exercising my discretion as I consider the four conditions that the Court of Appeal gave in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. The reason given by the Applicants for delay in moving this Court is not satisfactory. Moreover, the delay is inexcusable in the circumstances. I am convinced that granting the Application herein will prejudice the Respondents who have been dragged through litigation for many years...

32. I associate myself to the sentiments of learned Judge Justice Wambuzi as he then was who expressed himself as follows in the case of *AO Menya v Mcreas Ltd* [1978] eKLR where the Court held that :

“doing the best I can in the circumstances, I find it difficult to say that sufficient reason has been shown to justify extension of time. In the words of Windham JA, “there was a lack of diligence” on the part of the Advocates and their clerk in taking steps to see that the notice of appeal was filed in time. I express my sympathy to the Applicant who indicated his desire to appeal at the earliest moment given him, but if a mistake of clear law or of fact without more on the part of the Advocate or his clerk will not constitute sufficient reason I fail to see how inadvertence on the part of the either or both as in this case, can. Furthermore, there is no element of blame on the part of the Court as in some of the cases referred to in this ruling. The application is refused, with costs.”



33. The Applicant laid blame on its Advocate who took the wrong path for the delay which this Court has found to be inexcusable. This Court is of the view that the Applicant is now cherry picking with the Court process with the hope of finding justice. Justice has procedural aspects which need to be followed. These are given by law and regulations or rules made thereunder. These ought not to be ignored or taken lightly. By the applicant's conduct of deliberately skipping the necessary step which is mandatory amounts to abuse of process of the Court and overlooking such in order to grant it one more chance in Court would amount to a miscarriage of justice." [Emphasis Mine]

81. The Applicant blames his Counsel for the filing of the appeal before the High Court which did not have jurisdiction. As was held in *Almer Farm Limited v National Land Commission & 2 others (Sued as Executrix of the estate of the late David Rono)* (*supra*) cited above, blaming Counsel for taking the wrong path for the delay in filing an appeal is inexcusable.

82. It is important to note that the Applicant's appeal was struck out on 23rd November, 2023 and the present application was filed on 12th February, 2024, A period of about eighty days lapsed before the Applicant filed the present application. It is worth mentioning that no explanation has been given by the Applicant for the delay in seeking leave to appeal out of time.

83. It is my view that in the present case, the reasons advanced for the delay are insufficient. Further the period taken between the appeal being struck out and filing the present application is inordinate.

84. I find that the Applicant has not demonstrated why the Court should exercise discretion in his favour. I decline to grant orders of extension of time to file an appeal.

B. Whether an order of stay of execution of the judgement delivered in Sotik ELC Case No. 1 of 2018 should be granted pending the hearing and determination of the appeal.

85. Given my finding on issue (a) above, It shall not be necessary to analyse and determine this question.

C. Whether an order of stay of proceedings should be granted staying the proceedings in Sotik ELC Case No. 1 of 2018 pending the hearing and determination of the appeal.

86. Similarly, Given my finding on issue (a) above, It shall not be necessary to determine this question.

D. Who shall bear the cost of this application?

87. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21).

88. 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.

89. Consequently, I find that the Applicant's Notice of Motion application dated February 8, 2024 lacks merit and is hereby dismissed with costs to the Respondents.

90. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 3RD DAY OF OCTOBER, 2024.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Leteipa for the Applicant.

Koech +for the Respondents.

Court Assistant; Mr. Joseph Makori.

