



Cheletewon v County Government of Baringo & 3 others; Damatek Builders Contractors Company Limited (Objector) (Environment & Land Case 334 of 2016) [2023] KEELC 565 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 334 OF 2016**

**JM ONYANGO, J
FEBRUARY 9, 2023**

BETWEEN

KIPYEGO CHELETEWON APPLICANT

AND

COUNTY GOVERNMENT OF BARINGO 1ST RESPONDENT

DAMATEK BUILDERS LIMITED 2ND RESPONDENT

KIBIWOT KANDIE 3RD RESPONDENT

DICKSON CHEBON 4TH RESPONDENT

AND

DAMATEK BUILDERS CONTRACTORS COMPANY LIMITED OBJECTOR

RULING

1. The Applicant moved the court by way of a notice of motion dated October 25, 2021 seeking an order for enlargement of time to lodge an appeal against the ruling of the Deputy Registrar delivered on July 14, 2021.
2. The application is based on the grounds set out on the face of the application and the Applicant's supporting affidavit sworn on the 25th October, 2021. In the said affidavit, he gives the main reason for the delay as the fact the he was not served with a Notice of delivery of ruling and he only got a copy of the ruling more than a month after it had been delivered by which time the period for filing the appeal had lapsed.
3. The application was strenuously opposed by the Objector through the Replying Affidavit of Zachary Kibet Birgen sworn on the 8th November, 2021 in which he depones that the Applicant was aware of



the ruling which was delivered on 14th July, 2021 and was subsequently served with a taxation notice soon after delivery of the ruling. He therefore contends that the Applicant has no valid explanation for the delay in filing the appeal. He further deponed that the 1st Respondent had already settled the decretal sum and therefore the appeal would serve no useful purpose.

4. The application was canvassed by way of written submissions and both parties filed their submissions.

Applicant's Submissions

5. Learned counsel for the Applicant submitted that all that the Applicant was required to do was to give a satisfactory explanation for the delay in filing the appeal. He relied on the case of *Odera Obar & Co Advocates v Acquva Agencies Limited* (2021) eKLR where the court held as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that the delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”.

6. Counsel further submitted that they were not served with a notice of delivery of ruling as it was not delivered on the 14.7.2021 when it was first scheduled and this resulted in a failure of justice. He relied on the case of *Ngoso General Contractors Ltd v Jacob Gichunge* (2005)eKLR.
7. He finally submitted that the Applicant has an arguable appeal with high chances of success and unless the same is heard the Applicant would suffer irreparable harm and a gross miscarriage of justice.

Objector's Submissions

8. On his part, counsel for objector submitted that the entire application was incompetent, devoid of merit and an abuse of the court process. He further submitted that the ruling was delivered on 14th July, 2021 in the presence of both counsel. Copies of the ruling were subsequently sent to advocates for the parties via email on 3rd September, 2021. In the meantime, the Objector filed a Party and Party Bill of costs on 19.8.2021 and served the Applicant with a taxation notice. It was his contention that the Applicant was all along aware of the ruling but he failed to lodge his appeal on time. He submitted that the application for enlargement of time ought to have been made before the Deputy Registrar.
9. Relying on the cases of *Elkana Kipruto Taallam v Moi University* (2020) eKLR, counsel argued that the decision whether or not to extend time was discretionary and the court takes into account the length of delay and the reason for the delay as well as the chances of the appeal succeeding. He also relied on the case of *Nick Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR where the Supreme Court set down the principles for granting an application for enlargement of time. He concluded that the delay was inexcusable as the Applicant had not been diligent enough to get a copy of the ruling after it was delivered.

Analysis and Determination

10. The only issue for determination is whether the Applicant ought to be granted leave to lodge his appeal out of time.



11. The principles for granting an application for leave to appeal out of time are now well settled. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR, it was held that:

“... 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.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay;”

12. Applying by the above-mentioned principles to the instant case, I am not persuaded that the applicant has given a satisfactory explanation for the delay in filing the appeal. Contrary to the applicant’s assertion that the ruling was delivered on 3.9.21, the court record shows that it was delivered on 14.7.21 in the presence of both counsel. Granted that a soft copy of the ruling was sent on 3.9.21. there is no indication that Applicant’s counsel made any effort to get a copy of the ruling soon after it was delivered. The instant application was filed on 25. 10 21 which is more than 3 months after delivery of the ruling without sufficient explanation.

13. In the premises, I decline to exercise my discretion in favour of the Applicant. The application lacks merit and it is hereby dismissed with costs to the Objector.

DATED SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF FEBRUARY, 2023.

J.M ONYANGO

JUDGE.

