



**RJG (A person of unsound mind Suing through Next Friend and son ENK)
& another v GAG (Environment and Land Miscellaneous Application
E024 of 2022) [2023] KEELC 567 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E024 OF 2022
DO OHUNGO, J
FEBRUARY 7, 2023**

BETWEEN

**RJG (A PERSON OF UNSOUND MIND SUING THROUGH NEXT FRIEND
AND SON ENK) 1ST APPLICANT**

ENK 2ND APPLICANT

AND

GAG RESPONDENT

RULING

1. By Notice of Motion dated July 12, 2022, the applicants seek the following orders:
 1. [Spent]
 2. That this Honourable court be pleased to grant leave to the applicant to file an appeal out of time.
 3. [Spent]
 4. That costs of this application be in the cause.

2. The application is supported by an affidavit sworn by ENK who deposed that the respondent sued the applicants in Kakamega MCL&E No. 194 of 2018 and that judgment was delivered in the said case on September 10, 2019. That the applicants were not informed by their then advocates on record D.S.G Mango & Co Advocates of the outcome until March 2021 and that they paid the advocate’s professional fees for the appeal on April 7, 2021. That the advocates failed to file the appeal on time despite promising them that he had filed the appeal and that a hearing date would soon be given. That the applicant only learnt that the former advocates never filed the appeal when auctioneers visited them



on July 8, 2022. He further deposed that the advocate's professional misconduct should not be visited on them, that they have an arguable appeal and that no prejudice will be occasioned to the respondent if the orders sought are granted.

3. The respondent opposed the application through a replying affidavit in which he deposed that the applicant is guilty of inordinate delay and that the judgment was delivered on September 10, 2019 in the presence of counsels for all parties. That the applicants' allegations that they were not informed of the judgment by their counsel is unsupported, that the annexed receipt does not state that the fees were for filing an appeal and that the applicants cannot therefore allege professional misconduct against the advocate. He further deposed that the applicants have not disclosed whether they applied for proceedings and that the application is thus an afterthought.
4. The application was canvassed through written submissions which both sides duly filed. The applicants relied on *First American Bank of Kenya Ltd -vs- Gulab P. Sha and 2 others*, Nairobi (Milimani) HCCC No. 2355 of 2020 (2002) 1 EA 65 and submitted that the delay was caused by their former advocates. Relying on the provisions of Article 159 (2) (d) of the *Constitution*, the applicants argued that justice should be administered without regard to technicalities and that the application should be allowed since they have a constitutional right of appeal.
5. The respondent submitted that the delay of almost three years is inordinate and further that the applicants have not demonstrated seriousness to pursue the intended appeal since they have not shown that they applied for certified copies of proceedings and judgment. He relied on *Evans Mungasia Annob v Sierra Flora Limited* [2022] eKLR. Arguing that the applicants have not demonstrated an arguable appeal, the respondent urged the court to dismiss the application with costs.
6. I have considered the application and the material placed before the court. The sole issue for determination is whether leave to file an appeal out of time should be granted.
7. The guiding principles in an application such as the present one were identified by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

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 under-lying 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; ...



8. Pursuant to Section 16A (1) of the *Environment and Land Court Act*, 2011, an appeal from the Subordinate Court to this court is to be filed within 30 days of delivery of the judgment or ruling. Further, Section 16A (2) empowers the court to admit an appeal out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. The judgment sought to be appealed against was delivered on September 10, 2019 while the present application was filed on July 12, 2022. There has thus been a delay of two years and eight months.
9. The applicants contend that the delay was occasioned by their former advocate's failure to act on instructions. I note however that beyond the allegation, nothing has been placed on record to show that the applicants ever made such an accusation directly and formally to the concerned advocate. It is all too convenient to blame the advocate in these proceedings where he is not a party and has not been offered an opportunity to respond to such serious allegations. Even assuming the allegation of inaction on the part of the advocate was true, such inaction by counsel or refusal to act cannot be termed a mistake. See *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR. Recourse for such lie elsewhere, in proceedings between the client and the counsel.
10. Enlargement of time is a matter of judicial discretion which is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. It is not sufficient to blame previous counsel on record without an explanation as to action taken by the applicants to show that they did not condone or collude in the delay. The applicants have failed to show tangible steps taken by them in following the matter. There is uncontested evidence on record that suit was defended and that the judgment was delivered in the presence of counsel for both sides. In the circumstances, the reasons given for not filing the appeal on time are neither satisfactory nor sufficient. I find that the delay is inordinate and undue.
11. The applicants have not laid a basis to warrant exercise of discretion in their favour. I find no merit in Notice of Motion dated 12th July 2022 and I therefore dismiss it. No order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF FEBRUARY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The first applicant

The second applicant absent.

Mr Okali holding brief for Mr Getanda for the respondent.

Court Assistant: E. Juma

