



REPUBLIC OF KENYA



KENYA LAW
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**Siengo v Ajwala (Environment and Land Miscellaneous Application
E011 of 2022) [2023] KEELC 403 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 403 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2022
AY KOROSS, J
FEBRUARY 2, 2023**

BETWEEN

GEORGE OTIENO SIENGO APPLICANT

AND

JOSHUA OUMA AJWALA RESPONDENT

RULING

1. The application that is the subject of this ruling is a notice of motion dated 7/09/2022 where the applicant has sought the following reliefs:
 - a. The applicant be allowed to appeal out of time.
 - b. The Honourable Court do grant such further relief it deems fit.
2. The motion is supported by grounds set out on its face and on the supporting affidavit deponed by the applicant George Otieno Siengo sworn on 5/09/2022.
3. He deponed inter alia, the decree and judgment were served upon him on 3/09/2022 by an assistant chief. He worked outside the jurisdiction of the court and he had not been privy that the trial magistrate was proceeding on transfer and a hearing date had been issued.
4. Despite service, the respondent did not file any documents in opposition to the motion. Notwithstanding that the motion was unopposed, it is the duty of the court to nevertheless subject it to a merit evaluation in accord with the applicable laws and principles. When the motion came up for mention for directions on 31/10/2022, this court reserved it for ruling.
5. This court has considered the motion, grounds thereof and supporting affidavit and the single issue for determination is whether the applicant has met the threshold to warrant issuance of the orders sought.



6. The applicant who acted in person understandably did not cite any statutory or regulatory provisions on which his motion was anchored upon. Although parties are expected to guide courts on the applicable law that they seek to rely upon in support of their case, failure to cite a legal provision does not divest the court of the jurisdiction to delve into the issue in dispute or render the application incompetent. The framers of the Civil Procedure Rules must have been alive to this fact when they enacted Order 51 Rule 10 of the Civil Procedure Rules which provides as follows;

- 10. ‘Provision under which application is made to be stated [Order 51, rule 10.]
 - (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
 - (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.’

7. Within the provisions of Section 16A (1) of the Environment and Land Court Act, the period of time for filing an appeal from a judgment of the subordinate court or local tribunal to the ELC is 30 days. This provision of law is echoed in Section 79G of the Civil Procedure Act.

8. Section 16A (2) of the Environment and Land Court Act, Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules gives this court discretion to extend time to appeal and such discretion must be exercised judiciously. This Section 16A(2) states as follows;

- 16A. ‘ Appeals from subordinate
 - (1)
 - (2) 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.’

9. The date of the impugned judgement, its particulars and the court that rendered it has not been disclosed in either the application or supporting affidavit. Court orders cannot be issued in vain and it behoved upon the applicant to disclose the decision he was aggrieved against and the date of its delivery. Such disclosures assist courts in determining whether the delay was inordinate, where the decision that a party is aggrieved against emanated from and the particulars of the case; which he did not.

10. Essentially, the substance of the decision the applicant intends to appeal against is not disclosed on the face of the motion or supporting affidavit. The affidavit too does not have any annexures.

11. It is trite law that courts are bound by the pleadings of the parties. This position of law was well encapsulated in the Court of Appeal decision of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR where the court stated:

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded.... parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way”

12. Even if this court were to grant the applicant the orders sought on the face of the motion, it would be an exercise in futility because the court and decision the applicant is aggrieved against are not disclosed.



13. Though the appellant has filed a memorandum of appeal, I find it irregular and I say so because, the 1st step was for him to obtain leave of the court to file an appeal out time and the grant of such leave would be the window of opportunity for him to file such a memorandum. In the alternative, he could have applied for the said appeal to be admitted out of time. It is on this basis that I hereby expunge the memorandum of appeal from the court record.
14. In his motion, the applicant failed to attach a draft copy of his memorandum of appeal. This is a mandatory requirement. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR held as follows;

“Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time.”
15. It is my finding that the applicant’s motion is fatally defective, incompetent and a nullity and I will not hesitate but strike it out. There shall be no orders as to costs for the reason the respondent did not participate in these proceedings.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF FEBRUARY 2023.

HON. A. Y. KOROSS

JUDGE

2/02/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Plaintiff acting in person

N/A for the respondent

Court assistant: Ishmael Orwa

