



**Otieno v Wawala & another (Environment & Land Miscellaneous Case E016 of 2022) [2023] KEELC 15833 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15833 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E016 OF 2022**

**AY KOROSS, J**

**MARCH 2, 2023**

**BETWEEN**

**EVALINE AUMA OTIENO ..... APPLICANT**

**AND**

**RAYMOND OUMA WAWALA ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN OMONDI WAWALA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for consideration is the applicant's notice of motion dated November 9, 2022 in which this court has been moved pursuant to the provisions of article 159 (2)(d) of the [Constitution of Kenya](#) and sections 1A, 1B, 3A, 79G and 95 of the [Civil Procedure Act](#). She sought the following reliefs;
  - a. That the applicant be granted leave to appeal out of time against the judgment of Principal Magistrate Honourable JP Nandi in Bondo ELC Case Number E29 of 2021 given on May 18, 2022;
  - b. That the applicant be granted leave to file a memorandum of appeal out of time; and
  - c. That the costs of the application abide the outcome of the appeal.
2. The motion was based on the grounds set out on its face and on the supporting affidavit sworn by the applicant dated November 9, 2022.
3. The applicant deposed *inter alia*; aggrieved and dissatisfied with the judgment of the lower court, she sought to file an appeal. However, due to lack of funds, she was unable to secure an advocate in good time to aid her file the necessary documents. In addition, there was delay in putting all the appeal documents together. She contended the intended appeal was arguable with chances of success.
4. The motion was unopposed. However, this court is called upon to determine it on merits.



## **Applicant's Submissions**

5. Mr Oduol, counsel for the applicant, filed his written submissions dated November 28, 2022. He identified the single issue as being whether the motion was merited.
6. Counsel asserted by section 79G of the *Civil Procedure Act*, the court had the power to exercise judicial discretion and admit an appeal out of time if an applicant satisfied the court she had good and sufficient cause for not filing the appeal on time. He relied on the case of *Agip (Kenya) Limited v Highlands Tyres Limited* [2001] eKLR and the Supreme Court of Kenya decision of *County Executive of Kisumu v County Government of Kisumu & 8 others* Civil Application number 3 of 2016 where the court expressed itself as follows: -

[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The court delineated 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; and 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” ’

7. Counsel submitted the appeal was not frivolous and the respondents would have a right of reply if leave to appeal was granted. Additionally, counsel contended the applicant had a constitutional right to be heard. Counsel urged court to allow the motion.

## **Analysis and Determination**

8. I have carefully considered the motion, grounds, affidavit and submissions and the issues falling for determination are: -
  - i. Whether the applicant should be granted leave to appeal out of time.
  - ii. What orders should this court issue.
9. The legal framework for admitting an appeal out of time is governed by sections 79G and 95 of the *Civil Procedure Act* and section 16A (2) of the *Environment and Land Court Act*. These provisions of law resonate with some of the provisions of law that have been relied upon by counsel.
10. In order for an applicant to succeed in such a motion, she must demonstrate she had a good and sufficient cause for not filing the appeal in time. See section 79G. Further, this court has discretion to



enlarge such period, even though the period originally fixed or granted may have expired See section 95. Section 16A (2) of the *Environment and Land Court Act* provides as follows;

“ 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.”

11. Section 3A of the *Civil Procedure Act* donates to this court with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. However, this discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment.
12. This court is in concurrence with the decisions cited by counsel. Being guided by the provisions of law and judicial precedents which have been well articulated by counsel’s submissions, I shall now proceed to consider the merits or otherwise of the motion before me.
13. This court must first consider the length of delay. In the instant case, judgment was given on May 18, 2022 whereas this motion was filed on November 23, 2022. There was a delay for close to 6 months. In my view, this delay was not inordinate. In addition, the applicant’s reason was sufficient and plausible.
14. The applicant has availed to this court a draft memorandum of appeal. A cursory glance at the memorandum of appeal demonstrates the applicant has raised arguable grounds of appeal. In the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR the court expressed itself as follows on arguability:

"An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous."
15. This court has to balance the interests of the respondents who have a judgment in their favour against the interest of the applicant who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate her dispute, against the need to ensure timely resolution of disputes.
16. It would be in the interest of justice if the applicant was given an opportunity to ventilate her case on appeal. I find the applicant has met the criteria to warrant an order for extension of time to file an appeal.
17. Ultimately, I find that the motion is merited. It is trite law that costs follow the event and the costs of this motion shall abide the outcome of the appeal. This court makes the following disposal orders:
  - a. The applicant is hereby granted leave to appeal out of time against the decision of Hon PM JP Nandi in Bondo ELC Case Number E29 of 2021.
  - b. Applicant to file and serve a record of appeal within 30 days from today.
  - c. Lower court record to be availed to this court.
  - d. Costs shall abide the outcome of the appeal.
  - e. The file is marked as closed.

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

**HON. A. Y. KOROSS**

**JUDGE**



02/03/2023

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

Mr. Oduol for the applicant

N/A for the respondents

Court assistant: Ishmael Orwa

