



**Alal v Okello & 2 others (Environment & Land Case 4 of 2022)
[2023] KEELC 20453 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 4 OF 2022
GMA ONGONDO, J
OCTOBER 4, 2023**

BETWEEN

CHRISTOPHER OTUK ALAL APPLICANT

AND

MICHAEL ONYANGO OKELLO 1ST RESPONDENT

JOSHUA OTIENO OKELLO 2ND RESPONDENT

LAND REGISTRAR, MIGORI COUNTY 3RD RESPONDENT

RULING

1. On December 19, 2022, the applicant/plaintiff, Christopher Otuk Alal through M/S Kwanga and Company Advocates generated an application by way of a Notice of Motion dated December 8, 2022 under, inter alia, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Articles 48, 50 (1) and 162 of the Constitution of Kenya, 2010. He is seeking the following orders;
 - a. Spent
 - b. Spent
 - c. The Honourable court be pleased to extend and/or enlarge time within which the plaintiff/Applicant herein can proceed to file and/or lodge a Notice of Appeal against the Judgment herein can proceed to file and/or lodge a Notice of Appeal against the Judgment and decree of the Honourable court rendered on the 8th day of November 2022.
 - d. Consequent to prayer 1 hereinabove being granted, the annexed Draft Notice of Appeal herein be deemed as duly filed or the Plaintiff/Applicant be granted liberty to file the intended Notice of Appeal within 7 days of the granting of leave or such shorter time as the Honourable court, may deem fit, just and expedient.



- e. The Honourable court be pleased to grant an Order of Stay of Execution of the Judgment and Decree of the Honourable Court rendered on the 8th day of November 2022 together with all consequential orders, pending the hearing and determination of the Intended Appeal to the Honourable Court of Appeal.
 - f. The Honourable court be pleased to grant and/or issue such Further and/or other directions, as may be necessary, just and/or otherwise expedient, to facilitate the realization of the Intended Appeal to the Honourable Court of Appeal.
 - g. Costs of this Application do abide the outcome of intended Appeal.
2. The applicant based the application on his supporting affidavit of thirty-seven (37) paragraphs sworn on even date together with a draft Notice of Appeal marked as “COA-1” and annexed thereto alongside grounds (a) to (aa) set out on it’s face. In a nutshell, the applicant’s complaint is that he is dissatisfied with this Honourable court’s judgment delivered on November 8, 2022 and is desirous of lodging an appeal. That he obtained a copy of the judgment late via email on November 28, 2022. That the defendants/respondents are likely to dispose of the suit property, land reference number Kanyamkago/Kawere II/4506 to defeat the intended appeal and his rights and or interests over the property.
 3. It is noteworthy that the firm of Kwanga Mboya and company Advocates was granted leave to cease acting for the applicant further to an application dated May 19, 2023 and this court’s ruling rendered on June 13, 2023. As a result, the applicant appears in person in this application.
 4. The 2nd defendant/respondent through the firm of Okong’o, Wandago and Company Advocates, opposed the application by his replying affidavit of sixty-five (65) paragraphs sworn on February 27, 2023 where he implored the court to dismiss the application for want of merit with costs. He deposed in part that on November 8, 2022 immediately after the delivery of judgment, the applicant’s counsel sought for leave to appeal to the Court of Appeal and the same was granted accordingly. That nevertheless, the applicant did not lodge an appeal. That there is nothing to show that the respondents will suddenly alienate the suit property and that the application is an afterthought.
 5. The 2nd respondent further deposed that he has rights over the suit property as envisaged and provided for under sections 24, 25 and 26 of the *Land Registration Act*, 2016 (2012). Also, he deposed that the applicant has no lawful rights over the suit property which would be defeated. In paragraph 43 of the affidavit, he stated that;

“I am not interested in executing any portion of the judgment and decree except the portion awarding me the costs of this suit, there being no other portion thereof capable of execution.”
 6. This court heard the application by way of written submissions further to the orders of December 19, 2022.
 7. In his submissions dated March 24, 2023, the applicant gave the background of the matter, inter alia, judgment delivered herein, reported illness of his former counsel and bill of costs dated January 17, 2023. He delineated seven issues for determination including whether this court has the jurisdiction to grant leave sought in the application and whether he is likely to suffer substantial loss if the orders sought in the application are declined. He submitted in favour of the said orders and cited section 7 of the *Appellate Jurisdiction Act, Butt vs Rent Restriction Tribunal* (1979) eKLR and *Malcom Bell vs Daniel Toroitich Arap Moi and another* (2006) KLR, among others. To buttress the submissions.



8. By the submissions dated May 22, 2023, the 2nd defendant/respondent relied on his replying affidavit and conceded that this court has jurisdiction to grant leave to file a notice of Appeal out of time further to section 7 of the *Appellate Jurisdiction Act* Chapter 9 Laws of Kenya. That nonetheless, the court should decline the orders sought in the application as the applicant has not shown sufficient cause for granting of the same. That therefore, the 2nd respondent is a successful party. To buttress the submissions, counsel relied upon the case of *County Executive of Kisumu vs County Government of Kisumu and 8 others* (2017) eKLR and *Muringa Company Ltd vs Archdiocese of Nairobi Registered Trustees* (2020) eKLR, among other authoritative pronouncements.
9. The 1st and 3rd defendants/respondents having been served, neither responded to the application nor filed any submissions herein.
10. I have carefully considered the entire application, the 2nd defendant/respondent's replying affidavit as well as the submissions of the applicant and the 2nd respondent. Therefore, are the orders sought in the application merited?
11. The applicant contended that following the judgment and decree herein, the respondents are at liberty to alienate the suit property which shall place the same beyond his reach. Further, the applicant asserted that the delay to lodge the notice of appeal was occasioned by mistake of his counsel then on record.
12. On the other hand, the 2nd respondent contended that the applicant has not shown sufficient cause to be discerned from various considerations for the court to grant the orders sought in the application. That the applicant delayed in filing a notice of appeal and has not offered a satisfactory explanation thereof. That litigation has to come to an end as a matter of public policy.
13. In obtaining circumstances, the applicant has established that he is bound to suffer substantial loss. Indeed, mistake of counsel cannot be visited on a client as held in the case of *Shabir Din vs Ram Parkash Anand* (1955) EACA VOL 22 page 48.
14. Section 79 G of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets the timelines of lodging an appeal from the subordinate courts. By the proviso thereof, the court has the discretion to extend time of filing an appeal. This court is conscious of Order 50 of the *Civil Procedure Rules*, 2010 on time
15. There is a draft Notice of Appeal (COA-1) annexed to the applicant's affidavit. Under Order 42 (6) (4) of the *Civil Procedure Rules*, 2010, an appeal is deemed duly lodged in light of the said draft.
16. Moreover, I subscribe to the decision in the case of *Butt vs Rent Restriction Tribunal* (1979) eKLR, where it was observed;

“appellant has an undoubted right of appeal.”
17. Articles 48 and 50 (1) of the *Constitution* (supra) provide for access to justice and fair hearing respectively. Notably, the right to fair trial shall not be limited as enshrined in Article 25 (c) of the same Constitution.
18. A fair opportunity to be heard is a fundamental principle of justice; see Halsbury's Laws of England 5th Edition 2010 Volume 61 paragraph 639.
19. It must be observed that this court has the mandate to grant leave to file a notice of appeal out of time under section 7 of the *Appellate Jurisdiction Act* (supra) and the 2nd respondent has acknowledged that fact as stated in paragraph 9 hereinabove.



20. The applicant's explanation is plausible and satisfactory as held in the case of *Andrew Kiplangat Chemaringo vs Paul Kipkorir Kibet* (2018) eKLR. It is therefore, the finding of this court that the instant application is meritorious.
21. In the result, this application dated December 8, 2022, be and is hereby allowed in terms of orders 3, 4 and 5 sought therein and as set out at paragraph 1 (c), (d) and (e) hereinabove.
22. Costs of the application to abide the outcome of the prospective appeal.
23. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 4TH DAY OF OCTOBER 2023.

G. M. A ONG'ONDO

JUDGE

