



**Ogembo v Nzinga (Environment & Land Case E041 of 2022)  
[2023] KEELC 20595 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20595 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E041 OF 2022  
CK YANO, J  
OCTOBER 11, 2023**

**BETWEEN**

**JAMES ONYANA OGEMBO ..... APPLICANT**

**AND**

**CHRISTINE TAABU NZINGA ..... RESPONDENT**

**RULING**

1. Before me for determination is a notice of motion dated 9<sup>th</sup> November, 2022 and filed in court on 11<sup>th</sup> November, 2022 for leave to file an intended appeal out of time. The application is brought under Articles 50 & 159 of the Constitution of Kenya, 2010, Order 42, Order 40 Rule 1 and Order 50 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. The application is supported by the affidavit of James Onyona Ogembo, the applicant herein sworn on 9<sup>th</sup> November, 2022 wherein he avers that the reason for the delay in filing this matter is that he had already prepared the memorandum of appeal but he inadvertently filed the appeal, within time, at the civil registry instead of the Environment and Land court registry. The applicant states that that was an unintentional mistake for which he is apologetic. A copy of the said memorandum of appeal has been annexed.
3. In opposing the application, the respondent filed a replying affidavit dated 10<sup>th</sup> March 2023 and filed in court on 13<sup>th</sup> March 2023. The respondent filed a another affidavit dated 17<sup>th</sup> July, 2023 which was verbatim to the earlier one. The respondent avers that she filed Nkubu PMCC ELC NO. 37 of 2018 in which judgment was entered in her favour and against the applicant on 25<sup>th</sup> August 2022 for refund of purchase price and damages for breach of contract. The said judgment has been exhibited. That the applicant did not satisfy the decree despite making a proposal to pay the decretal amount by installments. That the applicant not only ignored to settle the decretal sum but also failed to apply for proceedings to appeal, and only made the instant application to forestall the execution process. The



- respondent argues that the applicant is a person of means, adding that the judgment is for a money decree and therefore the intended appeal has no chances of success.
4. It is also the respondent's contention that the application which has been brought after over two months has been filed after inordinate and unreasonable delay. According to the respondent the application lacks merit and the same should be rejected.
  5. The application was canvassed by way of written submissions which were duly filed by the parties through their respective advocates on record and which I have read and considered and I need not reproduce them. The issue for determination is whether the applicant should be granted leave to file appeal out of time or not.
  6. The decision which is sought to be appealed is from the lower court. Section 79G of the [Civil Procedure Act](#) provides that appeals from decisions of the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. Therefore, an applicant seeking enlargement of time to file an appeal must show that he has good cause for doing so. The principles upon which the court should consider in exercising its discretion and grant leave to appeal out of time include the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted ( see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application NAI 255 of 1997 (Unreported) and *Thuita Mwangi v Kenya airways Limited* [2003] eKLR among other cases) The question that arises is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.
  7. Regarding the length of delay, the judgment of the trial court was delivered on 25<sup>th</sup> August 2022 and this application was filed on 11<sup>th</sup> November, 2022. The 30 days period within which the applicant ought to have filed the appeal lapsed on 25<sup>th</sup> September, 2022. The application has been brought after a period of over one month and some weeks. In my considered view, the application was brought timeously. I do not agree with the respondent's argument that the delay was inordinate.
  8. In justifying the said delay, the applicant stated that he prepared a memorandum of appeal but inadvertently filed the same at the High Court Civil registry instead of the ELC registry. I have perused the annexures in the applicant's affidavit in support of the application. One of the annexures is a memorandum of Appeal in Meru High Court Civil Appeal No. E126 of 2022 bearing a court stamp showing that the same was received in court on 15<sup>th</sup> September, 2022. It is my opinion that the reason for the delay has been well explained and is reasonable.
  9. As for the chances of the appeal succeeding, the court has perused the draft memorandum of appeal. The same inter alia faults the trial court for failing to consider the appellant's rights of ownership over land parcel No. Abothuguchi L-kaongo/1133 and the dispute whether the land sold was in hectares or acres. The applicant also faults the trial court for failing to consider the counterclaim. It has been held that an arguable appeal is not one which must necessarily succeed, but is one which raises arguable issues and ought to be argued before the court, that is one which is not frivolous. In my view, the intended appeal raises triable issues and is not frivolous.
  10. In [Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others](#) [2014] eKLR, the Supreme Court of Kenya stated that extension of time is not a right but an equitable remedy available to a deserving party at the discretion of the court. The Supreme Court stated further that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. I will therefore exercise my discretion in favour



of the applicant who has expressed his intention to exercise his constitutional right to be heard by this court on appeal and who has given a satisfactory explanation for the delay, which delay I have also found not to be inordinate. The respondent has submitted that she will suffer prejudice as she will be denied the fruits of her judgment. I note however that the judgment is for a money decree and therefore the respondent can be compensated in form of interest and costs in the event she is successful in the appeal.

11. In the result, the court will allow the notice of motion application dated 9<sup>th</sup> November, 2022 in the following terms-;
  - a) Leave is hereby granted to the applicant to file appeal out of time.
  - b) The appeal shall be filed and served within seven (7) days from the date of this ruling
  - c) Costs of the application to the respondent in any event.
12. Orders accordingly

**DATED, SIGNED AND DELIVERED AT MERU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023**

**In the presence of**

**Court assistant – V. Kiragu/Lena/M**

**Ms Mukaburu for respondent**

**No appearance for Otieno C for applicant who is present in person**

**C.K YANO**

**JUDGE**

