



**Oganga v Were (Environment & Land Miscellaneous Case
E004 of 2023) [2023] KEELC 20470 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E004 OF 2023**

AY KOROSS, J

OCTOBER 5, 2023

BETWEEN

JOHN OJWANG' OGANGA APPLICANT

AND

JAMES ODIPO WERE RESPONDENT

RULING

The Applicant's Case

1. This ruling determines the notice of motion dated February 8, 2023 brought under certificate of urgency by the applicant John Ojwang' Oganga. The applicant moved the court pursuant to the provisions of Sections 3A and 799 of the Civil Procedure Act and Order 21 Rule 22(1) of the Civil Procedure Rules and sought the following orders: -
 - a. This honourable court be pleased to grant leave to the applicant to file an appeal out of time from the decree of the SPM in Siaya ELC 221 of 2018.
 - b. The filed memorandum in appeal ELCA E40 of 2022 be deemed as properly filed upon payment of requisite court fees.
2. The motion is supported by grounds set out on its face and on the supporting affidavit deponed by the applicant John Ojwang' Oganga on February 8, 2022.
3. In brief, it was his case the appeal was excusable since he was self-represented. He thought he was within the statutory timelines when he filed ELCA E40 of 2022 dated December 14, 2022 and even filed a record of appeal on December 29, 2022 which was struck out for being filed out of time without leave. Even if he was guilty of delay, he immediately filed the instant motion when his appeal was struck out. As evidenced by the annexed draft memorandum of the appeal, his appeal was arguable.



Respondent's case

4. In opposition, the respondent who acted in person filed a 'supporting affidavit' dated March 17, 2023, grounds of opposition dated March 17, 2023 and further grounds of objection which he cited as 'citation for contempt' dated April 5, 2023.
5. In his affidavit, it was his position the applicant was guilty of inordinate delay, court orders were not issued in vain, the applicant was guilty of misconduct and the motion was tantamount to an abuse of court process and the subject matter of the appeal was rightfully so, rendered in his favour.
6. Some of his grounds of objection were a replica to those in his affidavit and I need not rehash them. In summary, the motion was an afterthought and the applicant had not complied with the orders for stay that were granted. In his 'citation for contempt', he contended the applicant was in contempt of court.

Applicant's submissions

7. The applicant's submissions which were filed on May 8, 2023 identified a single issue for determination; whether the applicant had tendered sufficient grounds to warrant the prayers sought in the motion.
8. The applicant submitted the grant of the orders sought were anchored in Sections 79G and 95 of the *Civil Procedure Act*. He submitted the principles for allowing extension of time was laid out in the Supreme Court of Kenya decision of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.
9. The applicant submitted he had met the criteria since he had tendered sufficient grounds for delay, he had an arguable appeal and the respondent would not be prejudiced. He relied on the case *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR.

Respondent's submissions

10. The respondent filed his written submissions dated May 17, 2023. He submitted the appeal did not have chances of success and the grant of the motion would deny him quiet possession of the suit property. Further, the applicant was exercising his financial muscle to frustrate him. Additionally, the applicant would not be prejudiced and it was in the interests of justice if peace prevailed amongst family members.

Analysis and determination

11. 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 order for leave to appeal out of time. However, before I do that, I must address certain preliminary issues.
12. Understandably, both the applicant and respondent who are self-represented have either cited wrong provisions of law or non-existent provisions of law. The *Civil Procedure Act* does not have Section 799 and it appears the applicant meant Section 79G.
13. While Order 21 Rule 22 (1) which the applicant relied upon is non-existent. The appropriate provisions of law are Sections 79G and 95 of the *Civil Procedure Act*, Section 16A (2) of the *Environment and Land Court Act* and Order 50 Rule 6 of the *Civil Procedure Rules*. In my view, these



are technical errors and curable by 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.”

14. However, the applicant went gone ahead and sought a strange order; the struck-out appeal be deemed as properly filed. The effect of the struck-out appeal could not be pursued further and it is treated as if it ceased to exist since it had been put to “death”. Put another way, it had been thrown out by the court. This strange prayer will be disregarded.
15. The respondent filed 3 sets of documents in opposition. The averments made in the ‘supporting’ affidavit denied averments in the motion and it appears it was a typographical error. However, he has inappropriately moved the court in his application for ‘citation for contempt’ dated April 5, 2023. The appropriate procedure for contempt proceedings is set out in Section 5 of the [Judicature Act](#).
16. This application dated April 5, 2023 in which he has filed further grounds of objection for citation of contempt is hereby expunged from the court record. As for submissions, this court must remind parties submissions are arguments and not evidence. I will now turn to the crux of the issue for determination.
17. The jurisdiction of this court to hear and determine an application for leave to appeal out of time is laid out in Sections 79G and 95 of the [Civil Procedure Act](#), Section 16A (2) of the [Environment and Land Court Act](#) and Order 50 Rule 6 of the Civil Procedure Rules. Section 16A of the ELC Act provides as follows;

“ 16A. Appeals from subordinate

- (1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the [Environment and Land Court Act](#), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
- (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.”

18. The grant of leave to appeal out of time is discretionary which should be exercised in a judicious manner. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court of Kenya cited with approval the Court of Appeal case of



Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR which laid down the principles as follows;

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

19. While this court is alive the applicant was unsuccessful in his quest in the lower court and the respondent will be denied the fruits of his judgment, the applicant has a right to appeal but first he must explain to the satisfaction of the court why discretion should be exercised in his favour.
20. On delay, judgment in this matter was rendered on November 2, 2022. The motion was filed February 8, 2023. The applicant has proffered several reasons for the delay notably, he mistakenly believed the appeal could be filed within 60 days and that was why he filed a memorandum and record of appeal in ELCA E040 of 2022 within 60 days from when judgement was rendered. Indeed, that is the position; he filed the struck-out memorandum and record of appeal on December 29, 2022 which was slightly less than 2 weeks outside the statutory period.
21. Immediately this court struck out the appeal on January 30, 2023, the applicant filed the instant motion. The applicant is self-represented and I am satisfied there was no unreasonable delay in filing the motion and he tendered plausible and sufficient reasons.
22. As to whether the appeal is arguable, the applicant annexed a memorandum of appeal and I am satisfied it raises arguable grounds of appeal.
23. Utmost, I find the notice of motion dated February 8, 2023 merited and issue the following orders:
 - a. Leave to file an appeal out of time is hereby granted and the appeal shall be filed and served within 14 days from the date of this ruling.
 - b. Failure to comply with order (a) above shall lead to its automatic vacation.
 - c. Costs of the motion shall abide the outcome of the appeal.
 - d. Lower court record to be called for.
 - e. The file is hereby marked as closed.
24. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 5TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

05/10/2023

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

Applicant

N/A for respondent



Court assistant: Ishmael Orwa

