



REPUBLIC OF KENYA



KENYA LAW
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Okenda v County Government of Kajiado & another (Environment & Land Case E039 of 2021) [2023] KEELC 20570 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20570 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E039 OF 2021
LC KOMINGOI, J
OCTOBER 5, 2023

BETWEEN

ROSE OKENDA PLAINTIFF

AND

COUNTY GOVERNMENT OF KAJIADO 1ST DEFENDANT

JANUARIS MWANGANGI NDAISI 2ND DEFENDANT

RULING

1. This is the notice of motion dated July 6, 2021 brought under;

(Under section 1A, 2A & 3A *Civil Procedure Act*, the Constitution of Kenya and all other enabling procedures of Law).
2. It seeks orders;
 1. Spent.
 2. That leave be granted to the Applicant to appeal out of time, the judgement and decree of Hon. Kahuya I.M, Principal Magistrate in Kajiado Chief Magistrates Court in CMCC – ELC NO.725 of 2015 dated and delivered on the December 9, 2020 inter alia dismissing the applicant’s suit with costs to the 2nd respondent.
 3. That costs of this application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 9.
4. The application is supported by the affidavit of Rose Okenda the Applicant herein sworn on the July 6, 2021 and a further affidavit sworn on the October 25, 2021.



5. The Application is opposed. There is a replying affidavit sworn by Januaris Mwangangi Ndaisi the 2nd Respondent herein on the September 6, 2021.
6. On the November 1, 2021 the court with the consent of parties directed that the application be canvassed by way of written submissions.

The Applicants Submissions.

7. They are dated January 25, 2022 and June 30, 2023. Counsel submitted that the Applicant has demonstrated that judgment was delivered in the absence of all the parties on December 9, 2020. That the applicant only discovered on June 29, 2021 that judgement had been delivered.
It is further submitted that the delay has been explained. He has put forward the cases of *Evans Kiptoo Vs. Reinhard Omwoyo Omwoyo* (2021)eKLR.
8. It is also submitted that no prejudice will be occasioned to the 2nd respondent as he is in possession of the suit property. He prays that the application be allowed.

The 1st Respondent's Submissions.

9. They are dated December 10, 2022. Counsel submitted that the applicant has failed to demonstrate a good and sufficient cause for not filing the appeal on time hence the application ought not be allowed. He has put forward the case of *Mombasa County Government Vs. Kenya Ferry Services Ltd and Another* (2019) eKLR.
10. It is further submitted that the judgement clearly established that the 2nd respondent had been wrongly sued hence the suit cannot be reinstated by the intended appeal. He prays that the application be dismissed with costs.

The 2nd Respondent's Submissions.

11. They are dated March 31, 2023. Counsel submitted that the suit was filed in 2015 and was dismissed for want of prosecution on July 25, 2018. Upon an application the was reinstated.
12. It is further submitted that the judgement declared the 2nd respondent to have been wrongfully sued. That the appeal cannot make a wrong party a proper party. Further that the suit as filed was fatally defective and an appeal cannot breath a life into it. He prays that the application be dismissed with costs.
13. I have considered the notice of motion, the affidavit in support the response thereto, the written submissions and the authorities cited. The issue for determination is whether the application is merited.
14. The court in *Mombasa County Government Vs. Kenya Ferry Services & Another* (2019) eKLR stated thus;
 - 25) Concerning extension of time, this court has already set the guiding principles in the Nick Salat Case as follows:

.....it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the



application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

.....we derive the following as the underlying principles that a court should consider in exercising 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 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. where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the court;
5. whether there will be any prejudice suffered by the respondents, if 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”.

15. It is the applicant’s case that she was physically in court on September 2020. That she was not aware that judgement had been delivered until June 29, 2021.

16. The 2nd respondents in her replying affidavit stated in paragraph 15;

“That the copy of judgment annexed by the Plaintiff to her supporting affidavit herein was the one served upon her Advocate’s by the 2nd defendant’s Advocate’s on January 27, 2021”.

These averments have not been controverted by the applicant herein.

17. I find that the Covid – 19 pandemic cannot be an excuse for the failure of the applicant to follow up on her case.

I find that this application has not been brought after undue delay and the delay of six (6) months has not been explained.

18. In the case of *Evans Kiptoo Vs. Reinhard Omwoyo Omwoyo* (2021)eKLR the court stated;

“Moreover, if, as conceded by the applicant, he got to learn of the judgment on 10th November 2020; what was the justification for the delay in filing the instant application? No explanation at all was proffered by the applicant for the delay between 10 November 2020 and January 25, 2021 when the instant application was filed. I am therefore far from convinced that the delay in filing the instant application has been convincingly explained. It therefore matters not that the intended appeal is arguable; or that no prejudice will be suffered by the respondent; for all the four prerequisites must be present to elicit the discretion of the court in the matter.....”

19. In conclusion, I find no merit in this application and the same is dismissed. I do order each party to bear own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN KAJIADO THIS 5TH DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE.

