



**Orwa v Otiemo & 2 others (Environment and Land Miscellaneous Application  
E007 of 2023) [2023] KEELC 20413 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20413 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2023  
AY KOROSS, J  
OCTOBER 5, 2023**

**BETWEEN**

**PAMELA ATIENO ORWA ..... APPLICANT**

**AND**

**JOHN OLOO OTIENO ..... 1<sup>ST</sup> RESPONDENT**

**ELKANA OTIENO OBUDHO ..... 2<sup>ND</sup> RESPONDENT**

**BONDO DISTRICT LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**The applicant's case**

1. The application for consideration is the applicant's notice of motion that was filed under certificate of urgency dated 27/03/2023 in which this court was moved pursuant to the provisions of Article 159 (2)(d) of the *Constitution of Kenya*, Sections 1A, 1B, 3A, 3B, 79G of the *Civil Procedure Act* and Order 42 of the *Civil Procedure Rules*. She sought the following reliefs;
  - a. Spent.
  - b. That the honourable court do grant leave to the applicant to appeal out of time against the decision of Hon. SPM J.P. Nandi (Mr.) in Bondo PM ELC E045 of 2022 in a ruling rendered on 6/12/2022.
  - c. Spent.
  - d. That the annexed memorandum of appeal be deemed as properly filed.
  - e. Costs of the motion be in the intended appeal.



2. The motion is supported by grounds set out on its face and on the supporting affidavit deposed on 8/02/2022 by the applicant's counsel Mr. Oduor Odinga.
3. In summary, it was counsel's case the intended appeal had good chances of success. The delay was occasioned by inadvertent presumption that an advocate who was present in court when the ruling was rendered had sought leave to appeal out of time. The mistakes of counsel should not be visited upon the applicant. The respondents would not be prejudiced and it was in the interests of justice if the motion was allowed.

#### **Respondent's case**

4. In opposition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents who were represented by Mr. Ochanyo of JDOK Advocates LLP filed grounds of opposition dated 30/03/2023. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit deposed on even date.
5. The grounds of opposition and replying affidavit raised similar issues which were inter alia: the motion was incompetent since within Order 43 of the Civil Procedure Rules, the impugned order was non-appealable as of right and such leave had not been obtained and the applicant had not tendered good and sufficient cause for not filing the appeal in time as envisaged by Section 79G of the Civil Procedure Act.
6. Additionally, the 1<sup>st</sup> and 2<sup>nd</sup> respondents contended the appeal was filed with inordinate delay; the applicant could not seek recourse in Article 159 (2) (d) of the Constitution since Section 79G of the Civil Procedure Act provided a clear appellate mechanism; the appeal was intended to forestall the execution process; motion was an afterthought, contemptuous and abuse of court process and lastly, they would be prejudiced.
7. The 3<sup>rd</sup> respondent who is ordinarily represented by the Office of the Attorney General did not participate in these proceedings.

#### **Applicant's submissions**

8. The applicant who was represented by M/s Mukoya filed her written submissions on 12/06/2023 in which she identified a single issue for determination; whether the applicant had satisfied the court that she had sufficient cause for not filing the appeal in time.
9. Counsel asserted the grant of leave to appeal out of time was discretionary and such discretion must be exercised judiciously and she relied on the decision of Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR where the Court of Appeal stated thus: -

“The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”
10. However, counsel introduced evidence that were not contained in the application and affidavit and they will be disregarded; submissions are not evidence but arguments. In reiterating some of the averments made in the supporting affidavit, counsel submitted the applicant was by Article 50 of the Constitution entitled to a right to fair hearing.



## 1<sup>st</sup> and 2<sup>nd</sup> respondent's submissions

11. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel, Mr. Ochanyo, filed his written submissions dated 17/05/2023. Counsel rehashed the grounds of opposition and I need not reiterate them. To buttress his position, counsel relied on the Court of Appeal case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR where the court held that cases belonged to a litigant and a litigant must show an interest in prosecuting her case.
12. Counsel submitted that Article 159 (2) (d) was not a panacea for curing all legal mishaps and the applicant could not hide under this provision of law and to buttress his position, counsel placed reliance on the decision of the Court of Appeal of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR which stated: -

“Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules.”
13. Counsel submitted the 1<sup>st</sup> and 2<sup>nd</sup> respondents were by virtue of Section 27 of the *Civil Procedure Act* entitled to costs and if the court was inclined to allow the motion, the 1<sup>st</sup> and 2<sup>nd</sup> respondents should be awarded costs of kshs. 100,000/-.

## Analysis and determination

14. This court has considered the motion, affidavits and rival submissions. Being guided by the provisions of law relied upon and judicial precedents cited, the issues for determination are: -
  - I. Whether the motion is competent.
  - II. Whether the motion is merited.

## Whether the motion is competent

15. Mr. Ochanyo argued the motion was incompetent since the applicant had not sought leave to appeal in accordance with the provisions of Order 43 of the *Civil Procedure Rules*. M/s Mukoya was silent on this issue.
16. Section 75 of the *Civil Procedure Act* and Order 43 Rule (1) of the *Civil Procedure Rules* sets out the orders from which appeals lie as a matter of right, while in respect of any other order in respect of which an appeal does not lie as of right, leave to appeal has to be sought. Section 75(1) thereof states:

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—”
17. The impugned ruling emanated from a preliminary objection dated 3/10/2022 in which the 1<sup>st</sup> and 2<sup>nd</sup> respondents had contended the claim before the trial court was statute barred. The trial court upheld this preliminary objection by striking out the applicant's claim.
18. Preliminary objections are not usually filed under any Order of the *Civil Procedure Act* since they usually arise from pure points on law. In this case, Section 7 of the *Limitation of Actions Act*. It follows on application of Section 75(1) of the *Civil Procedure Act*, orders emanating from a preliminary objection fall under the category of 'any other order' from which leave has to be obtained before an applicant can approach this court.



19. There is no evidence the applicant approached the trial court and obtained leave to appeal. I adopt the position of the Court of Appeal in [Kenya Commercial Bank Limited v Manaseh Esipeya](#) [1999] eKLR and also [G R Mandavia v Rattan Singh](#) [1965] EA 118. The former decision held: -
- “In the present case the limitation point was taken as a preliminary issue and it failed. What arose was not a preliminary decree but merely an order from which an appeal only lay with leave.”
20. This Court of Appeal decision placed reliance on the decision of Law JA in [G R Mandavia v Rattan Singh](#) [1965] EA 118 where at page 124 of his decision, the learned Judge held as follows: -
- “The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal will lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue and finally disposed of at first instance, a preliminary decree arises from which an appeal lies; but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal.”
21. Failure to obtain leave to appeal where such leave was required was fundamental and it could only be on the basis of such leave, that the applicant could invoke this court’s jurisdiction and as rightfully posited by Mr. Ochanyo, it is a core issue that could not be cured by Article 159 (2) (d) of the [Constitution](#). See the Court of Appeal decision of [Peter Nyaga Muvake v Joseph Mutunga](#), [2015] eKLR.

**Whether the motion is merited.**

22. 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](#).
23. The court exercises judicious discretion and an applicant has to show to the satisfaction of the court, good and sufficient cause why the appeal was not filed. See [Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Limited](#).
24. The applicant’s counsel’s contestation that he erroneously failed to appeal timeously since he thought the counsel who was present in court on the date of the ruling had applied for leave to appeal out of time is not plausible.
25. As at the date of the ruling, the applicant ought to have sought leave to appeal and once such leave was granted, he could appeal to this court. The applicant’s counsel is not truthful and is on a fishing expedition. This is evident from the submissions. I find the motion not merited.
26. In view of the foregoing, there is no valid notice of motion on the basis of which the orders sought can be granted. The applicant’s notice of motion dated 27/03/2023 is accordingly struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**DELIVERED AND DATED AT SIAYA THIS 5<sup>TH</sup> DAY OF OCTOBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**Ruling delivered virtually through microsfot teams video conferencing platform in the presence of:**

Mr Ochonyo for 1st and 2nd respondents



N/A for Applicant

Court assistant: Ishmael Orwa

