



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT HOMA BAY

MISCELLANEOUS CIVIL APPLICATION NO. E 001 OF 2022

ERICK ODHIAMBO ONG'ONDO.....APPELLANT/APPLICANT

VERSUS

ALOICE OBONGO ONGUS.....RESPONDENT

RULING

1. By a Notice of Motion Application dated 5<sup>th</sup> January 2022 and duly filed in court on 7<sup>th</sup> January 2022, mounted pursuant to **Order 51 Rule 1, Order 42 Rule 6** as well as **Sections 3A and 1A of the Civil Procedure Rules 2010** (the application), the applicant namely Erick Odhiambo Ong'ondo through M/s Nyauke & Company Advocates, has sought the orders infra:

- a. Spent
- b. THAT leave be granted to the Appellant to file an appeal out of time.
- c. THAT the Honorable court be pleased to extend time for filing the Appeal.
- d. THAT the draft appeal attached to this Application be considered duly filed upon payment of requisite court fees.
- e. THAT costs of this Application be provided for.
- f. Such further and/or other Orders be made as the court may deem fit and expedient.

2. The Application is anchored on the affidavit of Erick Odhiambo Ong'ondo. The applicant contends that the Honorable court delivered a ruling in Homa Bay SPM's Environment and Land Case No. 44 of 2020 on 17<sup>th</sup> September 2021 in his absence and that he only got to know of the ruling much later when he was very sick and not in a position to instruct his Advocate. The Applicant further states that he is now of sound health and seeks to prefer an appeal to the said ruling.

3. The Application is unopposed as the respondent did not file a response to the Application.

4. On 19<sup>th</sup> January 2022, the Honorable court directed that the Application be canvassed by way of written submissions in the spirit of **Article 159 (2) (b) of the Constitution of Kenya, 2010, Section 3 of the Environment and Land Court Act, 2015 (2011)** and **Order 51 Rule 16 of the Civil Procedure Rules, 2010**. Consequently, the Applicant's counsel filed his submissions on 8<sup>th</sup> February 2022 making reference to **Order 50 Rule 6 of the Civil Procedure Rules, 2010, Article 159(2)(d) of the Constitution of Kenya, 2010** and the case of **Liberato Kivanga Manga –vs- Prime Bank Ltd. (2021) JELR 99598 (CA)** hence urged the court to allow the application

5. I have duly considered the entire application and the applicant's submissions. In the circumstances, is the application merited?

6. On the issue of leave to appeal out of time **Section 79G of the Civil Procedure Act** provides as follows:-

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period, any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time”.

7. In **Bagajo vs Christian’s Children Fund Inc 2004 2 K.L.R 73 Ringera Ag. J.A** (as he then was) gave the following guidelines with regard to the exercise of such discretion:-

- a. Length of the delay
- b. The explanation for that delay
- c. Whether the appeal is arguable
- d. Any prejudice that may be caused to the respondent if the application is granted
- e. Generally, the requirements of justice in the case *also bearing in mind the importance of the case.*

8. In **Bagajo case** (supra), the court was considering an application under the Court of Appeal Rules. Similar guidelines would apply in the instant application since it seeks the exercise of the Court’s discretion and this court is guided thereby.

9. I am further guided by the recent Supreme Court of Kenya decision in **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others, [2014] eKLR** where the following principles for extension of time for filing appeal were laid down:-

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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the 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.”

10. There is delay which is admitted. However, this court does not find that the delay is inordinate as to deny the applicant an opportunity to ventilate its grievances by way of an appeal to this Court bearing in mind the applicant’s rights under **Articles 48 and 50(1) of the Constitution of Kenya, 2010.**

11. From the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it as there are triable issues discerned therein. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the Respondents will have a chance to respond to the merits or demerits of the appeal once filed; see **Ogada –vs- Mollin (2009) KLR 620** and **Onyango Oloo –vs- Attorney General (1986-1989) EA 456.**

12. A fortiori, I find the application dated 5<sup>th</sup> January, 2022 and duly filed on 7<sup>th</sup> January, 2022 meritorious. The same is allowed and the applicant is granted forty five (45) days from the date of this order to file and serve the Respondents with the record of appeal together with the orders herein.

13. Costs of the application to abide the intended appeal.

14. It is so ordered.

**G.M.A ONG’ONDO**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT THE ENVIRONMENT AND LAND COURT AT HOMA-BAY ON THIS 2<sup>ND</sup> DAY OF MARCH, 2022**

**G.M.A ONG’ONDO**

**JUDGE**

Present

Mr. S. Nyauke, Learned Counsel for the applicant

Okello A, Court Assistant