



**Nawiri v Oundo (Environment & Land Miscellaneous Case
E003 of 2022) [2022] KEELC 130 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2022**

AY KOROSS, J

MAY 5, 2022

BETWEEN

MICHAEL OTIENO NAWIRI APPELLANT

AND

FIDELIS ODUOR OUNDO RESPONDENT

RULING

Appellant's Case

1. Pursuant to the provisions of Section 3A, 79G and 95 of the *Civil Procedure Rules*, the plaintiff filed a motion dated 1/03/2021 seeking the following prayers;
 - a) The proposed appellant be granted leave to appeal out of time against the whole judgement and order of Hon. L. Simiyu, in Siaya PM in ELC Case No 33 of 2016 delivered on 9/06/2021.
 - b) Costs of the motion be in the cause.
2. The Motion is based on the grounds set out on the face of the motion and on the supporting affidavit of Fidelis Oduor Oundo dated 19/01/2022. The grounds of delay are that though the ruling, order or judgement was rendered on either 6/06/2021, 9/06/2021 or 5/08/2021, he applied for certified copies of the judgement, proceedings and order on 6/08/2021 and the trial court supplied them to him on 19/11/2021. However, he was unable to file the instant motion on time because his previous advocate delayed in executing a consent to allow his current advocates Oduol Achar & Co. Advocates to come on record. He contended that the respondent is unlikely to be prejudiced if the motion is allowed.

Proposed Appellant's Written Submissions

3. The proposed appellant filed written submissions dated 12/03/2022. In it the proposed appellant set out Section 79G of the *Civil Procedure Act* which states that an appeal from a subordinate court to the high court and in this case a court of equal status must be filed within 30 days from the date of



the decree or order provided that an appeal may be filed out of time if the appellant has a good and sufficient reason.

4. The proposed appellant relied on the case of *Agip (Kenya) Limited v Highlands Tyres Ltd* [2001] eKLR which was not availed to this court however, he contended that the decision stated that a delay of 8 months was not inordinate because the intended appellant's advocates were relocating offices. He also relied on the Supreme Court of Kenya decision of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR where the court stated that in an application seeking leave to file an appeal out of time, the court has to consider each case on its own merits.

Respondent's Case and Submissions

5. Despite service, the respondent did not file his response or file written submissions and be that as it may, this court has a duty in principle to determine the motion on its own merits and will as a matter of course grant the sought orders.

Analysis and Determination

6. I have carefully considered the motion, grounds in support, supporting affidavit, submissions and authorities cited therein and the only issue falling for determination is whether the motion is merited.
7. The principles to be considered in exercising the discretion on whether or not to enlarge time has been settled in a line of court decisions including the Supreme Court of Kenya decisions in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others* (Application 12 (E021) of 2021) [2022] KESC 3 (KLR) (Commercial and Tax) (10 February 2022) (Ruling). The *Nicholas Kiptoo case (Supra)* referenced with approval the case of *Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231* (unreported) which summarised the guiding principles for determining an application for extension to appeal out of time as follows:

“first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.
8. Section 79G of the *Civil Procedure Act* requires that before the Court enlarges the time for appealing, an applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time.
9. Before I delve into the issues at hand, a couple of preliminary issues have arisen from the motion some of which may have the effect of determining the motion.
10. 1st, the memorandum of appeal in the court record dated January 19, 2022 and filed in court on February 10, 2022 is improperly before the court for the simple reason that leave has not been granted for it to be filed out time and it is hereby expunged from the court record.
11. 2nd, the motion is dated October 19, 2020 whereas the ruling, order or judgement that the proposed appellant is aggrieved against was delivered either on 6/06/2021, 9/06/2021 or 5/08/2021. This signifies that the motion was dated prior to the determination of the suit by the trial court. The jury is out there whether there was oversight on the part of the proposed appellant or not.
12. 3rd, as has already been observed by this court, the date of the ruling, order or judgement the proposed appellant is aggrieved against is uncertain. A copy of the ruling, order or judgment that the proposed appellant is aggrieved against has not been availed to this court.



13. Lastly, from the face of the motion, Michael Otieno Nawiri is the proposed appellant whereas Fidelis Oduor Oundo is the respondent. The grounds on the face of motion contends that it is supported by the affidavit of the Fidelis and indeed, the affidavit in support of the motion dated January 19, 2022 is sworn and executed by him and astoundingly, he contends to be the proposed appellant. As it stands the court is uncertain as to who the proposed appellant is and it is the humble view of this court that this is fatal and goes to the root of the motion.
14. The extension of time to appeal out of time is an equitable remedy and not as of right and only a deserving party is entitled to enjoy such a remedy upon the court exercising its discretionary powers judiciously. In a case in which a litigant's application for leave to file an appeal out of time had serious laches, the Supreme Court of Kenya stated thus in the case of *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others (Supra)*;

“... equity aids the vigilant and not the indolent, it is quite apparent to us, from the numerous infractions and omissions identified above, that the appellants have not taken the processes of this court and their own Appeal with the seriousness deserved”.
15. I need not say more, it is my finding that the motion dated 19/10/2020 has serious flaws and has failed to meet the legal threshold and cannot stand and I hereby strike it out. It is trite law that costs follow the event and because this court has been unable to determine who the proposed appellant is, I make no orders as to costs.
16. The upshot is that I issue the following disposal orders;
 - a) The motion dated 19/10/2020 is hereby struck out with no orders as to costs.

Ruling delivered virtually.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 5TH DAY OF MAY 2022.

In the Presence of:

Mr. Oduol for the applicant

N/A for the respondent

Court assistant – Ishamael Orwa

HON. A. Y. KOROSS

JUDGE

5/5/2022

