



Pere & another v Okara T/A Kenagwa Enterprises & another (Environment & Land Case 951 of 2017) [2022] KEELC 13506 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 951 OF 2017
MN GICHERU, J
OCTOBER 4, 2022
FORMERLY NAIROBI ELC CASE NO. 790 OF 2005**

BETWEEN

**JACINTA PERE 1ST APPLICANT
NJENGA MARIMBEI 2ND APPLICANT**

AND

**LUCAS KIBEGWA OKARA T/A KENAGWA ENTERPRISES 1ST RESPONDENT
OLE KEJUADO COUNTY COUNCIL 2ND RESPONDENT**

RULING

1. This ruling is on the Notice of Motion dated 30th November, 2021. It is brought under Section 7 of the [Appellate Jurisdiction Act](#) and all other enabling provisions of law and seeks the following orders;
 - a. That the firm of P.S. Kisaka and Co. Advocates be granted leave to come on record on behalf of the first Appellant.
 - b. That there be a stay of execution of this Court's judgment delivered on 20/9/2021 together with all the consequential orders pending the inter partes hearing of this motion.
 - c. That the Applicant be granted leave to file and serve a notice of appeal out of time against the Judgment of the Honourable Court (Hon. Christine Ochieng) dated 20th September, 2021.
 - d. That the Applicant be granted leave to file and serve the record of appeal within such extended time.
 - e. That the costs of this application be in the cause.



2. The motion is supported by six grounds and a nine (9) paragraph supporting affidavit. The grounds are as follows:
- i. The Appellants appeal dated 15th September, 2005 was dismissed on 20th September, 2021.
 - ii. The Appellant's advocates did not communicate the decision to the Appellant until 24th November, 2021.
 - iii. The Appellant is dissatisfied with the said judgment and is desirous to instruct the proposed advocates to take necessary remedial measures to safeguard her interests in the property that she has now occupied for over 20 years.
 - iv. The issues raised in the intended appeal are of great public importance and necessary to be adjudicated upon by the Appellate Court.
 - v. The Application has been made promptly and without any undue delay on the part of the Appellant.
 - vi. That it is in the interests of justice to grant the orders sought herein.

The affidavit by the Appellant is in the same terms as the supporting grounds above.

3. The Application is opposed by the first Respondent who has sworn an 18 paragraph affidavit dated 14th March, 2022.

The affidavit gives the history of the dispute which is very simple and clear. The case concerns trespass by the Appellant on plot numbers 143 and 144 Ongata Rongai and Construction of permanent structures. The two plots were adjudged by the Lower Court to belong to the first Respondent.

This was after the second Respondent confirmed that the Appellant owned plot numbers 1104 and 140 which are at different locations.

The appellant has occupied the first Respondent's property for 18 years after she lost the case and she is guilty of delaying the hearing of the appeal as she has everything to gain from the delay.

This benefitting from the delay explains why the Appellant did not bother to attend Court for judgment on 20th September, 2021 even though notice of such judgment had been given on 22nd June, 2021, almost three months earlier.

In any event, her advocate was present and she should not be heard to say that she became aware of the judgment on 24th November, 2021.

The first Respondent further opposes the coming on record on P.S. Kisaka and Company Advocates in place of Chandri and Associates Advocates because the Appellant has not complied with Mandatory provisions of order 9 Rule 9 of the *Civil Procedure Rules*.

4. The Appellants' counsel filed written submissions on 20th May, 2022 and raised the following issues;
- a. Whether the firm of P.S. Kisaka and Co. Advocates should be granted leave to come on record on behalf of the Applicant?
 - b. Whether the Applicant should be granted leave to file appeal out of time?

In urging that the Court should find in the affirmative in the two issues, the Appellants' counsel urged that there was no requirement of the Court's leave for him to come on record. In so submitting, counsel relief on the authority of *Kazungu Ngari Yaa -vs- Naram Mulji and Co. Advocates* (2014) eKLR.



Regarding the extension of time, counsel relied on Section 7 of the *Appellate Jurisdiction Act* which gives discretion to this Court to extend time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or for making such an appeal may have already expired.

Counsel has cited a number of authorities from Superior Courts including the Supreme Court in support of his clients position that leave be granted.

5. On the other hand, the first Respondent's counsel filed written submissions on 15th June, 2022 and identified the same two issues for determination as identified by the Appellants' counsel. He however, urged that the Court should making a finding in the negative on both of them.

Counsel relied on many authorities including the one of *Nicholas Kiptoo Arap Korir Salat –versus- IEBC and 7 others*, Application No. 16 of 2014 (2014) eKLR.

6. I have carefully considered the application in its entirety including the entire record in the Lower and this Court, the two judgments of the Lower and this Court, the facts of the case, the affidavits, the annexures, the submissions and the authorities cited by both sides.

On the first issue, I find that the firm of P.S Kisaka and Co. Advocates should not be granted leave to come on record on behalf of the applicant. The reason is simple. Order 9 Rule 9 of the Civil Procedure Rules makes it mandatory for an advocate coming wishing to come on record for a party after judgment has been passed to do one of the following;

- a. File an application with notice to all parties.
- b. Obtain and file a consent between him and the outgoing advocate.

To me, those are the only options under Order 9 Rule 9. There is no third option. The Appellants' counsel has not done either of the two. The notice of change or the intention to come on record by the new counsel cannot be effected with either of the two prerequisites unmet. Only the old counsel is properly on record.

On the second issue of extending the time for giving notice of intention to appeal or for making an application for leave to appeal out of time, I find that the Appellant has not shown good cause for the following reasons;

Relying on the case of *Nicholas Kiptoo Arap Korir Salat (supra)*, which both counsel have cited, I find that the current application falls short of the seven principles set out in the above case for the following reasons.

Firstly, the Appellant is not deserving of the discretion of the Court because she has not proved that she acted diligently in following up on her case. She is not convincing that she was not aware of the judgment of this Court until after the period of filing an appeal had lapsed.

This is especially so when one considers the period the case has taken, close to twenty (20) years.

Secondly, the Applicant has not laid a basis that is satisfactory. She has not filed an affidavit from her counsel explain how he failed to inform her of such an important judgment and the need to appeal.

Thirdly, this is not a case where the Court can exercise its discretion in favour of the Appellant considering that she admitted in the Lower Court that her land is not plot numbers 143 and 144 and yet she occupies plots 143 and 144 which have been proved by the allocating authority to belong to the first Respondent.



Fourthly, as already found above, there is unreasonable delay in this case which the Appellant has not explained in a satisfactory manner.

Fifthly, there is extreme prejudice to be suffered by Respondent who has been denied the right to enjoy his property and there is no guarantee offered by the Appellant that he will be adequately compensated for his loss.

I need not exhaust all the seven principles as it is obvious to me that the application dated 30th November, 2021 has no merit at all whichever way one looks at it.

I therefore dismiss it with costs to the Respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 4TH DAY OF OCTOBER, 2022.

M.N. GICHERU

JUDGE

