



**Ong’udi v Gor Construction & Hardware Limited & another (Environment and Land Appeal 20 of 2022) [2022] KEELC 15694 (KLR) (8 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15694 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 20 OF 2022  
SO OKONG’O, J  
NOVEMBER 8, 2022**

**BETWEEN**

**EDITH ALUOCH ONG’UDI ..... APPELLANT**

**AND**

**GOR CONSTRUCTION & HARDWARE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ONG’UDI OKUMU HEZEKIAH ..... 2<sup>ND</sup> RESPONDENT**

*(Arising from Kisumu Chief Magistrate ELC No 25 of 2017, Gor Construction & Hardware Limited v Ong’udi Okumu Hezekia)*

**RULING**

1. On November 4, 2021, the appellant filed an application in the lower court suit namely, Kisumu Chief Magistrate ELC No 25 of 2017, Gor Construction & Hardware Limited v Ong’udi Okumu Hezekia (hereinafter referred to only as “the lower court”) seeking orders that the Appellant be joined in the suit as a party and that the judgment that had been delivered by the lower court in favour of the 1<sup>st</sup> Respondent herein against the 2<sup>nd</sup> Respondent on June 26, 2019 be reviewed and set aside. The Appellant’s application in the lower court was heard and dismissed by the court on March 11, 2022.
2. The Appellant filed this appeal on April 12, 2022 by way of a memorandum of appeal dated March 31, 2022. The appeal from the memorandum of appeal is against the said ruling and order of the lower court made on March 11, 2022. Together with the memorandum of appeal, the Appellant filed a Notice of Motion application dated March 31, 2022 seeking a stay of execution of the said order made by the lower court on March 11, 2022 pending the hearing and determination of this appeal.
3. In response to the appeal and the said application that has since been withdrawn, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection dated July 8, 2022 in which it contended among others that the Appellant’s appeal is incompetent on the grounds among others that the appeal was filed out of time without leave of the court and that the appeal was filed after the dismissal of the Appellant’s



application for review by the lower court. The 1<sup>st</sup> Respondent contended that the Appellant could not seek a review and also lodge an appeal against the same decision.

4. After the Appellant withdrew her application dated March 31, 2022, the parties argued the 1<sup>st</sup> Respondent's said preliminary objection. I have considered the preliminary objection and the submissions by the parties. The following is my view on the preliminary objection:

5. Section 79G of the [Civil Procedure Act](#) cap 21 laws of Kenya provides as follows:

79G. 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.”

6. Section 16A (1) and (2) of the [Environment and Land Court Act, 2011](#) provides as follows:

(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the [Environment and Land Court Act](#), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

7. Order 50 rule 3 of the [Civil Procedure Rules](#) provides as follows:

3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

8. Order 50 rule 8 of the [Civil Procedure Rules](#) provides as follows:

8. In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”

9. The decision the subject of this appeal was made on March 11, 2022. The appeal against the same was to be filed within 30 days of the decision. Computing the 30 days in accordance with Order 50 rule 8 of the [Civil Procedure Rules](#) reproduced above, the last day for filing the appeal was Sunday April 10, 2022. In accordance with the provisions of order 50 rule 3 of the [Civil Procedure Rules](#), the time within which the Appellant was to file her appeal was extended by operation of law to Monday April 11, 2022. It is not disputed that the present appeal was filed on April 12, 2022. That means that the same was filed one day out of the prescribed time. This fact was admitted by the appellant's advocate in his submissions.

10. An appeal that is filed out of time without leave of the court is incompetent and an abuse of the process of the court. The Appellant's advocate urged me to extend time within which the Appellant should



have filed the appeal and deem the appeal as properly filed within time. I am unable to accede to the Appellant's request for two reasons. First, the time within which an appeal from the lower court to this court is to be filed is fixed by section 79G of the Civil Procedure Act and section 16A of the Environment and Land Court Act, 2012. That means that a party seeking extension of time within which to appeal has to file a formal application for that purpose. There is no provision either in the Civil Procedure Act or in the Environment and Land Court Act which permits an oral application for extension of time. An applicant for extension of time must file an application and give reasons why time should be extended. In *Bagajo v Christian Children Fund* [2004] 2 KLR 73 the court set out the following as the factors to be considered in an application for extension of time;

- 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. The requirements of justice in the case also bearing in mind the importance of the case.
11. In the absence of an application for extension of time, I have no jurisdiction to grant the order. Secondly, even if, I had the power to consider an oral application for extension of time, there are no valid grounds laid before the court on the basis of which the court can exercise its discretionary power in favour of the Appellant. The mere fact that the delay in the filing of the appeal was only by one day is not sufficient to grant the order. In *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others* [2014] eKLR, the court stated as follows on applications for extension of time within which to file an appeal;
- a. Such extension is not a right but only an equitable remedy available to a deserving party at the court's discretion.
  - b. A party seeking extension must lay a basis for the same to the satisfaction of the court.
  - c. Where there is delay, the same must be explained to the satisfaction of the court.
  - d. Whether any prejudice will be caused to the respondents if extension is allowed must be considered.
  - e. The circumstances of each case must be considered.
12. For the foregoing reasons, I find merit in the 1<sup>st</sup> respondent's preliminary objection. Consequently, the memorandum of appeal dated March 31, 2022 and filed herein on April 12, 2022 is struck out for having been filed out of time with costs to the 1<sup>st</sup> respondent.

**DELIVERED AND DATED AT KISUMU THIS 8<sup>TH</sup> DAY OF NOVEMBER 2022**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellant

Mr. Sala for the 1<sup>st</sup> Respondent

**Ms. J.Omondi-Court Assistant**

