



REPUBLIC OF KENYA



KENYA LAW
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**Odongo v Makoyoko (Environmental and Land Originating Summons
65 of 2018) [2025] KEELC 5091 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 65 OF 2018
FO NYAGAKA, J
JUNE 18, 2025**

BETWEEN

MONICAH ACHIENG ODONGO APPLICANT

AND

PETER MIENCHA MAKYOYOKO RESPONDENT

RULING

1. By way of Notice of Motion dated 18/12/24, the Applicant seeks the following orders;
 1. ...Spent
 2. ...Spent
 3. ...Spent
 4. That the Honourable court do grant leave to the Applicant to lodge an Appeal on the entire Judgment delivered by Justice M. Kullow on the 22nd November 2022 out of time.
 5. That the Honourable court be pleased to issue orders of stay of execution of the Judgment delivered by Hon. Justice M. Kullow on the 22nd November 2022.
 6. That upon grant of prayer 4 and 5 above, there be an order of interim injunction restraining the Respondent, his servants, agents from constructing on, cultivating, evicting and interference with the Applicant's parcel LR. Kamagambo/Kanyajuok/984 pending the determination of the Applicants Appeal.
 7. That costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the contents of the affidavit sworn by Monicah Achieng. In her affidavit, she deposed that the Respondent was granted the relief of adverse possession vide a judgement delivered on 22/11/2022 which she intends to appeal against or from.



That the respondent has taken advantage of the judgement and encroached in the suit parcel of the land. She explained that she had delayed to file the appeal as she is an elderly woman who lives alone and has no one to support her. Further, that the file was missing since 2021 and therefore, she learnt of the judgement late. She prayed that the court grant the orders sought in the interest of justice.

3. The Applicant filed a Replying Affidavit dated 20/01/2025 in opposition to the Application. He stated that he instituted this case to obtain his title and the judgement was delivered on 22/11/2022. He denied the Applicants' allegations and urged that the Applicant has not provided any proof that the file was missing as alleged. Further, that the appellant has not established a proper reason to be granted leave to appeal out of time. He reiterated that he was opposed to the Application.
4. The parties filed submissions on the Application.

Analysis & Determination

5. I have considered the parties' submissions, examined the evidence and analysed the law. The sole major issue for determination is; Whether to grant the Applicant leave to appeal out of time. The minor one is the attendant question as to who to bear costs of the application.
6. About appeals from to this Court Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The said section provides that:

“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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.”

7. Regarding appeals from this Court to the Court of Appeal, the relevant provisions are Order 42 Rule 6(4) of the Civil Procedure Rules as read with Rule 77(1) and (2) of the *Appellate Jurisdiction Act* Court of Appeal Rules as published under *Legal Notice No. 20 of 2022*. Order 42 Rules 6(4) of the Civil Procedure Rules reads that,

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

8. Rule 77(1) and (2) of the Appellate Jurisdiction Rules provide that,

“(1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

(2) Each notice under sub rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”

9. In instances where an act required to be done as per the Rules is limited in terms of time, extension may be sought under Rule 4 of the Appellate Jurisdiction Rules in regard to the said Rules. Regarding enlargement of time about acts to be done under the Civil Procedure Rules when time lapses, the Rules have the specific provisions. Therefore, in terms of applications for appeals where not filed in time the



law has to be followed. But worthy of note is that where an appeal is to be filed out of time, there are principles that guide courts in exercising discretion in this regard.

10. The Supreme Court, in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR held as follows:
 - a. 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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the Application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
11. In this instance, the impugned judgement was delivered on 22/11/2022. The Applicant filed the present Application on 18/12/2025 which was about three years after the decision was rendered. The Applicant has not adequately explained the delay and further, she has not tabled any evidence in support of the claim that the file was missing. It is my considered view that the delay was inordinate.
12. The Respondent was the successful party in a judgment against which no appeal was preferred within time. Much worse was that no leave was sought for extension of time so soon thereafter. Even when an attempt has been made to do so, the explanation given by the applicant is wholly inadequate. That she delayed because she is an elderly living alone without support and that the file was missing since 2021 are reasons wholly insufficient. First, there is no evidence at all that the court file ever went missing. Secondly, if it is true that she was an elderly woman who did not have support it defeats reason and imagination that she would know that the file went missing.
13. Delay however small goes to the substance of the matter before the Court. Therefore, I agree with the Supreme Court decision in the *Nicholas Kiptoo* case (*supra*) that “Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.”
14. The applicant struggled to explain her delay. This Court is not satisfied with the reasons advanced. In my humble view, what awoke the applicant from slumber is the fact that the Respondent is executing the decree. Thus, it is only fair that the Respondent be allowed to enjoy the fruits of his judgment, while the Applicant is keen to frustrate these efforts. To this end, the Court finds and holds that there would be prejudice occasioned upon the Respondent should leave to appeal out of time be granted.
15. I find that the Notice of Motion Application dated December 18, 2024 lacks merit and the same is dismissed entirely with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 18TH DAY OF JUNE 2025.

DR. IUR NYAGAKA



JUDGE

In the presence of,

Singei for the Respondent

Owaka for Applicant Absent

