

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ELC MISC APP NO. 1 OF 2023

GEORGE ODERA ACHIENGA.....1ST
PLAINTIFF/APPLICANT
ALICE AKEYO ACHIENGA.....2ND
PLAINTIFF/APPLICANT

VERSUS

SALINE ALUOCHAYULE.....1ST
DEFENDANT/RESPONDENT
THE COUNTY REGISTRAR
OF HOMABAY.....2ND
DEFENDANT/RESPONDENT
THE LAND SURVEYOR
OF HOMABAY.....3RD
DEFENDANT/RESPONDENT
THE HON. ATTORNEY
GENERAL.....4TH
DEFENDANT/RESPONDENT

RULING

- 1.** Before this court is the Notice of Motion dated 21st September, 2023 seeking the following orders;
 - 1) ...Spent.**
 - 2) THAT this honourable court be pleased to extend time within which to lodge and serve the Memorandum of Appeal.**

3) THAT the Honourable court be pleased to extend time within which to lodge and serve a Record of Appeal.

4) ...Spent.

5) THAT this Honourable court be pleased to grant leave to the Applicant herein to adduce, produce new evidence in the intended appeal.

6) THAT costs of this application be in the cause.

- 2.** The Application is expressed to be brought under Section 79G, 1A, 1B and 3A of the Civil Procedure Act as read with Orders 42 Rule 6 and Order 51 of the Civil Procedure Rules. Additionally, it is premised on the grounds on the face of it and the depositions in the Affidavit sworn by George Odera Achienga.
- 3.** In his affidavit, the deponent stated that he was not in good health and that he was apprehensive that the Defendants/Decree holders were in the process of execution of the decree.
- 4.** He further stated that the Defendants would execute the judgment dated 23rd February, 2023 which judgment was erroneous. He stated that the same touched on alienation and encroachment of 1470 Lambwe East 12.5 acres possessed by the Applicant.
- 5.** He went on to state that on to state that instructions required money and that his son who was a resident in the USA has been the one paying for his needs. He added that there was need to safeguard the permanent structures and the agricultural produce.

- 6.** He stated that he was late to file the appeal as a result of the counsel's mistake since he needed fees and that he was informed on 27th February, 2023. He also stated that the said instructions never materialized and that the litigant ought not to be punished on account of counsel's negligence.
- 7.** He stated that the Principal Magistrate lacked the pecuniary jurisdiction to deliver the judgment since the value of land exceeded the same by 5 million. He urged the court to allow the application as prayed.
- 8.** In response to the Application, the 1st Respondent, filed her replying affidavit sworn on 4th December, 2023 where she averred that the Applicant had ample opportunity to produce their evidence before judgment had been entered. She further averred that the Applicants preferred a review and cannot again seek appeal before the review had been heard and determined.
- 9.** She went on to aver that the Applicant has not given reasonable excuse for failing to file an appeal out of time. She added that the issue of jurisdiction ought to have been raised in the trial court and not *de novo* on appeal.
- 10.** She averred that the Applicant was not being truthful since the Land Adjudicator, together with the 2nd and 3rd Respondent had testified and even produced the relevant documentation that showed the true position of the size of the suit property.
- 11.** She also averred that at the time of filing the instant suit, the value of the suit property was Kshs. 8,000,000 within the pecuniary jurisdiction of the subordinate court. She added

that the Applicants did valuation at the close of the pleadings and had not sought leave to file the valuation report.

- 12.** She averred that the application was incompetent and not appealable as of right under **Order 45 of the Civil Procedure Rules** and urged the court to dismiss the same with costs.
- 13.** In response, the Applicant filed a Supplementary Affidavit sworn on 20th December, 2023 where he reiterated the contents of his supporting affidavit. He denied that the application for review in Homabay CMCC 014 of 2018 had been filed by himself but by a party that was not represented in the suit.
- 14.** He further stated that the application for review had been filed by the firm of Wanyanga and Company Advocates on behalf of the estate of Elsa Odondi Achienga while his current advocates were Gregory Ndege and Associates.
- 15.** He also stated that Elsa Odondi Achienga was never represented in the suit as letters of Grant ad litem were issued on 4th October, 2023 to Stephen Otiato Oduor. He added that the review having been filed by the Administrator of the estate of Elsa Odondi, nothing barred him from filing an appeal or review.
- 16.** On the issue of pecuniary jurisdiction, he stated that the suit touched on two properties each valued at Ksh. 8 million thus total was Kshs. 16 million still beyond the court's jurisdiction.
- 17.** The 1st Respondent in response filed a further affidavit sworn on 12th February, 2024 where she averred that the

administrator of the estate of Elsa Odondi was well represented by the firm of Nyauke & Co. Advocates.

18. She averred that the firm of Wanyanga & Co. Advocates were not properly on record as no leave had been sought to file the application. She added that she was administratrix of the estate of Patrick Sangaro Abila the 1st Defendant in Homabay ELC 14 of 2018.

19. She further averred that the valuation report never formed part of the court record at the time of hearing and determination of the matter thus the issue of pecuniary jurisdiction does not apply.

Submissions

20. Counsel for the Applicant filed his submissions dated 8th January, 2024 where he relied on **Section 79G of the Civil Procedure Act** and the case of **Thuita Mwangi V Kenya Airways Ltd [2003]**.

21. He submits that the delay in filing the appeal was occasioned by his former advocate's failure to act on his instructions. He cited the Court of Appeal case of **Philip Keipto Chemwolo & Another V Augustine Kibende [1986] KLR 495**.

22. He relied on **Order 42 Rule (6) (1) of the Civil Procedure Rules** and the case in **Butt V Rent Restriction Tribunal [1982] KLR 417** and submits that the delay was not inordinate and that he had triable issues of appeal.

23. Counsel for the 1st Respondent on the other hand filed his submissions dated 12th February, 2024 where he identified two issues for determination. The first issue was whether the

Applicants have presented a good and sufficient cause for not filing the appeal within time. While submitting in the negative, he argues that the application was not accompanied with the notice of appeal.

24. He further submits that the Applicant has not presented good and sufficient cause for not filing the appeal within time. He cited the case of **Itute Ingu & Another V Ismael Mwakavi Mwendwa [1994] eKLR.**

25. It was his submission that the mistake of the advocate of not filing the appeal even after having been instructed was not in good faith and not explained. He relied on the case of **Rupa Savings & Credit Cooperative Society V Violet Shidofo [2022] eKLR.**

26. He submits that the Applicant failed to provide any evidence that they issued instructions to the advocate who failed to act on it.

27. The second issue was whether the court should grant leave to the Applicant herein to adduce new evidence in the intended appeal. Counsel submits in the negative and argues that the valuation report relied on by the Applicant did not form part of the record at the time of hearing and determination of the case. He adds that it would not be prudent to rely on a valuation report that was never availed and was also done several months after judgment. He urged the court to dismiss the application with costs.

Analysis and Determination

28. I have considered the pleadings, the affidavits and the submissions of the parties and the issue that arises for determination is whether the application is merited.

29. **Section 79G of the Civil Procedure Act** 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 satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

30. **Order 50 Rule 6 of the Civil Procedure Rules** provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be

borne by the parties making such application, unless the court orders otherwise.”

31.It is trite law that the power to grant leave for a party to appeal out of time is discretionary which discretion must be exercised judiciously. This means that it ought to be exercised on a case by case basis by considering the circumstances the party seeking its exercise places before the court.

32.In the instant case, it is not in dispute that judgment was delivered on 23rd February, 2023. It is trite law that the Applicant had 30 days within which he was to file an appeal. It was, however, the Applicant’s claim that the delay in filing the appeal was due to the fact that despite having instructed his then advocate to file an appeal, the advocate failed to do so. Notably, the Applicant did not attach any evidence of the said instructions. It is not in dispute that the 30 days lapsed on 23rd March, 2023.

33.In the case of **Omar Shurie v Marian Rashe Yafar [2020] KECA 492 (KLR)** the court held as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: 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.” [Emphasis mine]”

- 34.**It is not in contention that the time lapsed between the date of the judgment and the date of filing this application was approximately about seven (7) months.
- 35.**It is this court’s view that the delay was inordinate. There needed to be given a cogent explanation as to why the applicant did not comply with the requirements of the law, in terms of time. This court has considered the reasons given: there was no reasonable explanation which was sufficient enough to convince the court why the appeal was not filed in time. In addition, it is this court’s view that the Appellant failed to establish the prejudice he would suffer if this court were not to grant the orders sought.
- 36.**Furthermore, I have perused the court record and there is no evidence of any draft Memorandum of Appeal annexed to give an indication as whether the appeal would be arguable. Moreover, the applicant did not adduce any evidence from the previous counsel on record for him to show that indeed it was him or they who were instructed in time to appeal but failed to do that filing. Given that the accusation made borders on malpractice, it was important that an allegation be cleared by way of evidence that indeed they failed to do so. The practice of changing lawyers and accusing the previous ones without any evidence is nowadays rampant.
- 37.**The Applicant also sought leave to adduce additional evidence during appeal and even though this court has already declined the request to file appeal out of time, the

alleged valuation report was not produced at the trial court to warrant production at the appeal stage.

38. Regarding the prayer for adduction of additional evidence this court is of the view that once the prayer for extension of time has been declined this other prayer also falls by the wayside.

39. The upshot of the foregoing is that the Applicant failed to adduce sufficient reason to warrant extension of time within which he should file an appeal. The Application is without merit and I hereby dismiss it with costs.

40. Orders accordingly.

Ruling dated, signed and delivered via the Teams Platform the 9th day of

December 2025.

HON. DR. IUR NYAGAKA

JUDGE

From 14:47 hours, in the presence of

Mr. Ndege for the 1s Respondent

No appearance for Applicants and the other Respondents