



**Awino v Nyakodhe (Environment and Land Miscellaneous Application  
E001 of 2023) [2024] KEELC 297 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 297 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023  
NA MATHEKA, J  
JANUARY 31, 2024**

**BETWEEN**

**JOAB OTIENO AWINO ALSO KNOWN AS SAMUEL OTIENO  
AWINO ..... INTENDED APPELLANT**

**AND**

**ALLY B. OMONDI NYAKODHE ..... RESPONDENT**

**RULING**

1. The application is dated 18<sup>th</sup> July 2023 and is brought pursuant to Provisions of article 50 & 159 of the *Constitution of Kenya*, 2010; section IA, 1B, 3, A, 63(e), 79G & 95 of the *Civil Procedure Act* cap 21 Laws of Kenya, order 42 rule 6 and order 51 rule I seeking the following orders;
  1. That the Honourable Court be pleased to certify this application as urgent and service thereof be dispensed with in the first instance.
  2. That pending hearing and determination of this application, the Honourable Court be pleased to order a stay of execution of the whole Judgment of Hon. Mr. J.B. Kalo (Chief Magistrate), delivered in Mombasa CMCC No. 2529 of 2002; *Joab Otieno Awino also known as Samuel Otieno Awino v Ally B. Omondi Nyakodhe* on 02.03.2023 at Mombasa and consequential orders issued thereon.
  3. That pending hearing and determination of the Intended Appeal, the Honourable Court be pleased to order a stay of execution of the whole Judgment of Hon. Mr. J.B. Kalo (Chief Magistrate), delivered in Mombasa CMCC No. 2529 of 2002; *Joab Otieno Awino also known as Samuel Otieno Awino v Ally B. Omondi Nyakodhe* on 2<sup>nd</sup> March 2023 at Mombasa and consequential orders issued thereon.
  4. That the Honourable Court be pleased to enlarge time within which the Applicant is to file an appeal out of time against the whole Judgment of Hon. Mr. J. B. Kalo (Chief Magistrate),



delivered in Mombasa CMCC No. 2529 of 2002; Joab Otieno Awino also known as Samuel Otieno Awino v Ally B. Omondi Nyakodhe on 2<sup>nd</sup> March 2023 at Mombasa and consequential orders issued thereon.

5. That the Honourable Court be pleased to grant leave to the Intended Appellant to file an appeal out of time against the whole Judgment of Hon. Mr. J.B. Kalo (Chief Magistrate), delivered in Mombasa CMCC No. 2529 of 2002; Joab Otieno Awino also known as Samuel Otieno Awino v Ally B. Omondi Nyakodhe on 02.03.2023 at Mombasa and consequential orders issued thereon.
  6. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served upon payment of the requisite court fees.
  7. That this Honourable Court be pleased to issue other or further orders as it may deem just and fit to serve the interests of justice.
  8. That costs of this application do abide the outcome of the Intended Appeal.
2. It is based on the following inter alia grounds that the Applicant's application seeks to stay of execution of the whole Judgment delivered in CMCC No. 2529 of 2002; Joab Otieno Awino, also known as Samuel Otieno Awino v Ally B. Omondi Nyakodhe on 2<sup>nd</sup> March 2023 at Mombasa and the consequential orders issued thereon, pending hearing and determination of the application and intended Appeal. The Applicant also seeks leave to appeal against the said decision of the Trial Court out of time. That on 2<sup>nd</sup> March 2023, the Trial Court delivered Judgment in the suit herein in which the Applicant's suit was dismissed and Judgment entered in favour of the Respondent in respect of their undated Counterclaim. At the time of the delivery of the Judgment of the Trial Court, the Applicant had travelled to Nairobi to pursue his pension at the Kenya Defence Forces while on course to spend time in his rural home in Central Seme within Kisumu County. The Advocates on record for the Applicant encountered challenges in reaching the Applicant in time to inform him of the delivery of the Judgment of the Trial Court. That by the time sufficient instructions could be obtained from the Applicant, the prescribed time allowed to file an Appeal had run out. The Judgment of the Trial Court has now been placed in the hands of the Applicant who has expressed dissatisfaction with the same and has issued instructions for filing of an Appeal. The time allowed to appeal against the decision of the Trial Court has since lapsed. Nevertheless, it is settled law that this Honourable Court has wide and unfettered discretion to enlarge such time where sufficient cause is demonstrated. The Applicant has an arguable appeal and should be heard by the Appellate Court on merits of its final and logical conclusion. The Applicant has preferred Seven grounds of Appeal against the whole of the Judgment of the Trial. That it is evident from the above that the Applicant's intended Appeal is arguable and raises triable issues which require determination by the Honourable Court.
3. The subject matter herein is the property known as House and Plot No. 20/1 File (H.D./CH 576). The Applicant has had possession of the suit property and all developments erected thereunto for the last 29 years from the year 1994. The Respondent has never had possession and/or derived any benefit from the suit property and/or any part thereof at all. The levying of execution by the Respondent who has never had possession of the suit property coupled with the fact that the Applicant has always held and remains in possession of the suit property, creates a state of affairs that will irreparably affect and negate the very essence of the Applicant as the successful party in the intended Appeal. Unless the Court hears this application urgently and grants orders staying execution of the Judgment of the Trial Court, the Respondent will be at liberty to execute the Judgment which will render the Applicant's intended Appeal nugatory and the same shall be pursued in vain. The delay occasioned in bringing



this application is well accounted for and in any event, such delay is not so inordinate or so excessive as to be inexcusable.

4. This court has considered the application and submissions therein. 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. 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.”

5. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & others v Wanjiru & another* [1970] EA 482 the court stated as follows;

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

6. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in [Edith Gichungu Koine v Stephen Njagi Thoitih](#) [2014] eKLR thus;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

7. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. This application is for the extension of time to appeal against the judgment herein was delivered on 2<sup>nd</sup> March 2023 by Hon J. B. Kalo This application is dated 18<sup>th</sup> July 2023.

8. In [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2013] eKLR the court held as follows;

- (1) 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.
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.



- (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
  - (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  - (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
  - (6) Whether the application has been brought without undue delay; and
  - (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
9. I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that on 2<sup>nd</sup> March 2023, the Trial Court delivered Judgment in the suit herein in which the Applicant's suit was dismissed and Judgment entered in favour of the Respondent in respect of their undated Counterclaim. At the time of the delivery of the Judgement of the Trial Court, the Applicant had travelled to Nairobi to pursue his pension at the Kenya Defence Forces while on course to spend time in his rural home in Central Seme within Kisumu County. That his Advocates encountered challenges in reaching the Applicant in time to inform him of the delivery of the Judgment of the Trial Court. This excuse is casual and unacceptable. The draft memorandum of appeal states inter alia that the trial magistrate erred in fact and law by failing to take into account the plaintiff's evidence. I find that the applicant does not have an arguable appeal. I also that find that the applicant is guilty of inordinate delay and this application is an afterthought. I find this application is not merited and I dismiss it with no orders as to costs.
10. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

