



Cheptirim & 2 others v Kandie & 3 others (Environment and Land Miscellaneous Application E022 of 2023) [2024] KEELC 176 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E022 OF 2023
A OMBWAYO, J
JANUARY 25, 2024**

BETWEEN

**ZEPHANIAH CHERUTICH CHEPTIRIM 1ST APPLICANT
BENARD KIBET CHERUTICH 2ND APPLICANT
LORGIS LOGISTICS LIMITED 3RD APPLICANT**

AND

**CHRISTOPHER KANDIE 1ST RESPONDENT
AMOS KANGOGO CHEBII 2ND RESPONDENT
CHARLES YEGO TOROITICH 3RD RESPONDENT
WILLY KURGAT 4TH RESPONDENT**

RULING

1. Zephaniah Cherutich Cheptirim, Bernard Kibet Cherutich and Lorgis Logistics Ltd the intended appellants have come to court vide Notice of Motion dated September 22, 2023 seeking orders that this Honorable Court be pleased to grant the Defendants/Applicants leave to lodge an Appeal out of time against the decree and judgment delivered on July 14, 2023 in Nakuru CMELC No. 54B of 2021;
2. That this Honorable Court be pleased to stay of execution the judgment delivered on July 14, 2023 in Nakuru CMELC No. 54B of 2021 pending the hearing and determination of the intended appeal; and That the costs of and incidental to this Application be costs in the intended Appeal. The application is based on grounds that this matter was scheduled for judgment on June 16, 2023 and the court informed the parties that judgment was not ready and also that there was a function within the Court premises that the Honorable Magistrate presiding over the matter was attending. The parties were informed that judgment would thereby be delivered on Notice.



3. On September 18, 2023, the applicants were appalled to receive an e-mail from the respondents' Advocates informing them that the judgment had been delivered by Hon. Justice Y. I. Khatambi on July 14, 2023. Attached there was a Notice of Entry of Judgment dated September 18, 2023 and decree issued on September 8, 2023.
4. The applicants were neither served with a Notice to take the judgment nor were they served with a Notice of entry of Judgment until the respondents' Advocates served the same on September 18, 2023 way beyond the requisite time for filing an appeal.
5. The new date of delivery of the judgment after being deferred on 16th of June 2023 was neither communicated to the Applicants nor was it served upon their Advocates.
6. The delivery of the judgment only came to the Applicants knowledge on 18th September 2023, and by then the 30 days period within which the appeal was to be filed had lapsed hence the Application herein.
7. There has not been inordinate delay in filing the Application as the Applicants were only aware that judgment had been delivered on 18th September 2023 in the evening and the Application herein was filed on 22nd September 2023.
8. The Respondents have started the process of executing the judgment by extracting the decree and serving the same upon the land committee responsible for making transfers and changes to the register on the property. Thus, the Applicants are apprehensive that if the stay orders are not granted the Respondents may proceed to effect the changes before the intended appeal is concluded.
9. The Applicants believe that they have a high chance of success of the Appeal since they are the legal owners having bought the property and in possession of property thus the Application should be allowed.
10. The Respondents will not be prejudiced if time is enlarged and the Application is allowed as they will still participate in the intended Appeal. The Applicants shall be diligent in the prosecution of the Appeal once the Application herein is allowed. If the application is not allowed, the Applicants will have been denied the right to be heard on appeal and they shall suffer substantial loss and damage,
11. The Applicants are ready to perform any conditions that maybe imposed by the Honorable Court to grant the leave to file an appeal out of time.
12. It is therefore in the interest of justice and fairness that the Application herein be allowed with costs. The gravamens of the applicants explanation is that judgment was delivered on 14th July 2023 without Notice being given and without their knowledge.
13. In the replying affidavit, the 1st respondent agrees that judgment was not delivered as scheduled on 16th June 2023. The same had been rescheduled for delivery on 23th June 2023 vide a letter dated 2nd June 2023.
14. The judgment was not delivered as scheduled on 23rd June 2023 but the same was delivered on 14th July 2023. There is no evidence of Notice for delivery of judgment on 14th July 2023. The applicants request this court to enlarge time to file the appeal.



15. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time 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 a 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 respondents if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

16. The applicant has proved that he was not aware of the judgment date as there is no evidence that he was served with the judgment notice. The applicants have laid down a basis upon which this court can grant an order for the extension of time. I do find that the applicant have satisfied the requirement to enlarge time to file an appeal out of time and I do grant them 30 days to file and serve the memorandum of appeal and record of appeal simultaneously.

17. On stay pending appeal, I do find it just to grant the order that there be a stay pending appeal on condition that the applicants deposits in court security for costs of Kshs 200,000/=. Cost of the application be in the appeal. Orders accordingly.

RULING, DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 25TH DAY OF JANUARY 2024.

A. O. OMBWAYO

JUDGE

