



REPUBLIC OF KENYA



KENYA LAW
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**Kirwa & another v Choge & 2 others (Civil Application
E063 of 2023) [2024] KECA 403 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 403 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E063 OF 2023
FA OCHIENG, JA
APRIL 26, 2024**

BETWEEN

THOMAS KIRWA 1ST APPLICANT

ABRAHAN ROTICH 2ND APPLICANT

AND

ABRAHAM KIPROP CHOGE 1ST RESPONDENT

ELPHAS KIPCHIRCHIR CHOGE 2ND RESPONDENT

NELSON KIPYEGO CHOGE 3RD RESPONDENT

(An application for extension of time within which the applicants can file and serve memorandum and record of appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Eldoret (E. Obaga, J.) dated 27th July, 2023 in ELC Suit No. 93 of 2014)

RULING

1. The application before me is dated 21st November 2023. It is premised upon Rule 4 of the [Court of Appeal Rules](#), 2010; and it seeks three substantive orders, namely;
 - “(a) An extension of time within which the applicants can file and serve a record of appeal.
 - b. Leave to file or to mount an appeal out of the statutory period against the judgment and/or order of Hon. Justice Obaga, which was made on 30th June 2023.
 - c. Stay of proceedings in Eldoret ELC Suit No. 93 of 2014 until the intended appeal is heard and determined.”



2. In the event that the court granted leave to the applicants, to appeal out of time, it was their request that they be permitted to lodge the said intended appeal within 14 days from the date when the order is made.
3. The application is supported by the affidavit of Thomas Kirwa. It is the applicants' case that the respondents own a property that is adjacent to the applicants' property; but they emphasise that the said properties are separate and distinct.
4. Notwithstanding that position, the learned trial Judge held that the applicants herein had trespassed upon the respondents' parcel of land. In the circumstances, the ELC Judge declared that the respondents were the legal and rightful owners of the suit property Plateau/Kipkabus Block 4 (Lelmokwo)/24.
5. Consequently, the court issued a permanent injunction to restrain the applicants from interfering with the suit property.
6. The court also issued an order that the applicants be evicted from the suit property, if they did not voluntarily vacate the said parcel of land
7. The said pronouncements were made in a judgement dated 30th June 2022.
8. On 8th March 2023 the applicants herein lodged an application seeking to have the judgment set aside. In the said application, the applicants also sought an order for stay of execution.
9. On 27th July 2023, the learned Judge delivered his ruling, in which he dismissed the application dated 8th March 2023. In a nutshell, the court rejected the quest to have the judgment set aside.
10. Following the dismissal of their application, the applicants moved to this Court, through a notice of motion dated 21st November 2023.
11. It is the contention of the applicants that the advocates who had been representing them at the Environment and Land Court had not informed them about the judgment when the same was delivered. The applicants have told this Court that it was only when they were served with a Notice To Show Cause, that they first became aware that a judgment had been entered against them.
12. In other words, the applicants lay all the blame at the door of their erstwhile advocates, for their failure to inform them about the judgment.
13. In the event, by the time when the applicants first became aware of the judgment, the time within which they could have lodged an appeal to the Court of Appeal, had already lapsed.
14. It is the contention of the applicants that their explanation for the delay was a plausible one.
15. Secondly, the applicants contend that they have an arguable appeal. It is their considered view that their substantive appeal ought not to be thwarted by the earlier failure, which they have attributed to their erstwhile advocates.
16. The applicants' further submission was that the respondent would not suffer any prejudice, for which they could not be compensated by an award of costs.
17. In answer to the application, the respondents filed a replying affidavit, which was sworn by Abraham Kiprop Choge.



18. The respondents hold the view that the application lacked merit, especially when it was borne in mind that the applicants had been represented by an advocate who was aware of the date when the judgment was to be delivered.
19. It is on the record that the case was scheduled for hearing on 6th April 2022. However, on that date, all the Judges of the Environment and Land Court had a meeting in Mombasa, consequently the hearing did not proceed.
20. The case was re-scheduled to 21st April 2022, and the respondents have exhibited an affidavit of service, showing that the applicants' advocates were duly served.
21. Notwithstanding the service of a hearing notice, the applicants and their advocates failed to attend court on 21st April 2022. In the circumstances, the hearing proceeded in the absence of the applicants.
22. The position taken by the respondents was that it was not sufficient for the applicants to put the blame upon their advocates. The respondents submitted that the applicants had a responsibility to demonstrate their interest in the case, by making a follow-up, even when they were represented by an advocate.
23. It is well settled that a party cannot cede his interest in his case by simply engaging an advocate to act for him. The advocate is supposed to take action based on the instructions from his advocate.
24. Whereas an advocate is expected to give advice to his client, it is the responsibility of the client to ask for answers to questions whose answers he was not aware of.
25. In the case of *Savings & Loan Limited vs Susan Wanjiru Muritu* (Milimani), HCCC No. 397 of 2002, the court held as follows;

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not her advocate. A litigant has a duty to pursue the prosecution of his or her case.”
26. In order to answer the question as to whether or not the applicants herein had pursued the prosecution of their case, the court has to assess the level of their diligence.
27. I find that whereas the applicants' advocate received notification that the hearing had been rescheduled to 21st April 2022, there is no basis upon which I can dispute the applicants' contention, that their advocate failed to pass on that information to them. It is my finding that the applicants have a plausible explanation for their failure to attend court on 22nd April 2022.
28. The next question to be addressed relates to the date when the applicants first became aware of the judgment.
29. The applicants did specify they first got to know of the judgment on 15th October 2023, when they were served with the Notice To Show Cause. That information is cited in the applicants' submissions dated 5th January 2024. In other words, the information was not in the nature of evidence, attested to through an affidavit which was sworn by either of the applicants.
30. There is no doubt whatsoever that evidence cannot be provided through legal submissions.



31. In any event, it is crystal clear that the applicants had become aware of the judgment prior to 8th March 2023, because on that date they had lodged an application to set aside the judgment. I so find because in his affidavit sworn on 21st November 2023, Thomas Kirwa deponed thus, at paragraph 6;

“That being aggrieved by the said *ex parte* judgment, I filed an application against the whole of the said Judgment vide an application dated 08.03.2023.”

32. Having learnt about the judgment on or about 8th March 2023, the applicants filed an application. When Justice E. Obaga dismissed that application, he held, *inter alia*, that the discretion of the court which was being asked for, to set aside an *ex parte* judgment, would not be exercised in favour of an applicant who was clearly out to delay the course of justice.

33. The learned Judge was convinced that the applicants had not provided a plausible explanation for the delay of 8th months.

34. The challenge which the applicants wish to mount now, is in relation to the decision delivered on 30th June 2023. In that respect, the relevant period which this Court must take into account, begins to run from 30th June 2023.

35. By the time the applicants brought the present application, more than 3 months had lapsed, from the time when the impugned ruling was delivered. It is trite that there is no maximum or minimum period of delay set out under the law, as constituting excessive delay. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant to the leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

36. I have combed the affidavit filed in support of the application, but I have failed to find any plausible explanation for the state of inaction for over 3 months.

37. I appreciate that the court had an unfettered discretion when called upon to determine an application to extend time for lodging an appeal, but it is well settled that the exercise of the said discretion must be guided by factors such as the period of delay, and the prejudice to the respondents if the application was allowed.

38. Of itself, the period of 3 months is not manifestly excessive.

However, when the delay is not explained, the court cannot ignore it.

39. As regards the intended appeal, in the case of *Atbuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”



- 40. In this instance, I find that the intended appeal raises an arguable appeal. I so find because the two sides appear to be talking at cross-purposes. The applicants insist that the parcel of land which they own and occupy, is separate from the respondents' neighbouring property.
- 41. However, the respondents state that the applicants have occupied and utilised a portion of land which is a part of the respondents' property.
- 42. It would be in the interest of justice to have the issue of ownership determined after giving a substantive hearing to all the parties, especially because the subject matter is land, and also because the parties are literally neighbours.
- 43. However, the court cannot be expected to exercise its discretion in favour of the applicants when they did not tender a plausible explanation for the delay in taking steps to lodge their intended appeal.
- 44. In the result, the application dated 21st November 2023 is dismissed. The applicants will pay to the respondents, the cost of the application.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF APRIL, 2024.

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

