



**Lorkino v Lorkino (Civil Application E017 of 2024)
[2024] KECA 911 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 911 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E017 OF 2024
FA OCHIENG, JA
JULY 26, 2024**

BETWEEN

LORIAM LORKINO APPLICANT

AND

LINGAKWANG LORKINO RESPONDENT

(An application for leave to appeal out of time from the judgment of the Environment and Land Court at Kitale (Mwangi Njoroge, J.) delivered on 24th September 2018 in ELC Case No. 134 of 2016)

RULING

1. The application before me is dated 30th January 2024. It is an application for leave to appeal out of time, in respect to the Judgment which was delivered on 24th September 2018. The application is supported by the applicant's affidavit.
2. In order to have a clear perspective of the application, it is necessary to take note of the history of the case.
3. The respondent is a blood brother of the applicant. He instituted proceedings against the applicant through a plaint dated 5th September 2016. The respondent's prayers in the plaint were for the issuance of a declaration that the applicant held the title of the suit property in trust for both the applicant and the respondent.
4. Therefore, the respondent asked the court to order that the said suit property, L.R. No. West Pokot/ Chepareria/83 be subdivided between the 2 brothers.
5. The court did grant a judgment in favour of the respondent, who then set in motion, the process of execution.



6. It was the applicant's case that the trial court had ignored the fact that the respondent had not served him. He said that it was only when surveyors went onto the suit property, with the intention of subdividing it, that he became aware of the suit.
7. Having become aware of the judgment, the applicant canvassed an application to set aside the judgment.
8. On 24th November 2022, the court delivered its Ruling, in which it set aside the judgment, but the costs of the application were awarded to the respondent. The said "throw away" costs, of Kshs. 70,000/= were ordered to be paid within 14 days. The court further ordered the applicant to comply with the provisions of Order 11 of the *Civil Procedure Rules*, by filing and serving his bundle of documents within 21 days.
9. Finally, the court ordered that if the applicant failed to comply with the 2 conditions, (for payment of costs and the filing and service of the bundle of documents), the judgment would be automatically reinstated.
10. The applicant did not comply with the second condition, which could then have accorded him the opportunity to canvass his defence. He paid the "throw away" costs of Kshs. 70,000/= but the applicant did not file and serve his bundle of documents, within the specified time.
11. In the light of the decision rendered by the learned Judge on 24th November 2022, the judgment was automatically reinstated, following non-compliance by the applicant.
12. By an application dated 9th February 2023, the applicant sought, inter alia, leave to file his bundle of documents out of time.
13. After giving due consideration to that application, Justice (Dr.) Nyagaka dismissed it, as he found no merit in it. The said ruling (dismissing the application dated 9th February 2023) was delivered on 25th May 2023.
14. Following the dismissal of that application, the respondent went ahead and executed the decree. In real terms, the suit property was subdivided into two parts, being West Pokot/ Chepareria/2202 and West Pokot/Chepareria/2203.
15. As the title which was the subject matter of the suit was West Pokot/Chepareria/83, the respondent contended that the application herein had already been overtaken by events.
16. The respondent invited this Court to hold that the application was not only frivolous, but was also an abuse of the process of the court. Furthermore, as the applicant had entered into a consent order, through which he was to pay the costs of the suit, the respondent submitted that the applicant had acquiesced with the judgment. In those circumstances, the respondent reasoned that;

“Granting him leave to appeal against a judgment that the applicant has already agreed with will be an exercise in futility and will undermine the principle of finality of litigation.”
17. Notwithstanding that view, the applicant insisted that although the decree had been executed, that could not be a bar to the appeal which the applicant intended to lodge.
18. As far as the applicant was concerned, the execution of the decree did not take away his constitutional right to lodge an appeal. Therefore, the applicant invited this Court to rise to a higher calling, by protecting his right to be given a hearing by the appellate court.



19. The respondent countered that line of submissions by urging the court to hold that once the applicant had made a choice to seek the review of the orders which he now intends to appeal against, the applicant ought not to be permitted to appeal against the same orders.
20. In that respect, the court paid careful attention to the application for review. The said application sought the review of the Order made on 24th September 2018.
21. Accordingly, I find that the applicant was not seeking leave to appeal against an order in respect to which he had earlier asked for review. The application is properly before me. Having so held, I now need to determine whether or not it was merited.
22. The law governing the question as to whether or not the court ought to grant leave to appeal out of time is well settled. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Appeal No. 255 of 1997, the court noted 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.”
23. On the question of the duration of the delay, it is noted that the applicant moved the court after more than 5 years. In itself, that length of time is certainly considerable. Unless the applicant provided plausible explanations for the long delay, I would have no alternative but to find that there had been inordinate delay.
24. The applicant attributed the delay to the fact that he had, first, made an application to set aside the judgment. Secondly, he had to withdraw the notice of appeal which he had originally lodged in court. The said withdrawal was attributed to a technicality, occasioned by the lack of jurisdiction. Thirdly, the applicant informed the court that he had been involved in 2 separate accidents, which impacted his health. Finally, the applicant stated that he took time to raise legal fees before he could give instructions to his advocate.
25. Counsel for the applicant cited the decision in *Francis Barasa Lurare & Another v Dennis Nyongesa Maloba*, Civil Application No. 90 of 2018 to support his application.
26. In that case, the court granted leave to appeal out of time, after the applicants convinced it that they had been let down by their previous advocates.
27. In contrast to that case, I find absolutely no basis upon which the delay herein could be attributed to the applicant’s advocates.
28. On the issue of the 2 accidents which befell the applicant, he gave the dates thereof as being 2015 and 2020.
29. Clearly, the accident in the year 2015 would be of no relevance to the period after 24th September 2018, when the trial court rendered the judgment in question. Furthermore, the applicant has not provided any explanation for his inactivity between 24th September 2018 and the year 2020 when he suffered a second accident.



30. In any event, after the said second accident, the applicant was immobilized for a period of one year. He told this Court that he started walking in mid-2021; and that by 30th March 2024, he was still undergoing physiotherapy.
31. From the history provided, I found no material that could explain why the applicant could be deemed to have been so adversely affected by the accident, that he was incapable of filing and serving a notice of appeal.
32. The applicant appears to have the desire to demonstrate that he was incapacitated, due to the lack of funds which were necessary to enable him to pay legal fees.
33. I note that the applicant filed the application dated 8th April 2022, through which he sought the setting aside of the judgment. He then canvassed the said application.
34. After the court set down conditions upon which the judgment was set aside, the applicant raised Kshs. 70,000/=, which he paid on account of “throw away” costs.
35. It is thus evident that the applicant was not too incapacitated, as to be unable to make an application for leave to appeal out of time. It was simply his choice, to ask the court to review the orders made on 24th November 2022, rather than to seek leave to appeal.
36. As the applicant was not only able to file an application to set aside the judgment, and was thereafter able to raise the “throw away” costs, I find that the applicant failed to demonstrate that he was too impecunious to move the court in a timely manner.
37. Meanwhile, as there was no order for a stay of execution, the decree had been executed.
38. Whilst the respondent holds the view that the intended appeal would be a nullity because execution had already been undertaken, I find that even when a decree had been executed, that of itself, would not be a bar to an appeal against the judgment from which the decree emanated.
39. Nonetheless, the applicant has been very complacent, and there has not been forthcoming any plausible explanation for the same.
40. On the other hand, the respondent moved forward and executed the decree. In my considered view, although the process of execution was not, in itself, a bar to lodge an appeal to challenge the judgment, it would be highly prejudiced to the respondent if the orders sought herein are granted.
41. Accordingly, I hold that the application lacks merit, and it is therefore dismissed. The applicant is ordered to pay to the respondent, the costs of the application.

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

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

