



Laisa v Kinara (Civil Application E061 of 2024) [2024] KECA 834 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KECA 834 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E061 OF 2024
HM OKWENGU, JA
JULY 19, 2024**

BETWEEN

BOSCO WEPUKHULU LAISA APPLICANT

AND

ELCAH KINARA RESPONDENT

(Being an Application from the Judgment of the Environment & Land Court at Kakamega (Obungo, J) dated 21st November, 2023) in ELCA No. E040 of 2021)

RULING

1. The applicant, Bosco Wepukhulu Laisa, who was the respondent before the Environment & Land Court at Kakamega, is now before with a Notice of Motion dated 8th May, 2024. The motion which is drawn by the applicant in person seeks orders as follows:
 - i. That the application hereto be certified urgent and service of the application be dispensed with in the first instance.
 - ii. That the applicant be granted leave to appeal out of time.
 - iii. That the drafted memorandum of appeal and record of appeal be deemed filed upon payment of requisite fees.
 - iv. That the costs of this application be provided for.
2. The application is anchored on grounds stated on the notice of motion as follows:
 - i. The applicant was represented in the first appeal and being dissatisfied with the judgment therein instructed his then advocate Momanyi Manyoni & Co. Advocates to lodge an appeal.
 - ii. The applicant's lawyer lodged a notice of appeal within time stipulated but never filed an appeal as agreed.



- iii. The applicant paid his advocate fees to handle the appeal, and he kept visiting the offices inquiring the progress only to be refunded monies paid for the appeal after (3) months from the date judgment.
 - iv. The applicant's advocates on 29th February, 2024 signed consent to cease acting for the applicant and due to instant change of events has put the applicant to seek leave to file appeal out of time as it is not his mistake.
 - v. The applicant believes he has a triable appeal with good prospects of success.
 - vi. The applicant has compiled his record of appeal and is ready to prosecute it without delay if granted leave.
 - vii. This application has been made without unreasonable delay.
 - viii. It is in the interest of justice that the orders sought be granted.”
3. The motion is supported by an affidavit sworn by the applicant to which he has attached various documents. From the affidavit and the annexures, the following facts emerge. The applicant and the respondent, Elcah A. Kinara (Elcah) have been embroiled in a dispute over land known as Kakamega/Chekalini/744, which is a subdivision of Kakamega/Chekalini/85. The latter was registered in the name of Jacob Laisa Mafutu, (Mafutu) who died on 28th June 1988. Elcah claimed that before Mafutu's death, Mafutu had entered into an agreement with her husband for the sale of eight and a half acres out of Kakamega/Chekalini/85, and had obtained the necessary consent from the Land Control Board, pursuant to which, that property was subdivided into two, Kakamega/Chekalini/744 which was transferred to Elcah's husband, and Kakamega/Chekalini/743 which was retained by Mafutu's estate. Kakamega/Chekalini/743 was later transferred to the name of Elcah in trust for Philip Denda Kinara, Timothy O. Kinara and Boaz Shitsama Kinara, on 8th August, 2005.
 4. The applicant maintained that Elcah procured the registration of Kakamega/Chekalini/743 in her name through fraud. He filed a suit in the High Court at Kakamega seeking to have the subdivision cancelled, original title reverted back to Mafutu the original owner, and the two titles Kakamega/Chekalini/ 743 and 744 nullified. The suit was ultimately transferred to the subordinate court and heard by a Senior Principal Magistrate who delivered a judgement on 16th September, 2021, in which he allowed the applicant's prayers, and directed that the subdivision of Parcel No. Kakamega/Chekalini/85 be cancelled; the subsequent subdivision Kakamega/Chekalini/743/744 be nullified; and only three acres of the land be carved out Kakamega/Chekalini/85 for Elcah.
 5. Being dissatisfied with the judgment of the trial court, Elcah appealed to the ELC at Kakamega, where the appeal was heard by the learned Judge (Ohungo, J.) who delivered a judgment on 21st November, 2023, in which he allowed the appeal, set aside the judgment of the subordinate court, and replaced it with an order dismissing the applicant's suit.
 6. The applicant filed a notice of appeal dated 5th December, 2023, through his then counsel Momanyi Manyoni & Co. Advocates. Apparently, no memorandum of appeal or record of appeal was filed, hence the applicant's motion, seeking leave to appeal out of time and to have the memorandum and record of appeal deemed as filed. The applicant blames his advocate for the delay in filing the memorandum and record of appeal.
 7. The applicant explains that contrary to his instructions, the advocate did not file the requisite documents, and when he followed up, the advocate refunded his money, returned his file and signed a consent letter indicating that he had ceased acting for him.



8. Elcah has not filed any response to the application or any written submissions. This is despite the fact that a hearing notice was served on the parties advising that this matter would proceed through written submissions today, and that the submissions should be filed before today. In effect therefore, the applicant's motion stands unopposed.
9. In normal circumstances, I would have been hesitant to accept the explanation given by the applicant shifting the blame on his advocate. This is because, the advocate is only an agent and it was the responsibility of the applicant to ensure that the appeal is filed in time. Nevertheless, the applicant has demonstrated that the advocate refunded the money the applicant had paid him, and indicated that he had ceased acting for him on 29th February, 2024. This substantiates the applicant's contention that he was let down by his advocate.
10. I note that the applicant did not file his application until 8th May, 2024. He has explained the delay in filing the application by explaining his efforts acting in person. He wrote a letter requesting for proceedings on 20th March, 2024 but due to technical challenges, he was only able to pay for the proceedings through the online platform on 18th April, 2024, and although he was given the proceedings he has not been given a certificate of delay. It is evident that this is a situation in which the applicant has tried his best to exercise his right of appeal, but things just do not seem to have worked out for him. Through the draft memorandum of appeal that he has exhibited, he has also shown that he has an arguable appeal.
11. As stated by the Supreme Court in *Nicholas Kiptoo arap Korir Salat v IEBC* (2014) eKLR, extension of time is not a right of a party, but an equitable remedy that is only available to a deserving party at the discretion of the Court. The applicant has laid a good basis for the exercise of this Court's discretion. It is only fair and just that he be given an opportunity to exhaust his avenues of redress.
12. Consequently, I allow the application and grant the applicant leave to file his appeal out of time. The memorandum and record of appeal shall be filed and served within 21 days from today. As the motion was not challenged, I make no orders as to costs

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 2024

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

