



REPUBLIC OF KENYA



KENYA LAW
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**Amollo v Wilson (Civil Application E099 of 2022)
[2023] KECA 268 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 268 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E099 OF 2022
AK MURGOR, JA
MARCH 17, 2023**

BETWEEN

LINET ADHIAMBO AMOLLO APPLICANT

AND

REUBEN OPILE WILSON RESPONDENT

(An application to file an appeal out of time against the Judgment of the Environment and Land Court (B. M. Eboso, J.) delivered on 1st February 2022 in Environment and Land Court at Milimani Case No. 667 of 2013)

RULING

1. By a Notice of motion dated March 23, 2022 brought pursuant to Order 50 rule 6 and order 42 rule 6 of the Civil Procedure Rules, section 3A of the Civil Procedure Act Laws of Kenya and Article 159(d) of the Constitution, the applicant, Linet Adhiambo Amollo, seeks for, i) time to be extended to lodge an appeal against the judgment of Environment and Land Court dated February 1, 2022 and ii) a stay of execution against the judgment of the trial court.
2. The motion brought pursuant to the grounds on its face and supported by the sworn affidavit of the applicant contended that the judgment was delivered on February 1, 2022 while an application to appeal against the trial court's ruling dated July 21, 2021 that closed the defence's case was still pending; that is Civil Appeal No COACA/E466/2021; that she is aggrieved because the court file was transferred from the Nairobi registry to the Thika registry which refused to act on it because it was not originally from that registry; that this delayed the filing of an appeal that was to have been lodged within 30 days from the date of delivery of the judgment, which period expired on March 1, 2022; that her advocates applied for certified typed copies of proceedings by their letter dated October 10, 2020 and were not able to obtain the certified proceedings until March 18, 2022; that the 60 days stay of execution order which she was granted by the trial court was due to expire on April 1, 2022, and she will be greatly prejudiced by the delay in filing the appeal as she may not have been heard before the



- lapse of the order of stay; that consequently, she urgently seeks leave from this Court to file an appeal out of time.
- 3 In their submissions, the applicant's counsel Dola, Magani & Co Advocates submitted that the applicant was not able to file the appeal within 30 days because the certified copies of proceedings and judgment were not supplied within the prescribed time, but they were subsequently issued with a Certificate of delay which had explained the delay in filing the appeal. It was further submitted that, the appeal has a high chance of success since, the judge arrived at an unfair decision that did not take into account vital evidence from the defence that would have assisted the court.
 - 4 No replying affidavit or submissions were filed by the respondent, despite their having been served.
 - 5 Under rule 4 of this Court's rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No Nai 251 of 1997*.
 - 6 Before I determine the application for extension of time which is rightly before this Court, it is to be observed that the applicant's application also includes a prayer for stay of execution of the ruling of the trial court. As this is not a matter that a single judge can entertain, I decline the invitation to deal with the prayer seeking to stay the orders of the trial court.
 - 7 The applicant is seeking orders to extend time to file an appeal against the judgment of the Environment and Land Court of February 1, 2022. In ascertaining whether or not time should be extended, it will be necessary to compute the period of delay. Since the judgment was delivered on February 1, 2022, and this application was filed on March 23, 2022, the period of delay can be computed as 51 days.
 - 9 As far as the filing of an appeal to this Court is concerned, the applicant is under the mistaken impression that she had 30 days within which to file the appeal. However, under the rules of this Court, the notice of appeal ought to have been filed 14 days after delivery of the ruling or judgment, while the record of appeal should have been filed and served 60 days after the filing of the notice of appeal, subject, of course, to the proviso to rule 84 which allows time for preparation of the certified proceedings to be excluded from the period of delay, as long as the respondent has been served with a copy of the request for the proceedings.
 - 10 So that, in so far as the notice of appeal is concerned, the delay in filing it can be computed as 51 days from the date of the judgment upto the date of this application. A consideration of the motion and the annexures does not disclose that it was ever filed. The applicant explains that the delay in filing the notice of appeal was occasioned by the transfer of her file from the Nairobi registry to the Thika registry and back. Once again, I have reviewed the annexures and there is no evidence showing that the file was ever transferred from the Nairobi registry to the Thika registry and back. For this to have happened, I would have expected to see a letter from the registrar or a court order transferring the file, but there is no such notification.
 - 11 What the applicant seems to allude to as the file having been transferred to Thika is that when the trial judge delivered the judgment, it specified that it was, 'dated, Signed And Delivered Virtually In Thika On February 1, 2022,' On that day the applicant herself attended the virtual court. The fact that the judgment was delivered in Thika did not mean that the file was transferred to Thika. Furthermore, it is noteworthy that the Certificate of delay issued on March 21, 2022 was issued by the Nairobi registry. I



am not therefore satisfied that the reason proffered that the transfer of the applicant's file to Thika and back to Nairobi has properly explained the delay in filing the Notice of appeal.

12 We have said time without number, that the notice of appeal is a fairly simple document to file, and my view is that it ought to have been filed in the timeframe prescribed. I do not therefore find that the reason provided has explained the delay in filing it.

13 As concerns the requirement pertaining to the prospects of success of the intended appeal, an examination of the draft memorandum of appeal makes it clear that the applicant's grievance is more particularly against the ruling of October 21, 2021 that closed the defences's case rather than against the judgment of February 1, 2022. Given that her dissatisfaction lies with the ruling, as opposed to the judgment, it becomes difficult to understand how her appeal against the judgment is likely to succeed.

14 In sum, the applicant having failed to fulfil the threshold requirements necessary to satisfy a *rule 4* application, I decline to exercise my discretion to extend time for filing of the Notice of appeal, and accordingly dismiss the motion dated October 18, 2021 with no orders as to costs.

15 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

