



**National Land Commission v Tom Ojienda & Associates (Civil Application
E016 of 2022) [2023] KECA 1183 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1183 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E016 OF 2022
F SICHALE, JA
OCTOBER 6, 2023**

BETWEEN

NATIONAL LAND COMMISSION APPLICANT

AND

PROF TOM OJIENDA & ASSOCIATES RESPONDENT

*(Being an Application for Leave to file an Appeal out of time against
the Ruling and Orders of the High Court at Eldoret (Ogembo J), dated
21st June 2017) In (Eldoret Misc Application No. 29 (B) OF 2016)*

RULING

1. The application before me sitting as a Single Judge is a motion dated September 23, 2022, brought under the provisions of the *Appellate Jurisdiction Act*, Sections 3, 3A and Court of Appeal Rules 1 (2), 4, 42, 43 and Rule 5 (2) (b) and Article 159 of the *Constitution* in which the National Land Commission (the applicant herein) seeks the following orders;
 - “i. Spent.
 - ii. That this Honourable Court be pleased to grant an order for enlargement of time to file an appeal out of time to the judgment and order of the High Court at Eldoret (Justice Hon D O Ogembo) dated June 21, 2017 in Eldoret Misc Application Number 29 (B) of 2016.
 - iii. That upon grant of prayer 1 above, this Honourable Court be pleased to grant an order of stay of execution of the ruling of the judgment and order of the High Court at Eldoret (Justice Hon D O Ogembo) dated June 21, 2017 in Eldoret Misc Application Number 29 (B) of 2016.



iv. Costs of this application be in the course.”

2. That, being dissatisfied with the aforesaid ruling, the applicant filed an application seeking stay of execution and extension of time within which to file a reference against the decision of the Taxing Master and the respondent equally filed a notice of motion seeking entry of judgment for Kshs 220,735,840.88/= as taxed and vide a ruling delivered on June 21, 2017, Ogembo J dismissed the applicant’s application and effectively allowed the respondents application seeking to have the decision of the Taxing Master adopted as an order of the court.
3. He further deposed that on July 4, 2017, the applicant filed a Notice of Appeal against the impugned decision but inadvertently failed to timeously file/lodge a fresh appeal for the reasons that the matter was being handled M/S Murakaru and M/S Callen Masaka who subsequently left service of the applicant without proper handover and that further the applicant was awaiting the determination of Civil Appeal Number 51 and 58 of 2016, which finally set aside the judgment of the High Court in ELC Petition No 1 of 2013, which was used as a basis of taxation by the Taxing Master.
4. It was further deposed that the applicant had an arguable appeal and was apprehensive that if the orders sought were not issued, the respondent will execute effectively rendering the intended appeal nugatory and otiose.
5. The motion was opposed vide a replying affidavit sworn by Prof Tom Ojienda the Managing Partner of the respondent on July 18, 2023, who deposed *inter alia* that this Court does not have the jurisdiction to hear and determine the instant motion for the reasons inter alia the motion had been filed without obtaining leave to appeal from the trial court in violation of Order 43 of the Civil Procedure Rules 2020 and Rule 11 of the Advocates Remuneration Order yet it arose from taxation proceedings of an Advocate Client Bill of Costs and that further the issues raised in this motion to wit; failure to appeal against the Orders of Ogembo J, dated June 21, 2017, were sub judice as they were directly and substantially in issue before the Court of Appeal in Kisumu in Civil Appeal No E247 of 2022 which was slated for judgment on September 15, 2023.
6. None of the parties filed written submissions despite the directions given by the Deputy Registrar of this Court on July 5, 2023.
7. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit and the law.
8. The principles upon which this Court exercises its discretion under Rule 4 to extend time or not are firmly settled. The Court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the Court should do so judiciously.
9. See *Mwangi V Kenya Airways Limited* (2003) KLR 486 where this Court stated thus;

“Over the years, the Court has set out guidelines on what a single Judge Should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend 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.”

10. In the instant case, and as regards the length of the delay, the impugned ruling was delivered on June 21, 2017, whereupon the applicant filed a Notice of Appeal on July 4, 2017 which was well within time. The instant motion however is dated September 23, 2022, a period of about 5 years from the date of the impugned ruling which period is certainly inordinate.
11. Regarding reasons for the delay, the applicant has inter alia contended the matter was being handled by its former Advocates namely; Anthony Murakaru and Callen Masaka who had since left its employ without a proper hand over and that further they were awaiting the determination of Civil Appeals No.'s 51 and 58 of 2016, which finally set aside the judgment of the High Court in ELC Petition No 1 of 2013, that was used as the basis of the taxation by the Taxing Master.
12. Be that as it may, no evidence has been adduced before me evidencing the fact that this matter was being handled by the said advocates. In any event the mere fact the said advocates left the employ of the respondent does not necessarily mean that the operations of the respondent grinded to a halt and cannot certainly be a basis for not filing the appeal within time. Additionally, judgments in Civil Appeal No.'s 51 and 58 of 2016, that the applicant has alluded to were delivered December 6, 2018 and no explanation has been forthcoming from the applicant as to why they waited until September 23, 2022 to file the instant motion. The applicant has not even stated they have delayed for a period of how long. Given the circumstances of this case, I am satisfied that the delay herein has not been explained to the satisfaction of this Court and I find the reasons given for the delay not to be plausible.
13. With regard to the possibility of the appeal succeeding, the applicant has contended that it has an arguable appeal as per “copy of the draft memorandum of appeal”. I have however perused the record and none has been annexed to the motion. In any event, this Court sitting as a Single Judge cannot delve into the issue as to whether the applicant’s intended appeal is merited. Consequently, I will not say more regarding this issue.
14. As regards prejudice, no evidence has been placed before this Court to show that indeed the applicant will suffer any prejudice if the instant motion is not allowed.
15. Given the circumstances, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time to file the intended appeal.
16. In view of the above, the inevitable conclusion that I arrive at is that the applicant’s motion dated September 23, 2022, is without merit and I accordingly dismiss the same in its entirety with costs to the respondent.
17. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF OCTOBER, 2023.

F. SICHALE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

