



Kimaron & another v Ministry of Interior & Co-ordination of National Government & 11 others (Civil Application E020 of 2023) [2023] KECA 1335 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1335 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E020 OF 2023
WK KORIR, JA
NOVEMBER 10, 2023**

BETWEEN

ARGUT KIMARON 1ST APPLICANT

BENSON CHEMJOR KIMARON 2ND APPLICANT

AND

**MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 1ST RESPONDENT**

THE COUNTY COMMISSIONER, BARINGO COUNTY 2ND RESPONDENT

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT 3RD
RESPONDENT**

DIRECTOR OF LAND ADJUDICATION, NAIROBI 4TH RESPONDENT

THE DIRECTOR OF SURVEYS 5TH RESPONDENT

**THE COUNTY LAND ADJUDICATION OFFICER, COUNTY OF
BARINGO 6TH RESPONDENT**

THE COUNTY LANDS REGISTRAR, BARINGO COUNTY 7TH RESPONDENT

ATTORNEY GENERAL 8TH RESPONDENT

JOHN KANDIE CHELIMO ALIAS JOHN T. CHELIMO 9TH RESPONDENT

BENJAMIN CHEROP 10TH RESPONDENT

JONAH CHEPKANG'OR 11TH RESPONDENT

BARNABA KURGAT 12TH RESPONDENT



(Being an application for extension of time to file and serve a notice of appeal and the record of appeal out of time to the decision of Environment and Land Court at Iten (L.N. Waitbaka, J.) dated 29th September 2022 in ELC Judicial Review No. 5 of 2022)

RULING

1. The application before me is brought under Rule 4 of the *Court of Appeal Rules* as well as sections 3A, 3B and 5 of the *Appellate Jurisdiction Act*. The applicants, Argut Kimaron and Benson Chemjor Kimaron, are in the main prayer seeking that the “time limited for the applicants to file and serve the respondents with notice of appeal and record of appeal be enlarged and extended to allow the filing and serving of the same within such time as the court shall deem fit.” The reproduction of the order sought by the applicants is important as it shall substantially affect the determination of the application.
2. The application is supported by the affidavit of the 2nd applicant. The 2nd applicant avers in support of the application that the Environment and Land Court (ELC) at Iten delivered judgment in ELC JR No. 5 of 2022 on 29th September 2022 in favour of Benjamin Cherop, John Kandie Chelimo alias John T. Chelimo, Jonah Chepkang’or and Barnaba Kurgat the respective 9th, 10th, 11th and 12th respondents. That so soon thereafter, they wrote a letter requesting for a copy of the proceedings and even made the requisite payment for the proceedings. That on 12th October 2022 they were supplied with the copy of the certified proceedings. They, however, contend that a certificate of delay, as well as a certified decree, are yet to be provided by the trial court. They aver that they duly served the letter requesting for proceedings and the notice of appeal on the 9th, 10th, 11th and 12th respondents between 14th to 17th October, 2022. They also aver that they stand the risk of being evicted as the respondents have served them with a notice to vacate the suit property and that they have an arguable appeal.
3. The application was opposed. For the 1st to 8th respondents, the office of the Attorney General filed grounds of opposition dated 4th July 2023. Mr. Kwame Ramo, State Counsel, opposed the application on the grounds that it is fatally defective, incompetent and an abuse of the court process because it seeks leave to file a notice of appeal yet the same is averred to have been filed and served; that the application is an afterthought as it has been brought after the applicants were served with a notice to vacate the suit property; that the applicants have not explained why they have not filed the record of appeal yet the certified copy of proceedings were ready for collection within 60 days; and, that the applicants are guilty of laches as they have not explained or tendered any evidence to support the reasons advanced for the delay.
4. The 9th, 10th and 12th respondents opposed the application through an affidavit sworn by the 10th respondent. Their case is that the application is an abuse of the court of process and should be dismissed as it has been brought after inordinate delay.
5. No submissions had been filed by the time the application came up for hearing on 21st July 2023. This was despite the Deputy Registrar’s directions issued on 26th June 2023 outlining the timelines and guidelines for the filing of submissions. Ideally the application ought to have been dismissed or adjourned pursuant to the provisions of Rule 58(1) of the *Court of Appeal Rules, 2022*. However, in order to do substantive justice in the matter, I will consider the application on its merit.
6. Upon considering the pleadings of the parties, the issues that emerge for determination are whether the applicants have a notice of appeal on record and whether the application for extension of time is merited.



7. At page 53 of the application, the applicant has annexed a notice of appeal marked “BKC2” which was filed on 12th October 2022. An affidavit of service of the notice of appeal has also been annexed as “BKC5” confirming the service of the notice of appeal on the 9th, 10th, 11th and 12th respondents. The judgment which is the subject of the intended appeal was delivered on 29th September 2022. The notice of appeal was therefore lodged within the 14 days from the date of the decision intended to be appealed. It therefore met the requirements of Rule 77(2) of the *Court of Appeal Rules*. I will only observe that it appears that the other respondents were not served. I will however say no more as the issue of service is not the subject of this application.
8. The applicants have couched the present application to appear as if they have abandoned the earlier notice of appeal. As part of their prayers, they seek the extension of time to file and serve a notice of appeal as well a record of appeal. However, the applicants have failed to tender any explanation for the delay in bringing the application for extension of time to file a notice of appeal.
9. I note that the applicants also prayed for leave to file a record of appeal out of time. In explaining the reason for the delay in filing the record of appeal, the applicants have laid the entire blame on the registry of the trial court. Under Rule 84 of the *Court of Appeal Rules*, a record of appeal must be filed within 60 days from the date of the filing of the notice of appeal. The Rule also provides reprieve for an applicant who encounters delay by the trial court registry in procurement of proceedings. In other words, the computation of the 60 days within which the record of appeal should be lodged always stands suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent within the prescribed time. A certificate of delay, specifying the time taken for the proceedings to be typed, is usually issued in such cases. The certificate of delay will aid in the calculation of the period to be excluded during the computation of time.
10. In the present application, the applicants aver that the proceedings were delayed by the registry. Nevertheless, from the applicants’ own averment at paragraph 5 of the supporting affidavit, it is confirmed that the certified record of appeal was availed on 12th October 2022. This was within the stipulated timelines under Rule 84 of the *Court of Appeal Rules*. It is therefore not clear what other reason there was which barred the applicants from filing the record of appeal within the prescribed time.
11. Interestingly, the applicants again claim they were waiting for the certificate of delay. If this averment is correct, then there is no reason why this application was made in the first place. Afterall, a certificate of delay will cure what the applicants seek to cure through this application.
12. Considering the averments made by the applicants in support of this application, it becomes apparent that their application is founded on quicksand. Although the applicants have exhibited a notice of appeal, they now ask for leave to file another notice of appeal. They, however, have not advanced any plausible reason why the notice of appeal they now intend to file was not lodged within 14 days from the date of the judgment they wish to appeal. The alleged delay of procurement of proceedings cannot suffice as a reason for delaying the filing of a notice of appeal since the filing of a notice of appeal is never predicated on the availability of a copy of the proceedings. They cannot therefore say the lack of proceedings hindered them from lodging a notice of appeal.
13. For the reasons stated, I find that the application for extension of time for filing a notice of appeal and a record of appeal is without merit. I accordingly dismiss the notice of motion dated 26th April 2023 with costs of the application to the respondents.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF NOVEMBER, 2023.



W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

