



**Lagat v Vekaria & 3 others (Civil Application E004 of 2023)
[2023] KECA 1331 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1331 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E004 OF 2023
FA OCHIENG, JA
NOVEMBER 10, 2023**

A) THE APPLICATION DISMISSED.

B) THE APPLICANT WILL PAY COSTS, TO THE 1ST RESPONDENT.

BETWEEN

NATHANIEL KIPTALAM LAGAT APPLICANT

AND

RAMJI D VEKARIA 1ST RESPONDENT

SAMWEL KING'ORI MWANGI 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

THE UASIN GISHU DISTRICT LAND REGISTRAR 4TH RESPONDENT

(An application for extension of time to lodge an appeal from the judgment of the Environment and Land Court of Kenya at Eldoret (Anthony A. Ombwayo, J) delivered on 18th March, 2022 in ELC Case No 287 of 2012)

RULING

1. The application dated February 8, 2023 seeks an extension of time within which the applicant can lodge a Notice of Appeal and Record of Appeal, arising from the judgment which was delivered on March 18, 2022.
2. The grounds upon which the application is founded can be summarised in the manner following:
 - a. The delay in lodging the appeal was due to the serious and debilitating illness of the applicant.
 - b. The advocate did not inform him of the delivery of the judgment.



- c. It is only in December 2022 when auctioneers visited his home, to execute the judgment, that the applicant first became aware of the judgment.
 - d. The appeal has high chances of success.
 - e. If the application was rejected, it would give rise to a substantial miscarriage of justice.
 - f. If the application was allowed, the respondents would not be prejudiced.
 - g. It is in the best interest of the justice that this application be allowed.
3. The application was supported by an affidavit sworn by the applicant. He described himself as an 80-year-old man, who was sickly.
 4. The applicant told the court that throughout the year 2022, he was sickly, thus making him unable to communicate with his advocates on record, regarding the case.
 5. To support his said deposition, the applicant exhibited a bundle of treatment chits from Kitale County Hospital; St Luke's Orthopaedic and Trauma Hospital; and Mama Lucy Kibaki Hospital.
 6. It is the applicant's case that it was the proclamation of his moveable assets that prompted him to appoint another firm of advocates to, inter alia, apply for stay of execution.
 7. Meanwhile, as the time for filing of an appeal had expired, the applicant filed the current application. In his view, the application had been brought at the earliest opportunity, and there was no inordinate delay.
 8. In answer to the application, the 1st respondent stated that the delay of close to 10 months, between March 18, 2022 and February 8, 2023, was inordinate.
 9. Secondly, the 1st respondent was of the view that the medical treatment chits which the applicant exhibited did not show the extent of the infirmity to justify the delay in contacting his advocates.
 10. When canvassing the application, the applicant appreciated the fact that when the court was called upon to extend time for lodging a notice of appeal, it would exercise its discretion judiciously, depending on the circumstances of each particular case.
 11. The said legal position was eloquently spelt out by this Court in the case of *Njoroge v Kimani*, Civil Application No Nai E049 of 2022, as follows;

“An applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.”
 12. The applicant believes that he had demonstrated to the court that because he was elderly and also routinely fell ill from an assortment of ailments, that was a reasonable explanation for the delay in following up the case. He further submitted that;

“This situation is compounded by his former Advocate's negligent and neglectful failure to promptly inform him of the entry of judgment, which the Applicant only became aware of in December 2022 when Auctioneers proclaimed his movable assets.”



13. On his part, the 1st respondent expressed the view that in the absence of a medical report, the bundle of medical chits did not show the extent of the applicant's infirmity. In those circumstances, the 1st respondent submitted that the applicant had failed to discharge the burden of proof.
14. Having given due consideration to the application, the affidavits and the submissions, I find that the age and the ill-health of the applicant have not been disputed. He is an elderly person, who was not enjoying good health.
15. Although the extent of the applicant's infirmity was not clear, from my perusal of the medical chits, I find no reason to doubt the applicant's contention about his inability to communicate with his advocate about the case, during the period when he was unwell.
16. I appreciate that it is not enough for a party to simply blame his advocate for such transgressions as the failure to take steps in the prosecution of his case; and that was because the party has a responsibility to demonstrate the steps which he had taken to keep his advocate on his toes, by ensuring that the case was active.
17. A party might not understand the steps to be undertaken in litigation, but he has the right and duty to seek information from his lawyers. By seeking answers, the party would be showing a genuine interest in the case; and that would be a factor for a positive consideration by the court.
18. In this case, the applicant did not communicate with his advocates.
However, he has explained that the said inaction was due to the fact that he was unwell.
19. Secondly, the applicant's advocate had not informed him about the judgment. Therefore, the applicant had no reason to give appropriate instructions for the filing of a notice of appeal.
20. I am satisfied that the applicant has put forward a plausible explanation for the inaction between March 18, 2022 and December 6, 2022, when the auctioneers visited house for the purposes of executing the judgment. However, the applicant had not provided any explanation for the delay between December 6, 2022 and February 8, 2023.
21. Furthermore, as the 1st respondent has pointed out, the applicant has only sought the extension of time to file and serve a notice of appeal. The applicant had not asked for an extension of time to file and serve either the record of appeal, or the letter bespeaking the proceedings from the court whose decision the applicant intended to challenge by an appeal.
22. In the case of the *County Government of Mombasa vs Kooba Kenya Limited*, Civil Application No 130 of 2018, Sichale JA noted that the applicant had served the notice of appeal, and the letter bespeaking the proceedings, late. The learned Judge held as follows;

“These procedural lapses do not feature in the motion before me. Supposing I were to grant the orders sought, which orders are confined to two substantive prayers, what happens to the late service of the Notice of Appeal and the late service of the letter bespeaking the proceedings? In my view there will still be procedural lapses not salvaged by the two prayers in this motion i.e extension of time to file the Notice of Appeal as well as an extension of time to file the record of appeal.”
23. In this case the applicant has not asked for an extension of time to serve the letter bespeaking the proceedings from the trial court.



24. In the case of *Paul Kiprop Chepkuto vs University Council of Moi University & 3 others*, Civil Application No E089 of 2022, Joel Ngugi JA expressed himself thus;

“ 10. Then, there is a second, perhaps bigger problem; in bringing the Application, the Applicant would only have solved half of his conundrum: it still remains a fact that he served the Notice of Appeal and the letter bespeaking the proceedings late – and there are no substantive prayers in the present Application seeking extension of time to so serve them.

....

In the end, therefore, I would agree with Sichale, JA in the *Kooba Kenya Limited Case*, that an application such as this, in the present circumstances is doomed to fail.

To say so is not to succumb to the allure of technocratic formalism; it is to realise that the respondents were entitled to the right to have notice of all the substantive prayers sought in an application, so that they can adequately respond. It would be un-procedural and prejudicial to the respondents to grant the applicants substantive prayers regarding service which are not in his application.”

25. As the applicant did not seek an extension of time to serve the letter bespeaking the proceedings, this court cannot grant the same, gratis. And if no such an order is granted, the order for an extension of time to file the Notice of Appeal, by itself, would not advance the applicant’s position.

26. In the result the application is dismissed.

27. The applicant will pay costs thereof, to the 1st respondent.

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

F. OCHIENG

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

