



**Toloi v Murenga (Suing on Behalf of the Estate of Arose Akhusama Kassim) & 3 others
(Civil Application E072 of 2023) [2023] KECA 1365 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1365 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E072 OF 2023
HM OKWENGU, JA
NOVEMBER 10, 2023**

BETWEEN

ASMAN MATSUKHU TOLOI APPLICANT

AND

**FARAJALLAH MABIALE MURENGA (SUING ON BEHALF OF THE ESTATE
OF AROSE AKHUSAMA KASSIM) 1ST RESPONDENT**
RAMADHAN MABIALE KASSIM 2ND RESPONDENT
HASSAN MURENGA KASSIM 3RD RESPONDENT
BAKARI WEKHOBIA KASSIM 4TH RESPONDENT

*(Being an application for extension of time and leave to file an Appeal out of
time from the Judgment of the Environment and Land Court at Busia (A.
Omollo, J) delivered on 19th October 2021 in ELC Suit No. 149 of 2016 (O.S)*

RULING

1. On 19th October, 2021, the Environment and Land Court (A. Omollo, J.) delivered a judgment in which the court entered judgment for the 1st respondent Farajallah Mabiale Murenga (suing on behalf of the estate of Arose Akhusama Kassim and declared that the estate of Arose Akhusama Kassim, (now deceased) had a share in Busia Municipality Plot No. 7983/127 and Busia Municipality Plot No. 7983/7.
2. Asman Matsukhu Toloi, the applicant herein being dissatisfied with the judgment of the ELC, filed a notice of appeal dated 29th October, 2021. He is now before us with a notice of motion dated 7th June, 2023, seeking to have time extended to enable him file his intended appeal out of time and also to be granted leave to file the appeal out of time. The applicant explains that he had earlier filed an application



for review of the judgment intended to be appealed from, but the application was dismissed by the ELC court on 7th July, 2022.

3. The applicant maintains that he has an arguable appeal as the learned Judge failed to recognize that a Business Name cannot own property, that under the partnership's Act, a partnership is dissolved by the death of a partner, and that the deceased partner's interest in the partnership assets forms part of his estate. The court is further faulted for failing to recognize that a property becomes Partnership Property if there is proof that all partners contributed to the purchase of the said property.
4. The applicant urges the court to allow his application as he has an appeal that raises triable issues. He pleads that he should not be penalized for adopting the alternative method of review.
5. The application is opposed by a replying affidavit sworn by the 1st respondent who maintains that the applicant upon filing the notice of appeal dated 25th October, 2021, voluntarily abandoned the appeal and instead pursued an application for review and setting aside of the judgment delivered on 19th October, 2021.
6. The 1st respondent has filed written submission in which he maintains that the applicant is not deserving of the exercise of the court's discretion; that the notice of appeal was not filed and served upon the respondent as required by the rules; that the applicant has not given a plausible explanation as to why after filing the notice of appeal, the record of appeal was not- filed within 60 days as envisaged under Rule 84 of the [Court of Appeal Rules](#); and that under Rule 85 of the [Court of Appeal Rules](#), the notice of appeal dated 25th October, 2021 is deemed to have been withdrawn.
7. Under Rule 4 of the Court of Appeal Rules, this Court has discretion to extend time prescribed for the doing of any act under the Court of Appeal Rules. However, such discretion is not exercised on whim or caprice but must be exercised judicially.
8. In *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commissions and 7 Other* [2014] eKLR, the Supreme Court synthesized the principles for considering application for extension of time as follows:
 - “(i) Extension of time is not a right of party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the respondent if the extension is granted.
 - vi. Whether the application has been brought without undue delay; and
 - vii. whether in certain cases like election petitions public interest should be a consideration for extending time.”



9. In a nutshell, the applicant must satisfy the court that the delay is not inordinate, that it has been sufficiently explained and that there is a good basis for the exercise of the court's discretion in his favour. In addition, that the respondent will not suffer prejudice.
10. In this case, the notice of appeal was filed on 29th October, 2021, the memorandum of appeal and record of appeal were due within 60 days from that date. That is to say, that the applicant ought to have filed the memorandum and record of appeal by 28th December, 2021. The applicant moved the court for extension of time through his application dated 7th June, 2023. Before this no attempt had been made to file the memorandum of appeal or the record of appeal. That is to say, that the applicant is coming before this Court about 18 months from the time the memorandum of appeal and record of appeal were due.
11. The only explanation given by the applicant is the fact that he had opted to pursue the application for review of the judgment and only reverted back to the appellate process after the review application failed. That explanation is not a plausible explanation for the delay. The applicant voluntarily chose to pursue the review process instead of the appellate process. Having failed in that process, there is no reason why the court should indulge him by extending time for him to pursue the appellate process. The respondent has already been taken through the review process and it would not be fair nor just to delay him from reaping the fruits of his judgment. The applicant having filed a notice of appeal and having failed to institute an appeal within the required time, under Rule 85 of the Court of Appeal Rules, he must be deemed to have abandoned his intended appeal.
12. Clearly the delay in filing the memorandum and record of appeal is inordinate and has not been sufficiently explained. Granting the application 2 years after the judgment subject of the intended appeal would be extremely prejudicial to the respondent.
13. I come to the conclusion that there is no basis upon which this Court can exercise its discretion in the applicant's favour. Accordingly, the application dated 7th June, 2023 is dismissed with costs.

DATED AND DELIVERED AND KISUMU THIS 10TH DAY OF NOVEMBER, 2023

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

