



REPUBLIC OF KENYA



KENYA LAW
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**Chengo v Odida (Civil Appeal (Application) E571 of 2021)
[2022] KECA 615 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 615 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E571 OF 2021**

K M'INOTI, JA

APRIL 28, 2022

BETWEEN

MARTIN CHENGO APPLICANT

AND

VITALIS ODIDA RESPONDENT

(Application for extension of time to appeal out of time from the ruling and order of the Environment and Land Court at Nairobi (Komingoi, J.) dated 17th February 2022 in ELCC No. 648 of 2014)

RULING

1. The applicant's Motion on Notice dated 14th March 2022 is an omnibus application that purports to seek extension of time to file an appeal and at the same time stay of execution of the judgement intended to be appealed. This Court has stated time without number that the two prayers should not be made in the same application because the application for stay of execution when a party is out of time is contingent on the Court first extending time, and secondly, the application for extension of time is heard by a single judge whilst the application for stay of execution is determined by the full Court. (See *Abdulrazak Rageh Haji v. Mahado Abdulrazak Adichare*, C.A. No. E.030 of 2020). I shall, accordingly, consider only the prayer for extension of time.
2. The background to the application is that by a judgment dated 11th June 2020 the Environment and Land Court (Komingoi, J.) restrained the applicant from trespassing or constructing on LR No. 209/20594, Nairobi South B (the suit property) which the court found belongs to the respondent. The court further ordered the applicant to remove the structures that he had constructed on the suit property and to pay the respondent Kshs. 200,000 as general damages for trespass. The applicant duly filed a notice of appeal and the record of appeal against the judgment.



3. Before the hearing of appeal, the respondent took out contempt of court proceedings in the trial court against the applicant and by a ruling dated 17th February 2022, the court found the applicant guilty of contempt of court. It ordered him to purge his contempt by removing his structures from the suit property within 30 days, failing which he was to pay a fine of Kshs 200,000 or serve 4 months' imprisonment. The applicant was aggrieved and filed a notice of appeal against the ruling on 9th March 2022, which was obviously out of the time prescribed by rule 75 of the *Court of Appeal Rules*.
4. In the affidavit in support of the application and in his written submissions, as far as they are relevant to the prayer for extension of time, the applicant states that the delay is only 9 days, which is not inordinate. He explains the delay as having been occasioned by genuine and erroneous computation of time for filing the notice of appeal. The applicant further submits that the relatively short delay has not occasioned the respondent any prejudice. He relied on the ruling of this Court in *Liberato Kivanga Manga v. Prime Bank Ltd* (2021) eKLR where the Court found delay of 29 days not inordinate.
5. The respondent opposed the application vide a grounds of opposition dated March 31, 2022, the contents of which were elaborated in his written submissions. Most of the depositions and submissions addressed the prayer for an order of stay of execution. As far as is relevant to the application for extension of time, the respondent contends that the applicant has not advanced any good reason why the notice of appeal was filed and served out of time in breach of rules 75 and 77 of the Court of Appeal Rules. He adds that the applicant is not entitled to the orders sought because he has not purged his contempt.
6. I have carefully considered the application for extension of time. It is trite that the discretion of the Court under Rule 4 of the Court of Appeal Rules is wide and unfettered. The only caveat is that the discretion must be exercised judiciously rather than whimsically. The considerations that guide the Court in such applications were stated as follows in *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR:

"Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."
7. Turning to this application, the delay in filing the notice of appeal was 9 days, which I consider neither inordinate nor prejudicial to the respondent. The applicant has explained that the delay arose from erroneous computation of time, which I accept. The intended appeal involves, on the one hand, possible committal to jail and loss of liberty and on the other, the question of obedience of court orders and safeguarding of the rule of law. These are important issues that the Court should have an opportunity to pronounce itself on. Taking into account all the forgoing, I am persuaded that the application for extension of time is merited.
8. Accordingly, I allow the motion dated 14th March 2022 and deem the notice of appeal dated 9th March 2022 as filed on time. Costs of this application shall abide the outcome of the appeal. It is so ordered.

DATED AT NAIROBI THIS 28TH OF DAY APRIL, 2022



K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

