



REPUBLIC OF KENYA



KENYA LAW
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**Heldo Foodstuff Limited v Kiptugen & 6 others (Civil Application
E168 of 2021) [2022] KECA 528 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 528 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E168 OF 2021**

PO KIAGE, JA

APRIL 28, 2022

BETWEEN

HELDO FOODSTUFF LIMITED APPLICANT

AND

DAUDI KIPTUGEN 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

**COUNTY DISTRICT LAND REGISTRAR, UASIN GISHU
ELDORET 5TH RESPONDENT**

**HARON CHEPKILOT KIPSANG T/A HELDO FOODSTUFF 6TH
RESPONDENT**

**SILAS KIPTUI KIPCHILAT (ACTING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF THE LATE LEAH JELAGAT
KIPCHILAT) 7TH RESPONDENT**

*(Being an appeal (sic) from the Judgment and Decree of the Environment
and Land Court at Eldoret (M. Odeny, J) delivered on 27th January,
2021 in ELC No. 787 of 2012 (Formerly HCCC No. 213 of 2011))*

RULING

1. The applicant, Heldo Foodstuff Limited, has filed a Notice of Motion dated November 4, 2021 seeking the following orders;



1. The applicant/intended appellant be granted leave to file and serve a memorandum of appeal out of time against the judgment and decree in Environment and Land (sic) at Eldoret No. 787 of 2012 (formerly High Court HCCC No. 213 of 2011) as delivered on the 27th January, 2021;
 2. The Memorandum of Appeal filed and lodged on 7th November, 2021 deemed as duly filed;
 3. The applicant/intended appellant's appeal be consolidated with the 6th Respondent's appeal (Eldoret Civil Appeal No. E304 of 2021) and/or any of the Respondent's appeal herein on such terms as this Honorable Court thinks just or be heard at the same time.
 4. Costs of the application be in the cause.
2. The application is based on eleven grounds and is supported by two affidavits; one deposed by Maina Nyabuti, the applicant's counsel and the other by Shadrack Kimitei Kemboi, who is described as the applicant but since the applicant is a company, he could be the sole director or one of the directors. The two affidavits as read together paint the following narrative.
 3. The impugned judgment was delivered on January 27, 2021. The Counsel now on record, while holding brief for the applicant's former advocates, filed a letter on April 14, 2021 bespeaking the proceedings at the Environment and Land Court registry. Counsel then officially came on record for the applicant on July 7, 2021. Two days later, on 9th July, 2021, he wrote a follow up letter to the registry. Later, counsel, received a hearing notice for Eldoret Civil Appeal No. E304 of 2021, that, unbeknownst to them, had been filed by the 6th respondent. I think that the existence of that appeal should mean the applicant should not be pursuing the present course but I say no more on it.
 4. Shadrack tried to reach his former advocates in order to establish whether they were served with the notice and record of appeal but failed. Upon perusal of the file, counsel discovered that other parties had received copies of the proceedings save for the applicant. He wrote a complaint letter which was received on November 9, 2021 by the Deputy Registrar and sought a certificate of delay which was later issued. They assert that the delay was not their fault and hence the Court should allow this application and in addition have their intended appeal consolidated with the existing appeal filed by the 6th respondent.
 5. The 6th respondent filed a replying affidavit and urged the Court to dismiss the application. Henry Chepkilot Kipsang deposed that; the typed proceedings were ready for collection by February 24, 2021, therefore had the applicant made a follow up, they would have been aware of the same; the delay is inordinate and no satisfactory reason has been proffered; and the certificate of delay did not contain the time taken by the registry in the preparation of the proceedings to enable the Court to compute the delay.
 6. In a Rule 4 application, my free and unfettered discretion shall be exercised in accordance to the well known principles that govern these applications. As was held in *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019; [2020] eKLR.

" Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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. The reasons proffered by both counsel and Shadrack appear to me to be, with respect, little more than mere excuses aimed at covering up their indolence or inaction. From the record, the letter bespeaking the proceedings was filed over two months after the delivery of the impugned judgment. This is contrary to Rule 82(1) of the Court of Appeal Rules Rules which require the bespeaking the proceedings to be lodged within 30 days of the decision intended to be appealed against. Shadrack and his counsel then went to slumber only to make a follow up on the progress of the proceedings on November 7, 2021 two months after counsel properly came on record. Additionally, by counsel’s own admission, he was busy attending to the taxation and an application for stay in the matter, but still failed to make further follow ups on the proceedings which, in any case, had been ready for collection by February 24, 2021, even before counsel made the initial inquiry.
8. To my mind, the reasons advanced for the inordinate delay are unsatisfactory and inexcusable. Counsel had numerous occasions to follow up on the matter, if he so wished, but failed to do so. It seems like both parties were satisfied with writing letters and leaving the onus of following up on their issue to the Deputy Registrar. Counsel seems to rely upon the certificate of delay as evidence that the delay was not occasioned by them. However, the purpose of a certificate of delay as envisioned by Rule 82(1) of the Rules is to compute the amount of time taken by the superior court in the preparation of proceedings not as evidence of how much time it took for a party to collect the said proceedings. I believe a little vigilance on their part would have prevented them from being in this predicament. The delay was therefore not occasioned by the registry.
9. It is trite that there is set minimum or maximum time period of delay. However, since this is an equitable remedy, it is only available to deserving parties. See Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.
10. I find that the delay is not only inordinate but the reasons given are unsatisfactory and not plausible. Thus, the applicant is undeserving of this relief. As a result, I decline to grant the prayers sought and accordingly dismiss the application with costs.

DATED AND DELIVERED AT KISUMU THIS 28 TH DAY OF APRIL, 2022

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

