



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wesonga v Kiprono & 6 others (Civil Application  
E165 of 2021) [2022] KECA 616 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 616 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E165 OF 2021**

**F TUIYOTT, JA**

**MAY 13, 2022**

**BETWEEN**

**BEN MUNERIA WESONGA ..... APPLICANT**

**AND**

**MOSES KIPTOO KIPRONO ..... 1<sup>ST</sup> RESPONDENT**

**KEVIN KENNETH OKWARA ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR UASIN GISHU COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEYS ..... 6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

*(An intended appeal from the judgment (Ombwayo, J.) of the Land and Environment Court at Eldoret dated 20th April, 2018 in the Petition Edloret E & L Court No. 13 of 2015 Consolidated with Eldoret E & L Court No. 14 of 2015)*

**RULING**

[1] The application I am asked to consider and determine is brought under the provisions of Rule 4 of the Rules of this Court. It is dated 29<sup>th</sup> November, 2021 and seeks the following prayers: -

- a. That the Notice of Appeal filed on 3<sup>rd</sup> May 2018 is valid and properly filed and served.



- b. Alternatively, and without prejudice to prayer (a) above the said Notice of Appeal filed on 3<sup>rd</sup> May 2018 be deemed to be properly filed and served and/or leave be granted for a fresh Notice of Appeal to be filed and served.
- c. That time be extended for filing of the Memorandum and Record of Appeal in respect of the judgments made in the Land and Environment Court at Eldoret on the 20<sup>th</sup> day of April 2018.
- d. That this Honourable Court be pleased to define and grant the time span within which to file the Memorandum and Record of Appeal.
- e. That further orders be made including orders as to costs as the Justice of this application may require.”

- [2] The Applicant, Ben Muneria Wesonga, swore an affidavit on 29<sup>th</sup> November 2021 in which he seeks to explain the delay in keeping to the timelines of the Rules of this Court and the basis for his plea for extension of time.
- [3] He is the 6<sup>th</sup> respondent in petitions filed in the Environment and Land Court (ELC) at Eldoret as Petitions No. 13 of 2015 and 14 of 2015. These were consolidated to Environment and Land Petition No. 14A of 2015 and a judgment delivered in respect thereto on 20<sup>th</sup> April, 2020 (not 20<sup>th</sup> April 2018 as he deposes). At that time, he was represented by Mutitu Thiongo & Company Advocates. On his instructions, and timeously, the said advocates filed a Notice of Appeal against the said judgment and lodged it in the appropriate registry on 3<sup>rd</sup> May, 2018.
- [4] He was then to change advocates to his current advocates, Onyinkwa & Company Advocates, who duly filed a Notice of Change of Advocates dated 20<sup>th</sup> July, 2018 on 24<sup>th</sup> July 2018. On 4<sup>th</sup> July, 2020 (not 2019 as again erroneously deposed in the applicant’s affidavit), the new advocates wrote to the previous advocates inquiring if they had written to court requesting for proceedings and judgment and if so to avail a copy of the request.
- [5] In a curt response of 10<sup>th</sup> July, 2020, the said advocates simply stated that they no longer represented the applicant and had no instructions in the matter. The advocates did not address the matter raised by the current advocates. It is the applicant’s averment that the current advocates then informed him that they would assume that the previous advocates had not applied for copies of proceedings and judgment and so proceeded to make the request in writing on 23<sup>rd</sup> April 2019. There appears to be disharmony between the dates and the events and this attracts my comments presently.
- [6] Eventually, the ELC supplied proceedings and judgments to the said advocates and the Deputy Registrar issued a certificate of delay on 15<sup>th</sup> May, 2020. The applicant however says that the documents and proceedings supplied related to ELC No. 14 of 2015 only and not ELC No. 13 of 2015 and so an appeal could still not be filed. That it was not until 21<sup>st</sup> October, 2021 when his advocates requested the Deputy Registrar for an amended certificate of delay that the Deputy Registrar wrote on 30<sup>th</sup> November, 2021 acknowledging that there was indeed a delay in furnishing proceedings, judgment, pleadings and other documents. The applicant, however laments, that the Deputy Registrar refused to issue an amended certificate of delay.
- [7] The 1<sup>st</sup> and 2<sup>nd</sup> respondents oppose the application. The replying affidavit of Kevin Kenneth Okwara, the 2<sup>nd</sup> respondent, challenges the candor of the application. He thinks that the applicant misled the Deputy Registrar into issuing a certificate of delay without any basis in law. He then states that a further attempt to mislead the Deputy Registrar to issue an amended certificate of delay hit a snag when his



advocates alerted the Deputy Registrar of the mischief that would be achieved by the applicant in doing so.

- [8] The 2<sup>nd</sup> respondent states that the two firms of advocates representing the applicant have not explained why they were not able to file the Record of Appeal in line with the law. He questions why, from 3<sup>rd</sup> May, 2018, when the applicant's current advocates learnt that no application for supply of proceedings and judgment had been made by the previous advocates, they made no effort to regularize the record but instead decided to engage in mischief for five (5) years.
- [9] He raises other issues but which for reasons that became apparent shortly, I need not rehash.
- [10] I have considered the matter before me and the rival submissions filed. There is a quick answer to the application.
- [11] It is common ground that the Notice of Appeal was filed and served on time as required by Rules 75 & 77 of the Rules of this Court. Under Rule 82, an appeal is instituted when, inter alia, a record of appeal is lodged in the appropriate registry of this Court. The intended appeal for which leave is sought in this matter is an intended appeal to this Court from the superior court in its original jurisdiction and under Rule 87, a copy of proceedings and judgment of the ELC would be a necessary and vital component of the Record of Appeal.
- [12] As sometimes happens, preparation of copies of proceedings and judgment delay for reasons not attributable to the appellant and it is for this reason that the proviso to Rule 82 (1) excludes the time required for preparation and delivery of a copy of the proceedings to the appellant in the computation of the time within which an appeal is to be instituted. However, to take advantage of the relief of this Rule, Sub Rules (1) and (2) of Rule 82 requires an appellant to apply, in writing, for a copy of the proceedings within 30 days of the date of the decision against which it is desired to appeal and to serve a copy of the application upon the respondent. The entire Rule 82 reads: -

82. Institution of appeals

- (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—
- (a) a memorandum of appeal, in quadruplicate;
  - (b) the record of appeal, in quadruplicate;
  - (c) the prescribed fee; and
  - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
- (3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.



- [13] The applicant concedes that his previous advocates did not bespeak for a copy of proceedings at all. His current advocates, Onyinkwa & Company Advocates, came on record on 24<sup>th</sup> July, 2018 more than three months after the thirty day period for bespeaking the proceedings had past. But even then, it was not until 23<sup>rd</sup> April 2019, nine months later, that the advocates wrote to court requesting for the proceedings. The applicant’s explanation for this prolonged inaction is confusing, incoherent and eventually unbelievable.
- [14] The applicant first says that his current advocates wrote to the previous advocates on 4<sup>th</sup> July 2020 requesting for the stamped request of the proceedings, presumably that those advocates had done so. When the previous advocates respond, they do not address this issue at all. The applicant depones;
- “That I was shown the reply from my said previous advocates by Onyinkwa & company advocates who also informed me that they now assumed that no application was made to the court for proceedings and judgment at the time the Notice of Appeal was filed”
- [15] The reply from the previous advocates which was via email was on 10<sup>th</sup> September, 2020. This would be way over a year after Onyinkwa & Co. advocates had written to court, on 23<sup>rd</sup> April, 2019, requesting for copies of proceedings and judgment for purposes of appeal. Two questions have to be asked. Why would the firm of Onyinkwa & Co. write to court in 2019 asking for proceedings before ascertaining whether the previous advocates had done so? To what end would the current advocates be writing to the previous advocates in July 2020 asking them for a copy of the request for proceedings well aware that they (the current advocates) had in fact sought for those proceedings a year earlier on 23<sup>rd</sup> April 2019? This explanation is not candid and I reject it.
- [16] Matters get worse, even in the full knowledge that a letter bespeaking the proceedings would be hopelessly out of time, the said advocates do not attempt to remedy the situation by seeking extension of time to do so. Instead, they cause the Deputy Registrar of the superior court to issue a certificate of delay dated 15<sup>th</sup> May, 2020. The certificate is invalid because there was never a written request bespeaking a copy of proceedings and judgment made within thirty (30) days of the decision and the certificate was therefore prepared and issued in outright disregard of Rule 82 (1) of the Court of Appeal Rules. The conduct of the applicant’s advocate in seeking and obtaining a certificate of delay that is not in conformity with the law exacerbates the inordinate and unexplained period of inaction.
- [17] I am unable to exercise my discretion in favour of the applicant and in disallowing the application I remain faithful, I believe, to the considerations that guide the exercise of discretion in matters of this nature (See for example *Fakir Mohamed vs Joseph Mugambi & 2 others* [2005] eKLR.).
- [18] The application dated 29<sup>th</sup> November 2021 is without merit and is hereby dismissed with costs.

**DATED AND DELIVERED IN KISUMU THIS 13<sup>TH</sup> DAY OF MAY 2022.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed.*

**DEPUTY REGISTRAR**

