



REPUBLIC OF KENYA



KENYA LAW
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**Eldoc Company Limited v Mwangi & 5 others (Civil Application
E081 of 2021) [2021] KECA 59 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 59 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E081 OF 2021
DK MUSINGA, JA
OCTOBER 8, 2021**

BETWEEN

ELDOC COMPANY LIMITED APPLICANT

AND

SULEIMAN WAITHAKA MWANGI 1ST RESPONDENT

JIMMY KARATU KIMARU 2ND RESPONDENT

DISTRICT LAND REGISTRAR-UASIN GISHU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

CHIEF LAND REGISTRAR 6TH RESPONDENT

*(Being an application for extension of time within which to file and serve the
Notice of Appeal from the Judgment of the Environment and Land Court
(A.O. Ombwayo, J.) dated 23rd October 2020 in E.L.C. No. 442 of 2013.)*

RULING

1. The applicant's notice of motion dated 19th May 2021 seeks extension of time to file and serve a notice of appeal in respect of the judgment of Ombwayo, J. delivered on 11th November 2020 in Eldoret Environment and Land Court (ELC) No. 442 of 2013.
2. The application is supported by the affidavits of Dr. Constantine O. Akwanalo, a director of the applicant and J. I. Nyarotso Advocate, who was an associate in a law firm known as Maritim, Omondi & Company Advocates, who are on record for the applicant.
3. In his affidavit, Mr. Nyarotso advocate deposes, inter alia, that at the outbreak of Covid-19 pandemic in March 2020, law firms were requested by the court to provide their official email addresses for purposes



of communication and M/s Maritim, Omondi & Company Advocates submitted their email address as [Particulars Withheld]; that no notice was sent by the court to advise the firm about delivery of their foresaid judgment although a Judicial staff alleged that a notice was sent to Mr. Nyarotso's personal email address, [Particulars Withheld]; that he learnt about the delivery of the trial court's judgment on 19th January 2021 and on the following day he filed an application for leave to file a notice of appeal out of time before the trial court. The application was however dismissed on 12th May 2021 and on 19th May 2021, the applicant's advocates filed this application.

4. Dr. Akwanalo deposed in his affidavit, inter alia, that on 19th January 2021, after the applicant's advocates learnt that the trial court had delivered its judgment, the applicant instructed their advocates to seek leave to file a notice of appeal out of time which they did; that upon dismissal of that application by the trial court, the applicant further instructed their advocates to file this application; that the delay in filing the notice of appeal was occasioned by the fact that the applicant's advocates were not notified of the delivery of the impugned judgment; that the dispute that was before the trial court is over a parcel of land within Eldoret Municipality and the applicant was an innocent purchaser for value of the said property and became the registered proprietor thereof on 31st May 2010, but judgment was delivered in favour of the 1st respondent, who now intends to sell and transfer the suit property; that the intended appeal has high chances of success as per various grounds that are stated in his affidavit.
5. The application was not opposed by the respondents as no replying affidavit or submissions were filed despite notice of the hearing of the application having been served on 16th September 2021. That notwithstanding, the Court is duty bound to consider the application on its merits.
6. It is not in dispute that in considering an application of this nature under rule 4 of this Court's Rules, the Court exercises its unfettered discretion. The discretion must, however be exercised judiciously. The principles that the Court has to bear in mind in an application for an extension of time are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231.
7. The applicant's advocates stated that they did not receive any notice of delivery of the impugned judgment and I have no reason to doubt the unconverted affidavit of Mr. Nyarotso. Even assuming that the court had sent a notice of delivery of the judgment to Mr. Nyarotso's personal email address (which was not demonstrated), that would not suffice because the official email address of the applicant's advocates had been given as [Particulars Withheld]. There is nothing to show that the trial court ever sent any notice of delivery of the judgment to the applicant's advocates to the given email address.
8. Immediately after the applicant's advocates knew about delivery of the judgment, they notified the applicant, who instructed them to file an application for leave to file an appeal out of time, which they did. Shortly after dismissal of that application by the trial court, the applicant moved with haste to lodge this application. I therefore find that the delay was not inordinate and has been well explained.
9. The applicant is the registered proprietor of the property in dispute. The applicant verily believes that its intended appeal is arguable. It is in the interest of justice that the applicant be afforded an opportunity to pursue its constitutional right of appeal. I do not think that the respondent will be greatly prejudiced by the grant of such leave.
10. I am satisfied that this application is meritorious and allow the same. Consequently, I direct that the notice of appeal be filed and served within fourteen (14) days from the date hereof and the record of appeal be filed and served within thirty (30) days from the date of service of the notice of appeal. I make no order as to costs.



DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

