



Wanakacha v Wanakacha & another (Environment and Land Miscellaneous Application E012 of 2023) [2024] KEELC 3858 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2023
DO OHUNGO, J
MAY 16, 2024**

BETWEEN

WERE WANAKACHA APPLICANT

AND

TOM SHANGO WANAKACHA 1ST RESPONDENT

NANGETHE NETIA 2ND RESPONDENT

RULING

1. By Notice of Motion dated 22nd May 2023, the applicant seeks leave to appeal out of time against a judgment that was delivered by the Senior Principal Magistrate’s Court at Butali (Hon Z J Nyakundi, SPM) on 28th March 2022 in Butali MCELC No 175 of 2018. The applicant also seeks stay of execution of the judgment pending hearing and determination of the intended appeal. The application is based on the grounds listed on its face and supported by an affidavit sworn by the applicant.
2. The applicant deposed that opposing counsel did not inform him of the judgment date and that he was surprised when he instructed his new counsel on 4th October 2022 and the counsel informed him that judgment had been delivered. He added that failure to file the appeal on time was neither deliberate nor intended to defeat justice.
3. The respondents opposed the application through grounds of opposition in which they took the position that the applicant is guilty of laches and that no explanation has been given for the delay. That the applicant is guilty of laches and material nondisclosure.
4. The application was canvassed through written submissions, which both sides duly filed. The applicant argued that failure to attend court on the date of delivery of judgment was inadvertent and hence excusable. He also cited the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and argued that he has adequately explained the delay. He therefore urged the court to allow the application.



5. On their part, the respondents cited the case of *Evans Kiptoo v Reinhard Omwoyo Omwoyo* [2021] eKLR and argued that since the applicant is yet to file an appeal, an order of extension of time cannot issue and that the application is an abuse of the court's process. They further argued that there was a delay of one year and two months, which is inordinate. They therefore urged the court to dismiss the application.
6. I have considered the application, the affidavits, and the submissions. The only issue for determination is whether the orders sought should issue.
7. The Supreme Court stated as follows in the case of in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (*supra*), regarding the principles applicable to an application for enlargement of time:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; ...
8. Pursuant to Section 16A (1) of the *Environment and Land Court Act*, 2011, an appeal from the subordinate court to this court is to be filed within 30 days of delivery of the judgment or ruling. Since the subject judgment was delivered on 28th March 2022, any appeal against it ought to have been filed by 28th April 2022. The present application was filed on 26th May 2023, after a delay of one year and two months. Pursuant to Section 16A (2) of the *Environment and Land Court Act*, 2011, the court has jurisdiction to admit an appeal out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing it in time.
 9. The reason given by the applicant is that opposing counsel then on record did not inform him that the matter was scheduled for delivery of judgment on 28th March 2022. He has not disclosed why he did not know the date of judgment. Assuming that he was not in court when the date was set, he ought to have explained his failure or his advocate's failure to attend court. According to the applicant, he learnt about delivery of the judgment on 4th October 2022. One cannot help but note that even after the said discovery, he did not file the present application until 26th May 2023, almost eight months later. No explanation has been offered for the delay between 4th October 2022 and 26th May 2023. A delay of eight months, for a litigant who is blaming others for not informing him of the judgment date is inordinate.



10. I find that the applicant has failed to lay a satisfactory basis to warrant exercise of discretion in his favour. I find no merit in Notice of Motion dated 22nd May 2023 and I therefore dismiss it with costs to the respondents.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF MAY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Applicant

Ms Shabola holding brief for Mr Ligare for the Respondents

Court Assistant: M Nguyayi

