



**Odus v Odus (Environment & Land Miscellaneous Case
E003 of 2023) [2024] KEELC 4665 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2023**

AY KOROSS, J

JUNE 13, 2024

BETWEEN

MARTIN OHAYO ODUS APPLICANT

AND

BARRACK OWINO ODUS RESPONDENT

RULING

Applicant's case

1. By a notice of motion dated 17/10/2023 that was filed by the applicant, he sought the following reliefs:
 - a. Spent.
 - b. The court does grant leave for the applicant to appeal out of time against the ruling and order dated 28/01/2022 issued in Bondo ELC No. 13 of 2020.
 - c. Memorandum of appeal annexed to the supporting affidavit be deemed as properly filed.
 - d. Costs of the motion be costs in the appeal.
2. The motion was supported by several grounds on the face thereof and materially, the applicant stated he was aggrieved by the impugned decision and wrongly filed an appeal in the wrong court to wit Siaya HCCA No. E004 of 2022 hence the delay; counsel's error should not be visited upon the applicant; there should be a remedy to the filing of the appeal out of time and the respondent will not be prejudiced.
3. In addition, the applicant Mr. Martin Ohayo Odus swore a supporting affidavit on 2/11/2023 whereby he reiterated the grounds in support of the motion and rehashed the history and merits of the dispute,



stated he had an arguable appeal and averred there had been a protracted investigation by the directorate of criminal investigation.

Respondent's case

4. The motion was opposed by the respondent's replying affidavit which he deposed on 28/02/2024. Similarly, he rehashed the background and merits of the dispute and the circumstances that culminated in the impugned decision; stated the motion was filed over 1 ½ years after the impugned decision was rendered and that the applicant was indolent; the motion was not merited and Siaya HCCA No. E004 of 2022 was heard on merits.
5. As directed by the court, the matter was canvassed by written submissions.

Applicant's submissions

6. By the firm of M/s Lawi Ogutu & Company Advocates, the applicant filed brief submissions dated 27/03/2024 in which counsel identified a single issue for determination; whether the applicant has justified reasons for the delay to persuade the court into granting leave to file an appeal out of time.
7. Counsel submitted Section 79G of the Civil Procedure Act encompassed this court with jurisdiction to entertain the reliefs sought. Counsel submitted the Supreme Court of Kenya settled the non-exhaustive principles of leave to appeal out of time in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR thus: -
 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; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
8. Counsel submitted that there was indeed a delay for close to 1 ½ years and the delay had been explained by the applicant in his supporting affidavit. The court notes counsel also introduced new grounds for the delay in the submissions. Counsel submitted that this court should be guided by the decision of West Kenya Sugar Co Ltd v Jason Wafula Kalibo [2021] eKLR and urged this court to be guided by Sections 1A, 1B, and 3A of the Civil Procedure Act.

Respondent's submissions

9. The respondent's law firm on record Ms. Mang'era & Co. Advocates filed written submissions dated 5/04/2024. Counsel waded into the merits of the appeal.



10. Counsel submitted that though Section 79G of the [Civil Procedure Act](#) allowed this court to entertain the motion, this has to be weighed against the overriding objective of the court as set out in Sections 1A and 1B of the [Civil Procedure Act](#) and relied on Nicholas Kiptoo Arap Korir Salat (*Supra*) and the decision of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997 (unreported) which stated that the principles that guide courts in the exercise of discretion were well settled in the following terms: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”

11. Counsel submitted the onus was on the applicant to pursue his counsel to establish the status of his appeal and that sufficient reasons had not been advanced to justify an extension of time and this court ought to dismiss the motion.

Issues for determination, Analysis, and Determination

12. Having carefully given thought to the motion, its grounds, affidavits, and rival submissions, the issues that arise for resolution and shall be addressed together are: -
- a. Whether an extension of time should be granted.
 - b. What orders should this court issue including an order as to costs?
13. However, before I proceed further, I must remind counsels that submissions are not evidence and are mere persuasive arguments of a party’s position on the issues in dispute, and on that basis, this court will ignore any evidence introduced by counsels in their respective submissions.
14. Now, back to the issues for resolution, as evident from the face of the motion, Section 79G of the [Civil Procedure Act](#) provides that appeals originating from the lower court should be filed before this court within 30 days from the date of the decree or order appealed against.
15. However, in occasions of delay, parties can by Section 95 of the [Civil Procedure Act](#), move this court to exercise its judicious discretion based on good and sufficient grounds and the court may extend the time as it deems fit even if the time originally fixed has expired. Section 79G of the [Civil Procedure Act](#) states;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

While Section 95 of the [Civil Procedure Act](#) provides as follows: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



16. The principles that guide this court when faced with a prayer for an extension of time have been dealt with in a line of court decisions notably the recent decision of the Supreme Court of Kenya of *Non-Governmental Organizations Coordination Board v EG & 5 others* (Petition (Application) 16 of 2019) [2023] KESC 78 (KLR) (22 September 2023) (Ruling) which summarized the non-exhaustive principles thus: -

“The guiding principles in considering an application for extension of time were:

- a. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
- b. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
- c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
- d. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. whether there would be any prejudice suffered by the respondents if the extension was granted;
- f. whether the application had been brought without undue delay; and
- g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. In rendering this decision, the apex court cited with approval several authorities including the well-cited decision of Leo Sila Mutiso (*Supra*).

18. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its judicious discretion anchored on reason, material, and evidence placed before it. Since the circumstances of each case are unique as even a singular day could be tantamount to delay, each case has to be considered on its set of conditions.

19. In addition, this court must also consider its principal objective of facilitating the just, expeditious, proportionate, and accessible resolution of disputes as provided for in Section 3 of the *Environment and Land Court Act*.

20. On the principle of delay, it is not in contention there was a delay in filing the instant motion. This court concurs with both counsels on this issue as the impugned decision was rendered on 28/01/2022 and the instant motion was filed on 30/10/2023 which is about 1 year and 7 months after the decision was rendered.

21. The applicant has given two reasons for the delay. The 1st ground was that there were subsisting criminal investigations at Usenge Police Station over the demolition of the applicant’s house that existed in land parcel no. Siaya/Got Agulu/39 (suit property).

22. However, nothing turns on this as this was not substantiated by any evidence other than the applicant’s assertions. In any case, the court is unable to comprehend the nexus between the alleged investigation and the intended appeal.



23. The 2nd ground for the delay was that an appeal had previously been filed in the wrong court. The respondent graciously availed the ruling of Siaya HCCA No. E004 of 2022 which was rendered by Aburili J on 14/03/2022 where the Hon. Judge stated the appellant (applicant herein) had lost interest in the appeal since he had failed to appear before the court despite notices to appear being issued to him.
24. The Hon. Judge went further and struck out the appeal for want of jurisdiction and the decision was remitted to the parties.
25. With all due respect to the applicant, Siaya HCCA No. E004 of 2022 cannot be the basis for the delay since the High Court adequately gave him opportunities to appear before it but he squandered them. Further, he was all along aware of the outcome of the decision and has not been candid with this court.
26. The decision of *West Kenya Sugar Co Ltd (Supra)* which the applicant's counsel has relied on to support his argument is distinct from the circumstances of this case as in that case, the applicant therein acted with haste by applying for leave to appeal out of time before the appropriate court within 2 months after the wrong court he had appealed to struck out his appeal.
27. Yet, in this case, the applicant has approached this court over 1 ½ years after the decision striking out his appeal was rendered in Siaya HCCA No. E004 of 2022. A case belongs to a litigant and not his advocate and there is no evidence he made follow-ups to ensure this court is moved timeously in an appropriate manner. I am not satisfied with the explanations advanced by the applicant.
28. On the grounds of the arguability of the appeal, I am similarly not satisfied the appeal is arguable. The impugned decision which the applicant is aggrieved against emanated from an interlocutory application dated 13/12/2021 which has been overtaken by events since a substantial judgment was subsequently rendered by the lower court on 3/02/2022.
29. The burden was upon the applicant to demonstrate by way of evidence, plausible and satisfactory reasons for the delay and arguability of the appeal, and in the absence, I must conclude, find, and hold the applicant has not met the ingredients to warrant enlarging the time for him to file an appeal out of time.
30. Ultimately, this court hereby dismisses the notice of motion dated 17/10/2023 and since the parties are siblings, each party shall bear their respective costs.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 13TH DAY OF JUNE 2024.

HON. A. Y. KOROSS

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Ogutu for the applicant

Mr. Obado for the respondent

Court assistant: Ishmael Orwa

