



**Chepyegon v Chepyegon (Environmental and Land Originating Summons
372 of 2014) [2024] KEELC 5602 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5602 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 372 OF 2014**

JM ONYANGO, J

JULY 24, 2024

BETWEEN

WILSON CHEPYEGON PLAINTIFF

AND

KIMOSOP CHEPYEGON DEFENDANT

RULING

1. The Applicant moved the court *vide* a Notice of Motion dated 24th July, 2023 seeking the following orders:
 - a. The firm of Limo R.K & Company Advocates be and is hereby granted leave to come on record for and on behalf of the Defendant in place of Chebii & Company Advocates.
 - b. That the Honourable Court be pleased to enlarge time within which the Defendant/Applicant shall file and serve a Notice of Appeal against the judgment and Decree delivered on 9th February 2022 and upon time being enlarged as such, the Plaintiff/Applicant be allowed to file his appeal out of time
 - c. That the costs of this application be provided for.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 24th July 2023 in which he deposes that the Applicant was aggrieved by the judgment of this Honourable Court delivered on 9th February 2022. He deposes that he immediately instructed his former advocate to file a Notice of Appeal against the impugned judgment and the same was duly filed. That he thereafter fell ill and when he got better he discovered that his former advocate had not served the Notice upon the Respondent within the requisite timelines and the Respondent applied to have it struck out. He adds that by a ruling delivered on 30th June 2023, the Court of Appeal struck out the Notice of Appeal on the grounds that it was served out of time.



3. The Applicant avers that he has since instructed his current advocates to act for him and he has obtained a copy of the typed proceedings. He deposes that he has an arguable appeal and he seeks an opportunity to be heard on merit. He concludes that if the application is not granted, he shall suffer irreparably.
4. The Respondent has opposed the application vide his Replying Affidavit sworn on 9th October 2023. In the said affidavit he avers that the Applicant has been indolent since 2022 and adds that since June 2023 when the appeal was struck out, he did not take any further steps to pursue his case until September 2023.
5. He states that even though the Applicant has given the reason for the delay being the fact that he was sick, the medical documents annexed to his affidavit date back to July 2017, way before the case was concluded. He argues that the Court of Appeal considered the said medical records and found no merit in the reasons given for the delay. Further that the medical records do not account for the period between 21st February, 2022 and 26th April, 2022 when the Notice of Appeal was struck out.
6. He avers that he will be prejudiced if the orders sought are granted as the Applicant has not come to court with clean hands as the application is brought in bad faith and it is incompetent unmerited and an abuse of the court process.
7. The application was canvassed through written submissions and both parties filed their submissions which I have carefully considered.

Analysis and Determination

8. The only issues for determination are whether the firm of Limo R.K should be allowed to come of record for the Applicant in place of the firm of Chebii & Co Advocates and whether the Applicant should be granted leave to appeal out of time.
9. The first prayer is not contested by the Respondent and it is therefore granted as prayed.
10. With regard to the second prayer, counsel for the Applicant has submitted that the court has a wide and unfettered discretion to enlarge time. The discretion must however be exercised judiciously. He has relied on the case of *Elkana Kipruto Tallam v Moi University* (2020) eKLR and *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR.
11. It is his further contention that the mistake of his former advocate in failing to serve the Notice of Appeal on the Respondent on time should not be visited upon him. He relied on the case of *Bains Construction Co. Ltd v John Mzare Ogowe* (2011) eKLR and *Sokoro Savings & Credit Cooperative Society Ltd v Mwamburi (Civil Application No Eo32 of 2022)* (2023) KECA 281 (KLR) 31March 2023 (Ruling).
12. The principles for granting an application for leave to appeal out of time are now well settled. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR, it was held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay;”
13. In an application for extension of time the Applicant must explain the delay in filing the appeal to the satisfaction of the court.
14. In the case of *Odera Obar & Co Advocates v Acquva Agencies Limited* (2021) eKLR where the court held as follows:
- “The law does not set out any minimum or maximum period of delay. All it states is that the delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”
15. In the instant case the Applicant’s delay of five months has not been adequately explained by the Applicant. Even though he avers that his advocate discovered that the judgment was delivered on 28th February, 2023 the application was not filed until 3rd May 2023. In the circumstances, I am not persuaded that I should exercise my discretion in favour of the Applicant.
16. Consequently, it is my finding that the application lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JULY, 2024.

.....
J.M ONYANGO
JUDGE

In the presence of;

Mr. Tororei for the Respondent

No appearance for the Applicant

Court Assistant: Brian

