



**Odundo v Mainya (Environment and Land Miscellaneous Application
E009 of 2024) [2024] KEELC 6391 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2024
GMA ONGONDO, J
SEPTEMBER 30, 2024**

BETWEEN

PAUL KETA ODUNDO APPLICANT

AND

KENNEDY OTIENO MAINYA RESPONDENT

RULING

1. This ruling is in respect of an application by way of Notice of Motion dated 17th May 2024 brought under, inter alia, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and Order 22 Rule 52 of the [Civil Procedure Rules, 2010](#) by the applicant, Paul Keta Odundo, through Nancy Nyarige and Company Advocates, seeking the following orders:
 - a. Moot
 - b. That the honourable court be pleased to enlarge time for filing appeal thereafter issue certificate of delay outside time prescribed in law to file appeal.
 - c. That upon allowing this application and upon payment of the requisite court filing fees the appeal be deemed duly filed.
 - d. Moot
 - e. That the court do order any relief that it seems fit and just for the benefit of the applicant herein.
 - f. Costs of this application be in the cause.
2. The application is anchored on the supporting affidavit of twenty-five paragraphs sworn on even date by the applicant, alongside the annexed documents marked as P.K.O- 1 to P.K.O-3 which are; a copy of the draft memorandum of appeal, a copy of the trial court's judgment and a copy of the complaint filed against the auctioneer.



3. Briefly, the applicant laments that he was sued by the respondent in Mbita Principal Magistrate's Court Environment and Land Case No. 3 of 2024, for having trespassed onto the suit parcel of land, Kasgunga/Kamreri/3778. That vide its judgment delivered on 23rd August 2023, the trial court ordered him to pay the respondent a sum of Kshs.500,000. That on 6th May 2024, he was arrested and taken to Mbita Police Station where he was detained until 13th May 2024, when the trial court committed him to civil jail. That his family was evicted from the suit land and their house demolished.
4. He averred that his family is unable to establish a new home in his absence under Luo customs. That the intended appeal has high chances of success. Further, that the respondent will not suffer any prejudice if the orders sought herein are granted. That the instant application has been made timeously and it is in the interest of justice that the same be allowed.
5. The respondent, through J. W. Weke and Company Advocates, opposed the application by way of Grounds of opposition and Replying Affidavit both dated 6th June 2024. He contended that the application is scandalous, frivolous and vexatious and an abuse of the court process. Thus, counsel sought that the same be dismissed with costs and interest at court rates.
6. Pursuant to leave of court granted on 11th June 2024, both parties filed further affidavits. The applicant filed a further affidavit dated 20th June 2024 and deponed that immediately after the judgment of the trial court was delivered, he instructed the firm of M/s Moriasi Osoro and Company Advocates to file an appeal challenging the same and paid the requisite legal fees. That he also applied for a copy of the trial court's judgment and decree. That however, the said firm did not lodge the appeal. That therefore, the delay in lodging the appeal was a mistake of counsel and ought not to be visited upon the litigant. He attached a copy of the receipt for instruction fees dated 29th September 2023 (P.K.O-1) and a copy of the judgment, decree and court fees receipt (P.K.O-2 a, b & c).
7. In a further affidavit sworn on 27th June 2024, the respondent alleged that the applicant is no longer in custody at Homa Bay GK Prison. He reiterated that the instant application is an abuse of the court process and urged the court to dismiss the same with costs.
8. The application was heard by way of written submissions further to the directions of this court given on 11th June 2024.
9. The applicant's counsel filed submissions dated 26th June 2024 and submitted that the firm of Ms Moriasi Osoro and Company Advocates failed to file an appeal challenging the trial court's judgment in time, despite receiving instructions. That the prospective appeal has high chances of success. Thus, counsel urged the court to allow the applicant to file an appeal out of time or in the alternative, direct that the suit be heard afresh by a different court of similar jurisdiction. That in the interim, the court be pleased to grant the applicant bond pending appeal.
10. The respondent's counsel filed submissions dated 4th July 2024 and identified four issues for determination namely:
 - a. The merit of this application and memorandum of appeal attached hereto
 - b. Whether leave should be granted to file an appeal out of time.
 - c. Whether the applicant should be released on bond.
 - d. Whether the appeal has a prima facie high chance of success.
11. Learned counsel submitted that merely blaming counsel is not sufficient ground to warrant granting of leave to file an appeal out of time. That the applicant has unlawfully maneuvered his way out of custody



at Homa Bay GK prison in disregard of court orders. That the prospective appeal is not arguable and has no chance of success. Thus, counsel urged the court to dismiss the application with costs. Reliance was placed on various authoritative pronouncements, including the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR, to fortify the submissions.

12. From the foregoing, has the applicant established his case for grant of the orders sought in the application?
13. It is noteworthy that Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. It is further noted that Section 79 G of the same *Act* stipulates the time for filing of appeals from subordinate courts.
14. Order 50 Rules 4, 6, 7 and 8 of the *Civil Procedure Rules, 2010* provides for when time does not run, power to enlarge time, enlargement of time and computation of days respectively.
15. It is trite law that an application for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. That the court has to balance the competing interests of the applicant with those of the respondent, see *M/S Portreitz Maternity -v- James Karanga Kabia Civil Appeal No 63 of 1997*.
16. In *Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 others* {2014} eKLR, the Supreme Court of Kenya set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -
 - a. "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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
17. The applicant averred that the delay in lodging the appeal was a mistake of counsel and ought not to be visited upon him. However, the respondent contends that blaming counsel is not sufficient ground to warrant granting of leave to file an appeal out of time.
18. So, is the delay excusable? In *Njoroge -v- Kimani* (2022) KECA 1188 (KLR), the Court of Appeal stated that:

"...Excusable delays are delays that are unforeseeable and beyond the control of the party. Non- excusable delays are delays that are foreseeable or within the party's control..."



19. In Njoroge case (supra) which cited the decision in *National Union of Mineworkers -v- Council for Mineral Technology* (1998) ZALAC 22 at para 10, the court further held that:

“...The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive...

There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...” (Emphasis laid)

20. I bear in mind that the trial court’s judgment was delivered on 23rd August 2023. The instant application was lodged herein on 18th May 2024, almost 9 months later.

21. Regarding the applicant’s contention that the delay was occasioned by the mistake of counsel, it is trite law that a litigant has a duty to follow up on his case after he has instructed an advocate. This position was reaffirmed by the Court of Appeal in the case of *Rajesh Rugbani v Fifty Investments Limited & another* [2016] eKLR where it held that:

“In *Habo Agencies Limited -v- Wilfred Odhiambo Musingo* [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In *Mwangi - v - Kariuki* (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.”

22. In *Dilpack Kenya Limited -v- William Muthama Kitonyi* [2018] eKLR, which decision I cite with approval, Odunga J. (now, JA) stated that:

“33. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in *Berber Alibhai Mawji v. Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.” (Emphasis added)

23. Likewise, in *Duale Mary Ann Gurre -v - Amina Mohamed Mahamood & Another* [2014] eKLR, the court held as follows:

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If



the Advocate commits a negligent act the client has an independent cause of action against the Advocate.” (Emphasis laid)

24. In light of the foregoing, it is my considered view that the delay of nearly 9 months is inordinate. No reasonable and acceptable explanation for the delay has been advanced herein. Clearly, the instant application is an afterthought.
25. Therefore, I find and hold that the decree has been partially satisfied and that the delay in mounting this application is inexcusable and has not been satisfactorily explained.
26. Accordingly, the application by way of a Notice of motion dated 17th May 2024, be and is hereby dismissed with costs to the respondent.
27. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 30TH DAY OF SEPTEMBER 2024.

G.M.A ONGONDO

JUDGE

Present

1. Ms. Weke, Learned Counsel for the respondent
2. Respondent

