



REPUBLIC OF KENYA



**KENYA LAW**  
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**Badbess v Nahdy (Environment and Land Appeal E005 of 2024)  
[2024] KEELC 6098 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6098 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E005 OF 2024  
NA MATHEKA, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**MOHAMED BADBESS ..... APPELLANT**

**AND**

**ABDALLA MOHAMED NAHDY ..... RESPONDENT**

**RULING**

1. The application is dated 1<sup>st</sup> February 2024 and is brought under Sections 1B & 3As 63(e) 79G of the [Civil Procedure Act](#) seeking the following Orders;
  1. This application be certified as urgent and service thereof be dispensed with in the first instance.
  2. An order be granted extending the time for filing an appeal against the judgment of the Learned Hon. Mr. J. B. Kalo CM. delivered on 30<sup>th</sup> November, 2023 in Mombasa CMCC NC. 706 of 2006 (Abdalla Mohamed Nahdy -Vs- Shaban Swedi & Mohamed Badbess) of Appeal dated the 1<sup>st</sup> day of February, 2024 filed herein be deemed as duly filed within time and the same be deemed to be properly on record.
  3. Any further orders and/or directions be given as this Honorable Court may deem just and expedient.
  4. The costs of this application be provided for.
2. It is supported by the affidavit of Mohammed Badbess and grounds that he Appellant is the registered proprietor of all that property known as Plot No. Mombasa/Block XVII/1438 on which these stands a residential house. The property used to be a disused road reserve until sometimes in May, 2000 when no objection was made to the notice of intention to close the road reserve permanently and allocate the same for occupation. The Appellant was subsequently issued with a certificate of lease of the property dated 5<sup>th</sup> October, 2000. In judgment of the subordinate court the Learned Magistrate



failed to recognize that the Appellant's residential house is, therefore, not on a road reserve but on a legally allocated plot of land. The Learned Magistrate further failed to recognize that the Respondent's cause of action was in respect of an encroachment on his parcel of land namely Plot No. Mombasa/Block XII/120 but not blockage of access to his parcel of land. The Appellant's residential house stands squarely within the boundaries of the Appellant's Plot No. Mombasa/Block XVI 1438 and has not encroached on the Respondent's Plot No. Mombasa/Block/120. The appeal raises strong arguable and triable issues. The Plaintiffs have good and sufficient cause for not filing the appeal out of time. There has been no inordinate delay in filing this application.

3. This court has considered the application and submissions therein. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides that:

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.”

4. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of town. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* (1970) EA 482 the court stated as follows;

Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

5. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR thus;

Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

6. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. This application is for the extension of time to appeal against the judgement herein which was delivered on 30<sup>th</sup> November 2023 by Hon J. B Kalo. This application was filed on the 8<sup>th</sup> February 2024.

7. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* (2013) eKLR the court held as follows;



- (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 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 respondent of the extension is granted.
  - (6) Whether the application has been brought without undue delay; and
  - (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
8. I have given due consideration of the record in light of the rival pleading, oral and written submissions by the parties and principles that guide the court I find that the reason given for the delay in filing the appeal is that judgement to be appealed against was delivered on 30<sup>th</sup> November 2023 electronically to the Advocates. That he instructed his Advocates to prefer an appeal and only obtained a copy of the same sometime in January 2024. It was only later that he discovered the appeal was never filed. That by the time he instructed his current Advocates, the time allowed to file an Appeal had lapsed. The Applicant submitted that in the judgement the Learned Magistrate failed to recognize that the Appellant’s residential house is, therefore, not on a road reserve but on a legally allocated plot of land. The Learned Magistrate further failed to recognize that the Respondent’s cause of action was in respect of an encroachment on his parcel of land namely Plot No. Mombasa/Block XII/120 but not blockage of access to his parcel of land. This court notes that the said judgement was never attached to the application and this court cannot refer to the same. The Respondent submitted that their claim is on encroachment by the Applicant on a portion of his land thus blocking the Respondent’s access to that portion. That a site visit was conducted by the court on the 25<sup>th</sup> June 2021 and it was found that the Applicant had encroached and trespassed. I find that the applicant does not have an arguable appeal. I also find that the applicant is guilty of inordinate delay and the reason given for the delay is not acceptable. I find this application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

