



**Onyango v Legal Representatives of the Estate of Mohamed Zakaria
Sadik (Deceased) & another (Environment and Land Appeal
E008 of 2024) [2024] KEELC 6099 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E008 OF 2024
NA MATHEKA, J
SEPTEMBER 24, 2024**

BETWEEN

JARED OMONDI ONYANGO APPELLANT

AND

**THE LEGAL REPRESENTATIVES OF THE ESTATE OF MOHAMED ZAKARIA
SADIK (DECEASED) 1ST RESPONDENT**

MASAVE MWOLOLO 2ND RESPONDENT

RULING

1. The application is dated 29th February 2024 and is brought under Order 50 Rule 6 and Order 42 Rule 1 of the Civil Procedure Rules and Sections 79G and 1A, 1B and of the Civil Procedure seeking the following orders that;
 1. This Application be certified as urgent and be heard on priority basis forthwith.
 2. This Honourable Court be pleased to grant orders for extension of time for the Applicant to file an appeal out of time.
 3. Subsequent to prayer (2) above, the Honourable Court be pleased to admit the Memorandum of appeal filed on 20th January, 2024 and it be deemed to be properly on record.
 4. In the alternative, this Honourable Court be pleased to extend the time limited for filing of the Memorandum of Appeal herein and that the Memorandum of Appeal filed herein be deemed to be filed within the statutory time limits.
 5. Costs of this Application be provided for.



2. It is supported by the Affidavit of Jared Omondi Onyango and is based on the following grounds that vide the judgment delivered on 27th November, 2023 in Mombasa MCCC/E412/2022 Mohamed Zakaria Sadik Jared Omondi Onyango & Another, the Court in its decision found that the 1st Defendant participated in a plan to swindle the 1st Respondent by selling him land that he did not have. Being aggrieved by the decision of the lower court, the Applicant intends to appeal against the whole of the decision of the lower court. The Applicant was not aware of when the judgment was delivered since the same had been earmarked to be delivered on Notice, but the said Notice was never served upon the Applicant who only learned of the judgment upon perusal of the court's file out of anxiety. Failure to appeal timeously was not intentional, but rather occasioned by circumstances outside the control of the Applicant. Unless the Application is allowed and the appeal admitted out of time, time to file the intended appeal will continue running and ultimately cause inordinate delay to the Applicant's detriment. The intended appeal and/or Memorandum of appeal raises serious issues which need to be heard and determined on merits. The Respondents will not be prejudiced in any way as they shall have the opportunity to respond. In any event, they can be compensated by costs. It is in tandem with justice to certify this Application as extremely urgent in order to afford the Applicant the right to be heard as established under Article 50 of *the Constitution*. The right to fair hearing under Article 50, 25 and 24 of *the Constitution* of Kenya, 2010 is a nonderogable right. This Honourable Court is vested with jurisdiction under the cited law to entertain and determine this Application.
3. This court has considered the application and submissions therein. The respondents were served but failed to attend court or file any response. 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 decision of this court including, but no 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 of Hon M. Nabibya RM in Mombasa MCC C No. E412 of 2022 delivered on the 27th November 2023. This application was filed on the 3rd April 2024 over 4 months later.
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 and principles that guide the court. The reason given for the delay in filing the appeal is that Judgment was delivered on 27th November 2023 in Mombasa MCCC No. E412 of 2022 is that the Applicant was not aware of when the judgment was delivered since the same had been earmarked to be delivered on Notice, but the said Notice was never served upon the Applicant who only learned of the judgment upon perusal of the court's file out of anxiety. The applicant has filed the application without any delay after learning of the existence of the judgement. It is not indicated when this discovery came about. The only documents attached to the application is a draft memorandum and a letter to court dated 20th February 2024. The draft memorandum of appeal states that the trial magistrate erred in fact and law by failing to appreciate the proper effect and purport of the pleadings and evidence before it. I find that the applicant does not have an arguable appeal. I also that find that the applicant is guilty of inordinate delay and this application is an afterthought. I find this application is not merited and I dismiss it with no orders as to costs as it was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

