



**Etole v Akhwaba (Environment and Land Appeal E008 of 2024)  
[2024] KEELC 6221 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6221 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E008 OF 2024**

**E ASATI, J**

**SEPTEMBER 19, 2024**

**BETWEEN**

**JOSHUA ETOLE ..... APPLICANT**

**AND**

**JACKSON KOMBA AKHWABA ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of the Notice of Motion application dated 9<sup>th</sup> April, 2024 brought by Joshua Etole, the applicant pursuant to the provisions of section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya. The application seeks for orders that leave be granted to the applicant to file appeal out of time and that costs of the application be provided for. Prayers (a) and (c) of the application were dispensed with at the first instance when the application was presented ex parte.
2. The application was based on the grounds that the eviction order was not served upon the applicant, that the family of the evicted applicant is now living in the church, that the Respondent intends to dispose of the land to third parties, that the intended appeal has high chances of success and that unless the Respondents are restrained, the intended appeal shall be rendered nugatory and that the developments on the land shall go to waste. the applicant undertook to honour timelines that may be given by court.
3. The application was supported by the contents of the Supporting Affidavit sworn by the applicant on 9<sup>th</sup> April, 2024.
4. The Application was opposed vide the grounds contained in the Replying Affidavit sworn by Jackson Komba Akhwaba, the Respondent, on 11<sup>th</sup> June 2024. The Respondent's case is that the application is misconceived, unmeritorious and lacking in the conditions precedent. That the delay in filing the application has not been explained, that the Judgment and decree has already been executed and that conditions for grant of the orders sought have not been demonstrated.



5. The application was heard orally on 11<sup>th</sup> June 2024. I have taken into account the oral submissions made by the parties. The substantive prayer sought is for an order that leave be granted to the applicant to file appeal out of time. The power for the court to grant leave to file appeal out of time is provided for in the proviso to section 79G of the *Civil Procedure Act* which states; -

“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”

6. In the present case, the reasons advanced by the applicant for not filing the appeal in time are that he was not served with the eviction order and that the judgment was read in his absence. In an application for leave to file appeal out of time, the court takes into account the period of delay, the reasons of the delay, the arguability of the appeal, the degree of prejudice which would be suffered by the Respondent if the orders are granted, the importance of compliance with time limited to the particular litigant or issue and the effect, if any on the administration of justice or public interest, if any, is involved. See the case of *Mwangi -vs- Kenya Airways Ltd (2003) KLR*. In *Leo Sila Mutiso –Vs- RPS Hellen Wangari Mwangi Civil Appeal No. 255 of 198* it was held: -

“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 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.”

7. Regarding the length of the delay the applicant did not disclose in the application the date when the judgment intended to be appealed against was entered.

8. In his submissions, Counsel for the Respondent stated that the Judgment was entered on 19<sup>th</sup> June 2023. This was not denied by the applicant. The application was filed on 9<sup>th</sup> April, 2023 which was about 9 months after the Judgment. This delay was not explained. Under the provisions of Section 79G, an appeal ought to be lodged within 30 days from the date of the judgment. Affidavit of service annexed to the Replying Affidavit of the Respondent and sworn by one Athanas Arthur Musambai, a court process server, shows that the applicant was served with Notice of entry of Judgment, Decree and Notice of Eviction order on 18<sup>th</sup> March 2024. The delay was inordinate. It has not been demonstrated that the appeal is arguable. No copy of the proceedings or judgment or draft Memorandum of Appeal was attached to the application. It is not denied that execution of the decree has already taken place and the applicant evicted from the suit land. To undo all these will, no doubt, cause immense prejudice to the applicant. I find that the application lacks merit and hereby dismiss it with no order as to costs.

9. Orders accordingly.

**RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Ajevi Court Assistant.

Applicant present in person.



Shifwoka for the Respondent.

