



REPUBLIC OF KENYA



KENYA LAW
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**Mbogo v Ongato (Environment & Land Case E004 of 2023)
[2024] KEELC 6055 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E004 OF 2023
AY KOROSS, J
SEPTEMBER 19, 2024**

BETWEEN

REGINA ATIENO MBOGO PLAINTIFF

AND

MARTIN MALUMNGA ONGATO DEFENDANT

RULING

1. By a notice of motion dated 30/11/2022 that was filed by the applicant, she sought the following reliefs: -
 - a. Spent.
 - b. The court does grant leave for the applicant to appeal out of time against the ruling delivered on 4/10/2023 by Hon. L. Simiyu, SPM.
 - c. The Hon. Court be pleased to issue an order of a stay of execution of the ruling delivered on 4/10/2023 pending a hearing and determination of the intended appeal.
 - d. Costs of the motion be in the cause.
2. The motion was supported by several grounds on the face thereof and the 1st respondent's affidavit deposed on 26/02/2024. Materially in both, the applicant stated that the period to appeal lapsed on 4/11/2023; the motion had not been filed inordinately late; the reasons for the delay were that she was financially incapable of paying legal fees to the law firm of M/s. Yonga, Odhiambo & Associates who were her previous law firm on record or obtain court proceedings; the appeal was arguable and meritorious and no prejudice would be occasioned on the respondent.



Respondent's case

3. In opposition, the respondent filed a replying affidavit deposed on 19/04/2024 whereby he made several averments. He averred that the applicant was untruthful as she had earlier on, by a memorandum of appeal, filed an appeal against the impugned decision to wit Siaya ELC Appeal No. E011 of 2023 (appeal).
4. He asserted that when the appeal had reached an advanced stage of disposition including directions on a judgment date, the applicant filed a notice of withdrawal on 5/04/2024. He stated he had no intention of evicting the applicant from the portion of land awarded to her in the impugned decision.

Parties' submissions

5. On the hearing date, the motion was canvassed by oral submissions, and the applicant who was acting in person, submitted that the motion should be allowed as prayed.
6. Mr. Kowinoh, counsel for the respondent, rehashed averments contained in the respondent's replying affidavit and submitted the motion was an abuse of the court process. In rejoinder, the applicant submitted that she was not privy to the appeal.

Issues for determination, Analysis, and Determination

7. Having carefully given thought to the motion, its grounds, affidavits, and rival submissions, the issues that arise for resolution and shall be addressed consecutively are: -
 - a. Whether an extension of time should be granted.
 - b. Whether orders of stay of execution should be granted.
 - c. What orders should this court issue including an order as to costs?
 - a. Whether an extension of time should be granted.
8. Section 79G of the *Civil Procedure Act* provides that appeals originating from the lower court should be filed before this court within 30 days from the date of the decree or order appealed against.
9. However, in occasions of delay, parties can by Section 95 of the *Civil Procedure Act*, move this court to exercise its judicious discretion based on good and sufficient grounds and the court may extend the time as it deems fit even if the time originally fixed has expired. Section 79G of the *Civil Procedure Act* states;

“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.”

While Section 95 of the *Civil Procedure Act* provides as follows: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



10. The principles that guide this court when faced with a prayer for an extension of time has been dealt with in a line of court decisions notably the recent decision of the Supreme Court of Kenya of *Non-Governmental Organizations Coordination Board v EG & 5 others* (Petition (Application) 16 of 2019) [2023] KESC 78 (KLR) (22 September 2023) (Ruling) which summarized the non-exhaustive principles thus: -

“The guiding principles in considering an application for extension of time were:

- a. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
- b. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
- c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
- d. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. whether there would be any prejudice suffered by the respondents if the extension was granted;
- f. whether the application had been brought without undue delay; and
- g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. In rendering this decision, the apex court cited with approval several authorities including the well-cited decision of *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997 (unreported) which stated: -

“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 the 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.”

12. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its judicious discretion which is anchored on reason, material, and evidence placed before it. Since the circumstances of each case are unique as even a singular day could be tantamount to delay, each case has to be considered on its set of conditions.
13. In addition, this court must also consider its principal objective of facilitating the just, expeditious, proportionate, and accessible resolution of disputes as provided for in Section 3 of the *Environment and Land Court Act*.
14. On the principle of delay, the impugned decision was rendered on 4/10/2023 and the instant motion was filed on 8/12/2023- a period of slightly over 2 months which this court does not consider to be inordinately late. It is also noted the applicant erroneously dated the motion as dated in the year 2022 instead of 2023.



15. Though the applicant advanced convincing reasons, the respondent confronted her allegations and availed an appeal which showed that the applicant was guilty of abuse of court process which has been defined by *Black's Law Dictionary*, 11th Edition as the improper and tortious use of a legitimately issued court process to obtain a result that is unlawful or beyond the process's scope.
16. The Court of Appeal decision of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR that was cited with approval in the case of *Geoffrey Kipyegon Moi v Linet Minagi Mshamba & another* [2022] eKLR defined the term abuse of court process as follows: -

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”
17. This court has an inherent jurisdiction to protect itself from abuse or ensure that its processes are not abused. On this basis, this court called for the appeal file and confirmed the respondent's allegations that the applicant had been economical with the truth and was a perjurer. Therefore, I find the applicant is guilty of abuse of the court process.
18. She has not only wasted the court's and respondent's precious time by filing the instant motion but has fraughted the respondent with unnecessary expense. Having found the applicant guilty of abusing the court process, it is unnecessary for this court to address issue (b).
19. As I conclude, I must state that I am yet to comprehend why the applicant filed the motion yet the appeal which was filed by her then law firm on record M/s. Yonga, Odhiambo & Associates, was withdrawn.
20. The burden was upon the applicant to demonstrate by way of evidence, plausible and satisfactory reasons for the delay and arguability of the appeal. Based on the finding of abuse of court process, I must conclude, find, and hold the applicant has not met the ingredients to warrant enlarging the time for her to file an appeal out of time.
21. Ultimately, and in addressing issue (c), this court hereby dismisses the notice of motion dated 30/11/2022 with costs to the respondent. The file in respect of Siaya ELC Appeal No. E011 of 2023 to be remitted back to the registry.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2024.

HON. A. Y. KOROSS

JUDGE

19/9/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Applicant acting in person

Mr. Kowinoh for the respondent



Court assistant: Ishmael Orwa

