



REPUBLIC OF KENYA



KENYA LAW
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**Adeya v Ogutu (Land Case Appeal E020 of 2023)
[2024] KEELC 5917 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
LAND CASE APPEAL E020 OF 2023
GMA ONGONDO, J
SEPTEMBER 18, 2024**

BETWEEN

LILIAN ALUODO ADEYA APPELLANT

AND

JOSHUA OTIENO OGUTU RESPONDENT

RULING

1. The appellant/respondent, Lilian Aluodo Odenya (The applicant herein) through Odindo and Company Advocates lodged an application by way of a Notice of Motion dated 28th May 2024 under, inter alia, Order 42 Rules 11, 12 and 13 of the Civil Procedure Rules 2010 for orders;
 - a. Spent
 - b. That this Honourable court be pleased to strike out the cross-appellant's record of appeal dated 17th May 2024 which were served on the appellant on the 24th of May 2024.
 - c. That this Honourable court be pleased to strike out the cross appeal by dint that the same was filed and served out of time and without leave of the Honourable Court.
 - d. That the costs of this application be in the cause.
2. In support of the application are grounds 1 to 11 set out on it's face and the supporting affidavit of even date sworn by Oscar Odindo learned counsel for the applicant. In a nutshell, the applicant's complaint is that this court's directions given on 7th March 2024 were in regard to only the applicant's appeal dated 5th February 2024. That she was not served with any notice of the cross appeal and the record of appeal herein. Also, that she was served with the supplementary record of appeal dated 17th May 2024 and submissions dated 25th May 2024 by the cross appellant without directions of the court. That the cross appeal offends Order 42 (supra) since the same was not listed for directions and not admitted.



That the cross appeal is incomplete as it lacks a copy of the trial court's judgment. That the application is made in a timely fashion without undue delay and in the interest of justice.

3. By a Replying affidavit sworn on 31st May 20224 by Robert Ochieng learned counsel for the cross appellant/respondent, it is averred that the firm of H Obach and Partners Advocates and not Odindo and Company Advocates, is on record for the applicant. That the cross appellant/respondent's memorandum of cross appeal, record of the cross appeal as well as submissions were duly served timeously as shown in the e-filing system.
4. Also, counsel averred that the court gave directions on both the appeal and the cross appeal in the presence of counsel for the respective parties. That incomplete record of the cross appeal is a procedural technicality as stipulated under Article 159 (2) (d) of *the Constitution* of Kenya 2010 and section 19 of the Environment and Land Court 2015 (2011).
5. By a supplementary affidavit sworn on 4th June 2024, Oscar Odindo learned counsel for the applicant averred that there is no proof of service of notice of the memorandum of the cross appeal and supplementary record of appeal hence, the same is not duly served. That the cross appellant/respondent did not obtain leave of the court to serve the said documents out of time. That there were no directions of the court on the cross appeal.
6. In regard to hearing of the application, learned counsel for the appellant/applicant filed submissions dated 4th June 2024 and implored the court to expunge the record of the cross appeal and strike out the entire cross appeal as there was no leave obtained to file the same out of time. That failure to obtain leave thereof is not curable under Article 159 (2) (d) (supra). That no notice of cross appeal was ever served on the applicant. That therefore, the cross appeal is a non-starter and should be struck out as observed in the case of Kivanga Estates Ltd-vs-National Bank of Kenya Ltd (2017) eKLR.
7. Furthermore, counsel submitted that the cross appeal amounts to an illegality without a remedy in the circumstances. That the cross appellant/respondent does not deserve leave to extend time to regularise such an appeal as held in the case of Gilbert Mwangi Njuguna-vs-Judicial Service Commission and Attorney General (2020) KESC 52.
8. The cross appellant/respondent's counsel filed submissions dated 12th June 2024 to the effect that the application is based on two grounds namely that the cross appeal was not served on the applicant and that the same was filed out of time without leave of the court to do so. Counsel submitted that it is not disputed that the memorandum of the cross appeal and the supplementary record of appeal were duly served upon the firm of H Obach Advocates who were the authorised agents of Odindo and Company Advocates for the applicant as noted in Kimeu-vs-Kasese (1970) KLR 32. That the process server was not called for cross examination to challenge the service as held in Shadrack Arap Baiywo-vs-Bodi Bach (1987) eKLR, among others.
9. Further, counsel submitted that the only difference between the applicant's record of appeal and the cross appeal record by the respondent, is that no extract decree and certain applications made at the lower court, were filed in the former. That therefore, the applicant would be given opportunity to respond to whatever new piece of information raised in the cross appeal rather than to strike it out. That the record of the cross appeal was filed within time namely after the filing of the appeal and not thirty days after the delivery of the judgment of the trial court. Reliance was made on Order 42 Rules 11 and 32 of the Civil Procedure Rules 2010, Christine Aloo-vs-Mary Atieno Auma (2021) eKLR and Kenya Power and Lighting Company Ltd-vs- Peter Langi Mwasi (2018) eKLR hence, termed the application unfounded and urged the court to dismiss it with costs to the cross appellant.



10. I have carefully noted the application, the replying affidavit, the supplementary affidavit and the parties' respective submissions in entirety. So, are the orders sought in the application merited?
11. Concerning legal representation of the cross appellant/respondent, I take into account that on 7th March 2024 learned counsel H Obach held brief for Odingo learned counsel for the applicant. Therefore, there is no doubt that the firm of Odindo and Company Advocates and not any other counsel, is on record for the applicant.
12. It must be kept in mind that Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same Act provides for the time for filing of appeals from subordinate courts.
13. Order 50 Rules 4, 6, 7 and 8 of the Civil Procedure Rules, 2010 stipulates when time does not run, power to enlarge time, enlargement of time and computation of days respectively.
14. It is established law that an application for extension of time must show good and substantial reasons for the delay. That the said extension 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; see Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others {2014} eKLR, by the Supreme Court of Kenya on the considerations to guide the court in exercising its discretion in such cases.
15. The cross appeal was lodged by a memorandum of appeal dated 22nd December 2023. This was done immediately after the amended memorandum of appeal dated 21st December 2023 was filed thus, there was no delay thereof.
16. Proof of service of the record of the cross appeal and the cross appeal is disclosed in the replying affidavit at paragraph 8 in reference to the screen shot image attached to it that the memorandum of appeal of the cross appeal were duly served. The screen shot reads in part;

“Hello counsel kindly acknowledge receipt of this email. And kindly note by receipt you are duly served.”
17. The proceedings of 7th March 2024 herein show that learned counsel H. Obach held brief for the Mr Odingo for the appellant while C. Adingo held brief for Robert Ochieng for the respondent. Directions were given that the appeal and cross appeal be heard by written submissions as both of them were admitted
18. In giving the said directions, the court was guided by Article 159 (2) (b) (d) and (e) of *the Constitution* of Kenya 2010 alongside sections 3 and 19 of the *Environment and Land Court Act* 2015 (2011) and upon an unopposed request by counsel for the applicant. The court had to balance the competing interests of the parties herein.
19. It is trite that the appellant has an undoubted right of appeal; see Butt-vs-Rent Restriction Tribunal (1979) eKLR.
20. The appellant and the cross appellant are entitled to access justice and fair hearing of their respective appeals herein in the spirit of Articles 48 and 50 (1) of *the Constitution* of Kenya 2010. Therefore, it would be absurd and unfair to grant orders sought in the application.
21. Wherefore, the application dated 28th May 2024, is devoid of merit. The same is hereby dismissed with costs in the cause.

Orders accordingly.



DATED AND DELIVERED AT HOMA BAY THIS 18TH DAY OF SEPTEMBER 2024.

G.M. A ONG'ONDO

JUDGE

PRESENT;

1. Ms B Ochieng instructed by Odindo learned counsel for the appellant/applicant
2. Mr. R. Ochieng learned counsel for the respondent
3. T. Luanga, court assistant

