



REPUBLIC OF KENYA



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**Akedi v Atieno; Aloo (Interested Party) (Environment and Land Appeal
3 of 2021) [2024] KEELC 6815 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 3 OF 2021
AY KOROSS, J
OCTOBER 17, 2024
(ORIGINALLY KISUMU ELCA NO. E028 OF 2021)**

BETWEEN

MATIKO AGOYE AKEDI APPELLANT

AND

ROSELIDAH JOYCE ATIENO RESPONDENT

AND

WYCLIFF ALOO INTERESTED PARTY

*(Being an appeal from the judgment of SPM Hon. J.Ong'ondo
given on 25/03/2021 in Siaya PM ELC Case Number 133 of 2017)*

RULING

Background of the appeal

1. This is an appeal that emanates from the decision of the learned trial magistrate whereby parties were disputing over a parcel of land that had allegedly been doubly allocated to the appellant who was the plaintiff in the lower court and the respondent's husband Tom Amina (Tom) who is now deceased.
2. Because of certain intervening circumstances that are capable of disposing of this appeal and shall be unveiled later in this ruling, this court has to render a ruling instead of a judgment. Nonetheless, before I do that, it is pertinent that I revert to setting down the background to this appeal.
3. The appellant's claim dated 5/04/2017 before the trial court was that of trespass. It was against the respondent and the interested party (IP) who was by then a 2nd defendant and the appellant contended that he was the lawful owner and in possession of Commercial Block 1/346 Siaya (suit property).



4. Consequently, he sought orders of declaration that he was the owner of the suit property, permanent injunction, eviction of the respondent and IP, general damages for trespass, and costs of the suit.
5. In response, the respondent and IP who were represented by the law firm of M/s Otieno, Yogo, Ojuro & Co. Advocates filed a defence and counterclaim dated 22/06/2017 in which they denied the claim and put the appellant to strict proof. The respondent asserted she had possessed the suit property for over 6 years and prayed that she be declared the owner.
6. The matter was subsequently slated for hearing and the appellant testified as PW1 whereas the IP and respondent respectively testified DW1 and DW2. The appellant and respondent produced several documents that demonstrated the context of how the appellant and Tom were allocated the suit property by Siaya Municipal Council (council) and the actions that were respectively taken by them upon such allocations.
7. Upon hearing all parties and closing their respective cases, the learned trial magistrate in the impugned judgment was of the view that both parties had failed to properly describe the suit property in their pleadings. He concluded that the suit property as claimed by the appellant and Tom were distinct parcels.
8. This deduction was arrived at after the learned trial magistrate analyzed the council's minutes dated 2/5/2008 that were produced as evidence by both the appellant and respondent.
9. The learned trial magistrate stated that the only discrepancy over the suit property as claimed by the parties was that the appellant's allocation revealed it was located in the "market area" while Tom's was located in the "DC area".
10. He therefore ordered the Siaya County Land Registrar to visit these two distinct properties, mark them and put beacons on them, and put parties in possession as per the council's minutes dated 2/5/2008.
11. This decision did not go down well with the appellant and dissatisfied, he filed an appeal in Kisumu ELC on 29/04/2021. This appeal was dated 23/04/2021 and it raised 9 grounds of appeal.
12. Thereafter, and upon the establishment of this court, the matter was transferred from Kisumu ELC to this court. Subsequently, on 17/01/2022, this court dismissed the appeal for want of attendance. However, a ruling of this court rendered on 14/12/2023 reinstated the appeal and directed the appeal to be canvassed by written submissions.
13. In compliance, the appellant's law firm on record M/s Mugoye & Associates filed written submissions dated 2/05/2024 while the respondent and IP did not file any.
14. In his submissions, the appellant identified 3 issues that faulted the learned trial magistrate- failing to declare the appellant the bonafide and rightful owner of the suit property, failing to grant him permanent injunctive orders against the respondent and IP, and lastly, failing to issue eviction orders against the respondent or for her to give vacant possession to him.
15. The matter was thereafter reserved for judgment today. Nevertheless, as this court was scrutinizing the records in anticipation of penning down its judgment, it came to its attention that the appeal was filed out of time without leave to appeal out of time being granted or such extension being issued hence this ruling.
16. An appeal filed out of time without leave is an issue that touches on this court's jurisdiction and in the absence of such jurisdiction, this court cannot move one step further. This court adopts the position



taken in the Supreme Court of Kenya decision of *Mary Wambui Munene v Peter Gichuki King'ara & 2 others* [2014] eKLR where the court stated thus:-

“(68) The issue, whether these proceedings were a nullity ab initio is an issue that goes to the jurisdiction of this Court to entertain this matter. The question of jurisdiction is a pure question of law. This Court has on several occasions adopted the dictum of Nyarangi J.A in the *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 that it has to be determined from the start, and that where the Court finds it has no jurisdiction, it should down tools.”

17. Section 16A of the *Environment and Land Court Act* which mirrors 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.
18. 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.
19. This court has meticulously but anxiously gone through the entire records and it emerged that the impugned judgment was delivered on 25/03/2021 and the decree was issued on the same date which was a Thursday. The last day the appeal could be filed was 30 days thereafter which fell on 24/04/2021 - a Saturday.
20. Since Saturday fell on a day that offices were closed, it follows that according to Order 50 Rule 3 of the Civil Procedure Rules, the latest date the appeal ought to have been filed was 26/04/2021 which was a Monday.
21. Yet, this appeal was filed on 29/04/2021 which was 3 days out of time without leave of court to appeal out of time being granted or time being extended and I say so because I have not come across such orders in the record of appeal as envisaged by Order 42 Rule 13 (4) (f) of the Civil Procedure Rules,
22. The issue that suffices is whether an appeal that is filed outside the stipulated statutory timelines and without leave of court or extension of expired time is competently before this court and therefore capable of being determined on its merits.
23. This issue is not novel and has been dealt with by our courts and I adopt the positions they have taken. In the Supreme Court of Kenya decision of *County Executive of Kisumu v County Government of Kisumu & 8 others (Civil Application 3 of 2016)* [2017] KESC 16 (KLR) (Civ) (12 April 2017) (Ruling), the apex court had this to say:-

“No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

24. In a decision by a court of concurrent jurisdiction with this court, *Aburili J in Willis J. Ochieng & another v Samwel Abongo Asembo* [2020] eKLR stated:-

“20. The right of appeal lapses the moment the statutory period for filing of such appeal lapses. Beyond that period, the law gives the court discretion to grant extension of time for filing of the appeal. However, the court has no power on its own motion to extend such time for the parties who have not sought for



such leave as this is a jurisdictional issue. It is the parties to seek such extension from the court and make out their case for enlargement of time.”

25. Having filed the appeal out of time without first seeking leave to file it out of time or seek its admission out of time as envisaged by Sections 16A of the *Environment and Land Court Act*, this court was bereft of jurisdiction to entertain the appeal and finds it is incompetent, a nullity, incurably defective and amenable for being struck out in limine.
26. Thus for the reasons stated hereinabove and suo moto, I find that because the appeal is a nullity, I am bereft of jurisdiction to hear the appeal on merits, and the appeal is hereby struck out. It is trite law that costs follow the event and for reasons the respondent and IP did not participate in these proceedings, each party shall bear their respective costs. Ultimately I hereby issue the following disposal orders:-
 - a. That the appeal is hereby struck out.
 - b. That each party shall bear their respective costs.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF OCTOBER 2024.

HON. A. Y. KOROSS

JUDGE

17/10/2024

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

In the Presence of:

Mr. Alphonse for the appellant

N/A for the respondent

N/A for the interested party

Court assistant: Ishmael Orwa

