



REPUBLIC OF KENYA



**Chumo v Rotich (Environment and Land Appeal E003 of 2024)
[2024] KEELC 7519 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E003 OF 2024
LA OMOLLO, J
NOVEMBER 14, 2024**

BETWEEN

BORNES CHELANGAT CHUMO APPELLANT

AND

BENARD ROTICH RESPONDENT

RULING

Introduction.

1. This ruling is in respect of the Appellant/Applicant's Notice of Motion application dated 22nd May, 2024.
2. The application is expressed to be brought under Order 50 Rule 6, Order 22 Rules 22 & 25, Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 79G & 95 of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act* and Articles 50 & 159 of *the Constitution* of Kenya.
3. The application seeks the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to grant an order that the Memorandum of Appeal lodged on 22nd May, 2024 without leave, be deemed to have been duly filed.
 - c. That in the alternative and absolutely without prejudice to prayer (ii) above, this Honourable Court be pleased to grant the Applicant leave to file an appeal out of time against the judgement and decree of the subordinate Court delivered on 2nd August, 2023.
 - d. That this Honourable Court be pleased to grant the Applicant leave to file an appeal out of time against the Judgement and Decree of the subordinate Court delivered on 2nd August, 2023.



- e. Spent
 - f. That there be stay of execution of the judgement and decree of the subordinate Court issued in Kericho CMCC Case No. 24 of 2016 pending the hearing and determination of the Applicant's appeal.
 - g. That the necessary directions do issue.
4. The application is based on the grounds on its face and the supporting affidavit of one Bornes Chelangat Chumo sworn on 22nd May, 2024.

Factual Background.

5. The Appellant/Applicant filed the Memorandum of Appeal dated 22nd May, 2024 appealing from the judgement and decree of Hon. Japheth Bii SRM delivered in Kericho CMCC No. 24 of 2016 on 2nd August, 2023.
6. The Grounds of Appeal are as follows;
- a. That the Learned Trial Magistrate erred in law and in fact in making a finding that there existed a valid contract over land between the Appellant and the Respondent's mother whereas the impugned contract did not in the first place meet the essentials of a valid contract over land imposed by law.
 - b. That the Learned Trial Magistrate erred in law and in fact in making a determination in favour of the Respondent even in spite of his own finding that the contract had not been completed.
 - c. The Learned Trial Magistrate erred in law and in fact in failing to interrogate the Appellant's assertion that the impugned Sale Agreement was a forgery and further failing to critically analyze the evidence submitted before determining that the said sale agreement was valid.
 - d. The Learned Trial Magistrate erred in fact and in law by failing to appreciate the evidence tendered with regard to use, ownership and title to the said land.
 - e. The Learned Trial Magistrate erred in law and in fact in determining that the deceased and by extension the Respondent acquired a beneficial interest over the property known as LR No. Kericho/Chesinende/238 in spite of the fact that no legal and/or factual basis had been laid to warrant such finding.
 - f. The Learned Trial Magistrate erred in failing to appreciate that the Appellant had proved her case on a balance of probabilities against the Respondent.
7. The Appellant/Applicant prays for the following orders;
- a. That the judgment dismissing the Plaintiff's suit and all the consequential orders thereof be set aside and substituted with a finding allowing the Plaintiff's claim.
 - b. That any necessary directions do issue.
 - c. That the Respondent be ordered to pay costs for this appeal.
8. The application under consideration first came up for hearing on 28th May, 2024 when the Court gave the Respondent fourteen days to file his response.
9. On 19th June, 2024, directions were issued that the application would be heard by way of written submissions.



10. The application was mentioned to confirm filing of submissions on 25th July, 2024 and was reserved for ruling.

The Appellant/Applicant's Contention.

11. The Appellant/Applicant contends that she filed Kericho CMCC No. 24 of 2016 and judgment was entered against her on 2nd August, 2023.
12. The Appellant/Applicant also contends that she was dissatisfied with the judgement and decree of the trial Court and therefore appealed against the whole judgement.
13. The Appellant/Applicant further contends that her advocates on record requested the trial Court to supply them with certified copies of the proceedings and judgement to enable them prepare and file an appeal.
14. It is her contention that the certified copies of the proceedings and judgement were ready for collection on 6th November, 2023 and her Advocates on record presented the Memorandum and Record of Appeal for filing.
15. It is also her contention that when her Advocates on record sought directions on the Appeal they realized that there was an inadvertent error in the citation of the index and the appeal had been erroneously filed at the High Court Registry as High Court Civil Appeal No. 44 of 2023.
16. It is further her contention that the appeal was filed before the High Court notwithstanding the fact that the Memorandum of Appeal clearly stated that it was to be lodged in the Environment and Land Court.
17. She contends that the failure to file an appeal before the Environment and Land Court within the stipulated timelines was occasioned by an inadvertent error that led to the appeal being filed before the High Court.
18. She also contends that by the time they discovered the said error, the timelines provided for lodging the appeal had lapsed which necessitated the filing of the application dated 27th March, 2024.
19. She further contends that she has been advised by her Advocates on record that they were constrained to withdraw the aforesaid application which had been slated for hearing on 21st May, 2024 as the same would have been rendered incompetent as no appeal had been lodged prior to its filing.
20. It is her contention that she stands to suffer prejudice if the orders sought are not granted because the Respondent has forcefully taken possession of a substantial portion of the suit property in a purported implementation of the impugned judgement and decree of the Trial Court.
21. It is also her contention that the Respondent has committed further acts of trespass on the suit property that include ploughing, digging a pit latrine and causing a breach of peace notwithstanding the fact that no subdivision has ever been carried out on the property.
22. It is further her contention that the Respondent allegedly assaulted her agent occasioning him grievous harm which resulted in charges being preferred against him in Kipkelion Chief Magistrate Criminal Case No. E206 of 2024 (Kipkelion Division).
23. She contends that she is apprehensive that the Respondent may proceed to sub-divide and/or cause further alienation of the suit property with a view of defeating her interests in the suit property.



24. She also contends that she is advised by her advocates on record that the appeal is arguable hence her plea that the Court grants the orders sought.
25. She further contends that she is ready, able and willing to deposit a reasonable security pending the hearing and determination of the appeal.
26. She ends her deposition by stating that the application has been brought in the interest of justice and without unreasonable delay.
27. The Respondent did not file any response to the application despite service.

Issues for Determination.

28. The Appellant/Applicant filed her submissions on 25th June, 2024. The Respondent did not file any submissions.
29. The Appellant/Applicant identifies the following issues for determination;
 - a. Whether the Applicant is entitled to a grant of leave to have the present appeal deemed as duly filed or in the alternative file appeal out of time. (sic)
 - b. Whether the Honourable Court should issue an order staying execution.
30. On the first issue, the Appellant/Applicant relies on Section 79G of the *Civil Procedure Act* and submits that this Court has the jurisdiction to grant leave to file an appeal out of time.
31. The Appellant/Applicant also relies on Section 95 of the *Civil Procedure Act* and submits that the Court has discretion to enlarge time lines as it deems fit.
32. The Appellant/Applicant submits that before the Court enlarges time, an Applicant must satisfy the Court that he/she has a good and sufficient cause for not filing the appeal in time.
33. The Appellant/Applicant relies on the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, reiterates her averments in her supporting affidavit and submits that she has given a satisfactory explanation as to the delay in filing of the appeal.
34. The Appellant/Applicant also submits that the delay was occasioned by a bonafide mistake whereby the appeal was filed before the High Court instead of the Environment and Land Court.
35. The Appellant/Applicant further submits that her counsel's mistakes should not be visited upon her and she relies on the judicial decision of Lee G. Muthoga v Habib Zurich Finance (K) Ltd & another, Civil Application No. Nai 236 of 2009.
36. The Appellant/Applicant also relies on the judicial decision of Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR and submits that from the grounds of appeal espoused in her Memorandum of Appeal dated 22nd May, 2024 she has an arguable appeal.
37. The Appellant/Applicant sets out the grounds of appeal and submits that her advocates on record expeditiously filed the present application to avert a situation where she would have been condemned unheard and driven away from the seat of justice.
38. The Appellant/Applicant relies on the decisions in Stecol Corporation Limited v Susan Awuor Mudemb [2021]eKLR and Francis Likhabila v Barclays Bank of Kenya [2020]eKLR in support of her submissions.



39. The Appellant/Applicant submits that she will be highly prejudiced if the time to file an appeal is not extended and invites the Court to invoke its discretion and enlarge the time for filing an appeal.
40. With regard to the second issue, the Appellant/Applicant relies on Order 42 Rule 6(2) of the Civil Procedure Rules and submits that she continues to suffer substantial loss as the Respondent has forcefully taken possession of the suit property and committed further acts of trespass.
41. The Appellant/Applicant also submits that unless the Court issues orders of stay of execution pending appeal, she is likely to be permanently deprived of the suit property as the Respondent may dispose of the land based on the strength of the impugned judgement and decree.
42. The Appellant/Applicant further submits that an order of stay of execution ought to issue in order to avert a situation where the appeal would be rendered nugatory since the Respondent has not demonstrated his capacity to compensate her in the event the suit property is alienated and/or disposed of.
43. It is the Appellant/Applicant's submissions that in view of the prevailing circumstances, the present application has been filed without unreasonable delay and that she is willing to provide security as the Court may direct.
44. The Appellant/Applicant relies on the judicial decision of Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another [2018] eKLR as was cited in Anyenda v Simidi [§ 12 Others \(Environment and Land Appeal 1 of 2023\)](#) [2024] KEELC 4249 (KLR) (15 May 2024) (Ruling) and seeks that her application be allowed as prayed.

Analysis and Determination.

45. I have considered the application and the submissions. The following issues arise for determination;
 - a. Whether the Appellant/Applicant's Memorandum of Appeal lodged on 22nd May, 2024 should be deemed as duly filed.
 - b. Whether an order of stay of execution of the judgment and decree issued in Kericho CMCC Case No. 24 of 2016 should be granted pending the hearing and determination of the appeal.
 - c. Who should bear costs of the application.

A. Whether the Appellant/Applicant's Memorandum of Appeal lodged on 22nd May, 2024 should be deemed as duly filed.

46. The Appellant/Applicant is seeking to have her Memorandum of Appeal lodged on 22nd May, 2024 be deemed as duly filed. The Appellant/Applicant submits that judgement was delivered by the trial Court in CMCC No. 24 of 2016 on 2nd August, 2023.
47. The Appellant/Applicant also submits that she is aggrieved by the said judgment and she instructed her advocates on record to file an appeal. She further submits that due to an inadvertent error, the appeal was filed before the High Court instead of the Environment and Land Court.
48. The Appellant/Applicant submits that her advocates on record realized the said error after the period for filing an appeal before this Court had lapsed.
49. The Respondent did not file any response to the application.



50. Section 79G of the *Civil procedure Act* provides as follows;

“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.”

51. Section 79G of the *Civil Procedure Act* provides that the time for filing an appeal from a ruling of a subordinate Court to the High Court and Courts of equal status is thirty days.

52. In the present matter, the judgement sought to be challenged was delivered on 2nd August, 2023. It follows that any appeal challenging the said decision ought to have been filed on or before 2nd September, 2023.

53. The Appellant/Applicant has annexed to her supporting affidavit a copy of the Memorandum of Appeal that was filed before the High Court. The said Memorandum of Appeal was filed in HCC No. 44 of 2023 on 30th November, 2023.

54. It is important to note that the said appeal was filed three months and twenty-eight days after the Learned Trial Magistrate delivered his judgement. This was outside the thirty-day period within which an appeal was to be filed.

55. The Appellant/Applicant has also annexed a copy of a Notice of Withdrawal of Appeal that is dated 19th March, 2024. It is not clear when the said Notice of Appeal was filed.

56. It should be noted that the Appellant/Applicant filed the Memorandum of Appeal before this Court on 22nd May, 2024 after a period of about two months had lapsed after the appeal before the High Court had been withdrawn.

57. The Court of Appeal in *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR held as follows;

“25. Having expressed ourselves as herein above the other issue that falls for consideration is whether the appeal filed out of time on 24th October, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High Court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule, J. in the *Gerald M’limbine vs. Joseph Kangangi* [2009] eKLR stated that-

“My understanding of the proviso to section 79G is that an Applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of Court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending Appellant first seeks the Court’s permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the Court’s process under Section 79B”. [Emphasis Mine]



58. Courts have the power to deem an appeal already filed as duly filed once the conditions for filing an appeal out of time have been met.

59. In *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal stated as follows;

“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.” [Emphasis Mine]

60. In the above cited judicial decision, it was held that the Court in deciding whether or not to extend time has to take into consideration the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent.

61. In the present case, there are two instances where there have been delays that the Appellant/Applicant has not given any explanation.

62. Firstly, the Appellant/Applicant filed her appeal before the High Court on 30th November, 2023 which was three months and twenty-eight days after the Learned Trial Magistrate delivered his judgement. No reason for this delay has been given.

63. Secondly, the Appellant/Applicant filed the Memorandum of Appeal before this Court and the application to have it deemed as duly filed on 22nd May, 2024 and yet the Notice of Withdrawal is dated 19th March, 2024. No explanation for this delay has been given.

64. Other than blaming her advocates on record for filing the appeal before the wrong Court, the Appellant/Applicant has not given any sufficient explanation for the above noted delays.

65. The Court of Appeal in *Susan Ogutu Oloo & 2 others v Doris Odindo Omolo* [2019] eKLR held as follows;

“The instant application is founded on Rule 4 of the Rules of this Court. In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo arap Korir Salat V. IEBC* (2014) eKLR Sup. Ct. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the Respondent will not suffer prejudice if extension is granted.” [Emphasis Mine]

66. In addition to the inordinate delays occasioned by the Appellant/Applicant, the Appellant/Applicant blames her advocates on record for filing the Memorandum and Record of Appeal at the High Court instead of the Environment and Land Court.



67. In the judicial decision of *Almer Farm Limited v National Land Commission & 2 others (Sued as Executrix of the estate of the late David Rono)* [2021] eKLR the Court held as follows;

“27. This Court has observed that the Applicant herein was represented by counsel all through. Nevertheless, it decided to file an application for Judicial Review instead of an appeal. The Applicant deponed and submitted that the procedure (of Judicial Review Proceedings) adopted by counsel was an inadvertent error. It submitted that the error arose due to its counsel mistakenly using “...a similar procedure us used (sic) in appeals against the decisions of the Public Procurement Oversight Board.” What I understand the Applicant to be saying is that learned counsel did not know the law to use. This is sad! I find that deposition ingenious but of no avail to the Applicant. I remind the Applicant the old maxim: *ignorantia juris non excusat*. Since the shareholders of the Applicant may be laymen in the legal circles, I interpret the maxim for them: ignorance of the law is not an excuse. Even then, there is no single disposition from learned counsel that that was the position. Learned counsel could not have dared to say so...

30. In essence the question the Court is posing here, in its mind as it considers fact that Mr. Yego swore to is, was it not clear all along from early 2019 that the Applicant should have pursued an Appeal but it chose not to? This conduct of the Applicant is what I weigh against exercising my discretion as I consider the four conditions that the Court of Appeal gave in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. The reason given by the Applicants for delay in moving this Court is not satisfactory. Moreover, the delay is inexcusable in the circumstances. I am convinced that granting the Application herein will prejudice the Respondents who have been dragged through litigation for many years...

32. I associate myself to the sentiments of learned Judge Justice Wambuzi as he then was who expressed himself as follows in the case of *AO Menya v Mcreas Ltd* [1978] eKLR where the Court held that :

“Doing the best I can in the circumstances, I find it difficult to say that sufficient reason has been shown to justify extension of time. In the words of Windham JA, “there was a lack of diligence” on the part of the advocates and their clerk in taking steps to see that the notice of appeal was filed in time. I express my sympathy to the Applicant who indicated his desire to appeal at the earliest moment given him, but if a mistake of clear law or of fact without more on the part of the Advocate or his clerk will not constitute sufficient reason I fail to see how inadvertence on the part of the either or both as in this case, can. Furthermore there is no element of blame on the part of the Court as in some of the cases referred to in this ruling. The application is refused, with costs.”

33. The applicant laid blame on its Advocate who took the wrong path for the delay which this Court has found to be inexcusable. This Court is of the view that the Applicant is now cherry picking with the Court process with the hope of finding justice. Justice has procedural aspects which need to be followed.



These are given by law and regulations or rules made thereunder. These ought not to be ignored or taken lightly. By the Applicant's conduct of deliberately skipping the necessary step which is mandatory amounts to abuse of process of the Court and overlooking such in order to grant it one more chance in Court would amount to a miscarriage of justice."

68. As was held in *Almer Farm Limited v National Land Commission & 2 others* (Sued as Executrix of the estate of the late David Rono) (supra) cited above, blaming Counsel for taking the wrong path for the delay in filing an appeal is inexcusable.
69. Having considered the instances of delay and having found that the Appellant/Applicant has not advanced any sufficient reasons for the delays, I will now consider the chances of the appeal succeeding if the application is allowed.
70. In *Paul Njage Njeru v Karija K Mugambi* [2021] eKLR the Court while considering a similar application held as follows;

"15. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 3 grounds of appeal which challenge the trial Court's exercise of discretion to grant leave to file a claim which was already time barred. The Court considers that an appeal on the question of whether or not the Court could grant leave to appeal out of time and therefore, whether the Court has jurisdiction to entertain the claim is arguable. The Court considers that an arguable appeal is not one which must necessarily succeed and it is not for this Court, at this stage to go into the merits of the appeal, to avoid embarrassing the Court that will sit on appeal, if leave is ultimately granted and the appeal is filed."

71. The Appellant/Applicant's Memorandum of Appeal raises six grounds of appeal which challenge the Trial Court's finding that a valid contract existed between the Appellant/Applicant and the Respondent's mother and that the Respondent acquired a beneficial interest over the suit property. It is my view that the said appeal is arguable and as was held in the above cited judicial decision, an arguable appeal must not be one which must necessarily succeed.
72. It is also my view that the Respondent will not suffer any prejudice if the application is granted.
73. The Court in *Paul Njage Njeru v Karija K Mugambi* (supra) further held as follows;

"18. Ultimately, the Court considers that in the circumstances of the case, even though the delay of one and a half years on the part of the Applicant was inordinate and that the Applicant has not advanced any good reasons for the delay but has merely made unsubstantiated claims which this Court cannot fully rely on, the Court finds that there appears to be an arguable point of law, on the question of whether or not the trial Court could extend time for filing a claim based on breach of contract after the statutory timelines had lapsed. That, together with the absence of prejudice entitles the Court to exercise its discretion in favour of the Applicant and therefore grants leave to appeal out of time. The Court however finds that the Applicant must pay the costs of the application for failing to advance any good reasons for the delay as was required of him."



74. Even though the Appellant/Applicant has not given sufficient reasons for the delays in filing the appeal before the High court and before this court, I find that her appeal is arguable and further no known prejudice will be occasioned to the Respondent who despite service, failed to file a response to this application.

B. Whether an order of stay of execution of the judgment and decree issued in Kericho CMCC Case No. 24 of 2016 should be granted pending the hearing and determination of the appeal.

75. The Appellant/Applicant is seeking for an order of stay of execution of the judgement and decree issued in Kericho CMCC No. 24 of 2016.

76. The law relating to stay pending Appeal is Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows;

- “(2) No order for stay of execution shall be made under sub rule (1) unless
- a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

77. In the judgement delivered on 2nd August, 2023 the Learned Trial Magistrate held as follows;

“...This Court because of the above finds that the deceased duly acquired a beneficial interest over part of the suit land through the sale agreement. The balance of probability tilts in favour of the Defendant in this case. I do not find the Plaintiff deserves the orders sought. For that reason, I am not inclined to order for the exhumation of the body of Catherine Soi (the deceased). That can only be done in the clearest of circumstances. The Plaintiff fails and is hereby dismissed with costs.(sic)”

78. In Joseph Muthuri & 32 others v Cooperative Bank Limited & 15 others [2018] eKLR the Court cited with approval the judicial decision of Raymond M Omboga v Austine Pyan Maranga Kisii HCCA Number 15 of 2010 where the Court expressed itself thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order.”

79. In the present case, since the Learned Trial Magistrate dismissed the Appellant/Applicant’s case the same was a negative order and cannot therefore be stayed.

C. Who should bear costs of the application.

80. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.



Disposition.

81. Taking into consideration the foregoing, I find that the Application dated 22nd May, 2024 is merited and I hereby issue orders as follows;

- a. Leave is granted to the Applicant to file an appeal out of time against the judgement and decree of the subordinate Court delivered on 2nd August, 2023.
- b. The Memorandum of Appeal lodged on 22nd May, 2024 without leave shall be deemed duly filed.
- c. The order for stay is declined.
- d. The Applicant shall bear costs of this application.

82. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF NOVEMBER, 2024.

L. A. OMOLLO

JUDGE.

In the presence of:

Mr. Kipkorir for the Applicant.

Respondent - Absent

Court Assistant; Mr. Joseph Makori

