



Egesa (Substituted by Roselida Adhiambo Egesa) v Kwoba (Environment & Land Case 15 of 2017) [2024] KEELC 14010 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 15 OF 2017**

BN OLAO, J

DECEMBER 18, 2024

BETWEEN

WILLIAM NAMUKOMA EGESA (SUBSTITUTED BY ROSELIDA ADHIAMBO EGESA) PLAINTIFF

AND

HENDRIKA ANYANGO KWOPA DEFENDANT

RULING

1. The judgment in this case involving the land parcel No Bukhayo/Kisoko/1711 was delivered on 14th December 2023 in favour of William Namukoma Egesa as substituted with Roselida Adhiambo Egesa (the Plaintiff) as against Hendrika Anyango Kwoba (the Defendant). No appeal was filed.
2. The Defendant has now approached this Court vide her Notice of Motion dated 4th March 2024 in which she seeks the following order:
 - a. That the Honourable Court be pleased to grant the Defendant herein leave to appeal out of time against the judgment and order of Hon. B. N. Olao J delivered on 14th December 2023.
 - b. The costs of the application abide by the main appeal.
3. The application is premised on the provisions of Sections 1A, 1B and 95 of the *Civil Procedure Act*, Rule 4 of the Court of Appeal Rules, Section 7 of the *Appellate Jurisdiction Act* and Order 51 of the Civil Procedure Rules. It is anchored on the grounds set out therein and supported by the Defendant's application of even date.
4. The gravamen of the application is that whereas the Defendant was dissatisfied with the judgment delivered on 14th December 2023, her counsel held a contrary opinion thus prompting her to seek the services of another counsel. Meanwhile, the time within which the appeal should have been filed lapsed because it was only on 18th January 2024 when her previous counsel made his views known to her



prompting her to seek the services of another counsel who then came on record. She is dissatisfied with the judgement herein and wishes to appeal yet the time within which to do so has been exhausted. That the Plaintiff will not be prejudiced in any manner and it is in the interest of justice that the orders sought be granted.

5. Annexed to the application are the following documents:

1. Copy of a letter dated 18th January 2024 from the Defendant's previous counsel F. Omondi Advocates informing her that they do not recommend an appeal.
2. A copy of a consent letter dated 6th January 2024 signed by Omondi & Company Advocates and Balongo, Otanga & Company Advocates allowing the latter firm to come on record for the Defendant.
3. A copy of a letter dated 5th March 2024 addressed to the Deputy Registrar seeking a hearing date for this application.
4. A Notice of Appeal dated 5th February 2024 and lodged herein on 6th February 2024.

The application is opposed and the Plaintiff filed Grounds of Opposition dated 9th March 2024 in which the following issues are raised:

1. That this Court lacks jurisdiction.
2. That the application is an abuse of the process of the Court.
3. That the application is an afterthought calculated to prejudice and embarrass the Plaintiff.
4. That the application lacks merit.

Directions were taken that the application be canvassed by way of written submissions. The same were filed by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the Defendant and by Mr Were instructed by the firm of Gabriel Fwaya Advocates for the Plaintiff.

6. I have considered the application, the grounds of opposition and the submissions by counsel.

7. The Defendant has questioned the jurisdiction of this Court to grant the prayers sought. Her counsel has submitted, citing the provisions of Section 7 of the *Appellate Jurisdiction Act*, that this Court "has no power to grant leave to appeal out of time but power to only extend time to make an application for leave to appeal." Counsel for the Plaintiff has submitted that this Court has the requisite jurisdiction.

8. Section 7 of the *Appellate Jurisdiction Act* CAP 9 LAWS OF KENYA reads:

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence."

It is clear from the application before me that what the Defendant seeks is to lodge the Notice of Appeal out of time. Indeed she has annexed to her application a Notice of Appeal dated 5th February 2024 and lodged herein on 6th February 2024. Without a proper Notice of Appeal which, by dint of the provisions of Rule 75 (2) of the Court of Appeal Rules, should be lodged within 14 days of the delivery



of judgment herein, no appeal can properly be filed without leave. That this Court has the jurisdiction to extend the time to lodge such a Notice of Appeal was affirmed by Githinji J.A in the case of Kenya Airports Authority & Another -v- Timothy Nduvi Mutungi C.a. Civil Application No 165 of 2013 [2014 eKLR]. The High Court had declined to hear an application for extension of time to lodge such Notice of Appeal and had referred the Applicant to move to the Court of Appeal. Githinji J.A had the following to say:

“The application of 10th December 2012 (the application for extension of time to lodge Notice of Appeal out of time) was properly made in the High Court as the High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined ...”

Counsel for the Plaintiff has submitted that this Court is not clothed with any jurisdiction under Section 7 of the Appellate Jurisdiction Act to grant the remedy sought. However, as is now clear from the decision in Kenya Airports Authority & Another -v- Timothy Nduvi Mutungi (supra), this Court enjoys that jurisdiction “for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal.”

9. Counsel for the Plaintiff has also submitted that:

“There is no draft Memorandum of Appeal attached or filed with the application to demonstrate that the applicant has an arguable appeal. No certified proceedings have been supplied to demonstrate the readiness and goodwill of the applicant. There is no offer to deposit the costs awarded to the respondent as may be taxed to Court as we await the said appeal.”

It is not a requirement of the law that an application such as this must be accompanied by any draft memorandum of appeal nor certified proceedings.

10. I am satisfied that I have the jurisdiction to determine this application.

11. Having determined that I have the requisite jurisdiction, I must now consider if the Defendant has met the requisite threshold for the order sought. The Supreme Court in the case of Nicholas Kiptoo arap Korir Salat -v- Independent Electoral And Boundaries Commission & 7 others 2014 eKLR laid down the considerations to guide a Court while exercising its discretion in such an application. It said:

- “1. Extension of time 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.
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis.
4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
5. Whether there will be any prejudice suffered by the respondent if the extension is granted.
”


6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

See also the case of *Leo Sila Mutiso -v- Hellen Wangari Mwangi* 1999 2 E.A 231.

12. It is clear from the provision of Rule 75(2) of the Court of Appeal Rule that the Defendant should have filed a Notice of Appeal within 14 days from 14th December 2023 when the judgment herein was delivered. Vide Order 50 Rule 4 of the Civil Procedure Rules, time does not run between 21st December to 13th January of the year next. Therefore, time started to run for the Defendant from 15th December 2023 upto 20th December 2023 (6 days) and started again on 14th January 2024 and so the additional 8 days expired on 22nd January 2024 by which time she should have filed the Notice of Appeal. This application is dated 4th March 2024 and was filed on 7th March 2024 to which was annexed a Notice of Appeal dated 6th February 2024. The Defendant has explained that although she was desirous of appealing the judgment herein, her counsel was of the contrary opinion. That opinion was communicated to her vide the letter dated 18th January 2024. So the explanation as to why no Notice of Appeal was filed before 18th January 2024 is, in my view, a reasonable one. Therefore by 18th January 2024 at the earliest, she must have known that her previous advocate was not going to act for her in any appeal. Then it took her a month and a half to move to this Court on 4th March 2024 with this application which was actually filed on 7th March 2024. That delay has not been explained at all. It is the explanation of any delay which enables the Court to exercise its indulgence and discretion in extending time. This is because such discretion must be exercised judicially, it must also be remembered that in granting leave, the Court must balance the competing interests of both parties. In the case of *Portreitz Maternity -v- James Karanga Kabia* Civil Appeal No 63 of 1997, it was stated thus:

“The right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment. There must be a just cause for depriving the Plaintiff of that right.”

Considering all the above, I am not persuaded that I should exercise my discretion in favour of allowing the Defendant’s application.

13. Ultimately therefore, I make the following disposal orders:
 1. The Notice of Motion dated 4th March 2024 and filed on 7th March 2024 is devoid of merit. It is hereby dismissed.
 2. Costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

18TH DECEMBER 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OR ELECTRONIC MAIL ON THIS 18TH DAY OF DECEMBER 2024.

BOAZ N. OLAO

JUDGE

18TH DECEMBER 2024

