



**Oisera & another v Gai (Environment and Land Miscellaneous Application E025 of 2024) [2024] KEELC 13725 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13725 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E025 OF 2024  
M SILA, J  
DECEMBER 10, 2024**

**BETWEEN**

**BEN BITANGE OISERA ..... 1<sup>ST</sup> APPLICANT**

**JACQUELINE NYANG'ARISA BITANGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ELIJAH NYAGAMI GAI ..... RESPONDENT**

*(Application to file appeal out of time; Section 79 </akn/ke/act/1924/3 Civil Procedure Act>; applicants showing that the appeal could not be filed in time owing to health challenges faced by the 1<sup>st</sup> applicant; sufficient cause shown; application allowed)*

**RULING**

1. Before me is an application dated 24 October 2024 filed by the unsuccessful plaintiffs in the suit Kisii CMCC/ELC No. 214 of 2018. They seek orders to be allowed to file an appeal out of time. Judgment in the matter was delivered on 26 August 2024 and the ordinary time to file appeal, which is 30 days from the date of judgment, has since lapsed. The supporting affidavit is sworn by Ben Bitange Oisera, the 1<sup>st</sup> applicant. He deposes that at the time the judgment was delivered he was battling health challenges that kept him in and out of hospital and was not able to give instructions to his advocate to file appeal. He has annexed a medical report to support his averment. He believes that they have an arguable appeal with chances of success and he has annexed a draft memorandum of appeal.
2. The respondent has opposed the motion through a replying affidavit. He deposes that if the 1<sup>st</sup> applicant was unwell, nothing stopped the 2<sup>nd</sup> applicant from giving instructions to file appeal. He does not believe that the applicants have met the threshold of being allowed leave to file appeal out of time.
3. The applicants presented a supplementary affidavit again sworn by the 1<sup>st</sup> applicant. I see that it principally canvasses the question raised by the respondent as to why the 2<sup>nd</sup> applicant could not give



instructions to file appeal within time. He deposes that the 2<sup>nd</sup> applicant is his wife and that she had given him authority in the matter. He adds that she was also engaged in assisting him when he had health challenges.

4. I have given the application due consideration. What I have is an application to file appeal out of time and the applicable law is Section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows :

79G. Time for filing appeals from subordinate courts

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.

5. From the above it will be seen that appeals are to be filed within 30 days of the order appealed from though the time for preparing the copy of the order may be discounted. In our case, the judgment was delivered on 26 August 2024. The applicants were thus supposed to file their appeal by 25 September 2024 as it is not claimed that there was any delay in delivery of the judgment. In the provision to Section 79G an appeal may be admitted out of time if the applicant provides ‘sufficient cause’ for not filing the appeal in time.
6. In our case, the applicants aver that the 1<sup>st</sup> applicant fell unwell and that is why they could not file their appeal within time. I have seen the medical report annexed and it shows that the 1<sup>st</sup> applicant was in and out of Aga Khan Hospital Kisumu for about 2 months prior to October 2024. I have taken note of the contention by the respondent that the appeal could as well have been filed by the 2<sup>nd</sup> applicant but this is well explained in the supplementary affidavit. I am persuaded that the illness of the 1<sup>st</sup> applicant and the fact that the 2<sup>nd</sup> applicant was involved in taking care of him is sufficient reason to enable this court exercise its discretion to allow the applicants file appeal out of time. I also observe that the applicants are just about one month or so late, which delay is not inordinate.
7. For the above reasons, I allow this application. I direct the applicants to file their appeal within the next Fourteen (14) Days.
8. I make no orders as to costs as the delay is well explained.
9. Orders accordingly.

**DATED AND DELIVERED THIS 10 DAY OF DECEMBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of:

Mr. Ombachi for the applicants

Mr. Wafula h/b for Mr. Mulisa for the respondent

Court Assistant – David Ochieng’

