



REPUBLIC OF KENYA



**Kemei & another v Kiobe (Environment and Land Appeal
14 of 2022) [2023] KEELC 61 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 61 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 14 OF 2022
EO OBAGA, J
JANUARY 19, 2023**

BETWEEN

JAMES KEMEI 1ST APPLICANT

CHRISTINE CHEPKEMBOI 2ND APPLICANT

AND

EMILY JERONO KIOBE RESPONDENT

*(Being an Appeal against the ruling of Hon. B. Kiptoo (R.M) delivered on the
24th November, 2021 in Eldoret Chief Magistrate's Court E&L No. 72 of 2020)*

RULING

Introduction

1. This is a ruling in respect of two applications. The first application is dated May 17, 2022. It is brought by the Respondent/Applicant and it seeks striking out of the appeal filed herein with costs. The second application is dated June 6, 2022. It is brought by the Appellants/Applicants and it seeks stay of execution of the ruling of Hon BK Kiptoo SRM delivered on November 24, 2021 in CM E&L No 72 of 2020 pending hearing and determination of the filed appeal and for enlargement of time for the already filed appeal.

Background:

2. The Applicants in the second application had filed Eldoret CM E&L case No 72 of 2020 against the Applicant in the first application. The Applicant in the first application filed an application in that suit on the ground that the suit was *res judicata*. In a ruling delivered on November 24, 2021, Hon BK Kiptoo SRM allowed the same and struck out the suit.



3. Over five months after the delivery of the ruling, the Applicants in the first application filed a memorandum of appeal against the ruling of Hon BK Kiptoo on April 26, 2021 without seeking enlargement of time to do so. The Applicant in the first application then filed an application seeking to strike out the appeal which had been filed without first seeking enlargement of time to do so.
4. The filing of the application to strike out the appeal is what triggered the Applicants in the second application to file their application seeking to stay the ruling of November 24, 2021 and asking the court to enlarge time and deem the already filed appeal as having been properly filed.
5. Prior to the filing of the two applications, the applicants in the second application had already been evicted from LR No Moi's Bridge/ Moi's Bridge Block 8 (Natwana ADC)/68 (Suit property) pursuant to a decree in ELC No 2012 following a judgment dated December 20, 2018.

The Second Application:

6. I will first deal with the second Application Because its outcome will have a bearing on the first application

Applicants' Contention:

7. The Applicants in this application contend that they were unable to file an appeal in time because of financial constraints. They state that they were unable to raise legal fees and that the 1st Applicant fell ill soon after being evicted from the suit property sometime in June 2020 and that his illness was aggravated by the ruling of November 24, 2021.
8. The Applicants contend that the failure to file the appeal in time was not deliberate and that their appeal has overwhelming chances of success. The 1st Applicant contends that he was the one financing litigation and due to his illness, he could not do so hence the late filing.
9. The Applicants further state that the order being appealed from had not been extracted as the file was in the magistrates' chambers awaiting ruling on a bill of costs which had been argued.

Respondent's Contention:

10. The Respondent contends that the Applicants' application is bad in law, an abuse of the process of court and fatally defective and that the Applicants have not met the threshold for grant of the reliefs being sought in the application. She contends that the appeal was filed out of time hence fatally defective and that litigation must come to an end.

Analysis and Determination:

11. The parties were directed to file written submissions. The Applicants filed their submissions on November 2, 2022. The Respondent filed her submissions on July 29, 2022. I have carefully examined the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the submissions filed herein. There are only two issues to be determined. The first is whether enlargement of time should be granted and the appeal filed deemed as having been properly filed. The second is whether there should be stay of execution of the ruling given on November 24, 2021.
12. On the first issue, there are a number of cases from the superior courts which have laid down the principles to be considered in dealing whether to grant extension of time or not. Some of these principles include, the period of delay, the reason for the delay, the chances of appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted. The list is inexhaustive.



13. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & another* (2014) eKLR the Supreme Court of Kenya stated the Principles to be considered in applications for extension of time as follows:-
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 bear 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.
 7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.”
14. In the instant case, the Applicants had been evicted from the suit property where they had lived for over 23 years. The 1st Applicant who was the financier of the litigation developed hypertension for which he has been receiving treatment. The eviction was as a result of a decree in a different suit to which they were not parties. Coupled with the illness was financial constraints. This is what made the Applicants not to instruct their lawyer to file an appeal in time.
15. The Applicant has annexed medical chits to confirm his illness. The medical chits are before the date of ruling but the 1st Applicant has explained that he developed hypertension after eviction which was in 2020. The situation only became worse after their suit was dismissed. It is therefore not correct for the Respondent to argue that the medical chits pre dates the delivery of ruling.
16. The Court is required to be convinced that there was good and sufficient cause which made the Applicant not to file an appeal in time. The term good and sufficient cause was defined in the case of *Attorney General v Law Society of Kenya & another* (2017) eKLR as follows:-
- “.....rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
17. The delay in filing the appeal was for 5 months. Given the fact that the Applicants had been evicted from what they called home for 23 years coupled with illness which required medication and with limited financial resource during time of Covid 19 pandemic, I find that the delay of 5 months has been amply explained.
18. I now turn to the issue of the Applicants having to file an appeal and later coming to court for extension of time. This issue was put to rest in Civil Appeal No 71 of 2016 between *Charles Karanja Karu v Charles Muigwa* where the Court of Appeal stated as follows:-
- “...having expressed ourselves as herein above the other issues that falls for consideration is whether the appeal filed out of time on October 24, 2014 could be deemed as being properly



on record. There is a plethora of authorities from the High Court which interpret the provision 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 provision 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 statutory period of time. The provisions does not mean that an intending Appellant must first seek the court’s permission to admit a non- existent appeal out of the stipulated period, to do so would actually be an abuse of the Court’s process under section 79B”

19. The Respondent will not suffer any prejudice if the application for extension is granted. The Applicants are already out of the suit property having been evicted in or around July, 2020. They will remain so until the appeal is heard and determined and if it is ruled in their favour, until the dismissed suit is heard and determined. There will therefore be no prejudice suffered by the Respondent.
20. On the second issue, I notice that the Applicants’ suit was struck out. There is no positive order there. What may befall the Applicants is execution on costs. Ordinarily execution of costs will not amount to substantial loss as to call for stay of the same. However, given the circumstances of this case, there is need to interrogate why the Applicants were on the suit property for over 23 years and were only evicted pursuant to a decree issued in a different case to which they were not parties. I will in the circumstances find that the Applicants have made a case for grant of stay of execution.

Disposition:

21. From the above analysis, it is clear that the Applicants’ application is well founded. I allow it with the result that stay of ruling of the November 24, 2021 is hereby granted pending the hearing and determination of the appeal filed herein. The time for appealing against the ruling of November 24, 2021 is hereby granted and the appeal filed on April 26, 2022 is deemed to have been properly filed pursuant to the extended period. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

The First Application

22. The second application having been allowed it will be superfluous to consider in detail this application. I proceed to dismiss the same. The costs shall abide the costs of the outcome of the appeal.

Final Disposition:

- 23 In the final analysis, I give the following final orders. The first application is dismissed whereas the second application is allowed in terms of the orders granted in paragraph 21 hereinabove. The costs of the two applications shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF JANUARY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;



Mr. Mathai for Respondent.

Court Assistant –Akidor

E. O. OBAGA

JUDGE

19TH JANUARY, 2023

