



**Jowi v Ochiel & 3 others (Miscellaneous Civil Application
E29 of 2022) [2023] KEELC 708 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E29 OF 2022**

E ASATI, J

JANUARY 19, 2023

BETWEEN

JEREMIAH ONGONDO JOWI APPLICANT

AND

DR. STEPHEN OCHIEL 1ST RESPONDENT

COUNTY LAND SURVEYOR 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

LAND REGISTRAR KISUMU 4TH RESPONDENT

RULING

1. This is a ruling in respect of the Notice of motion application dated September 19, 2022 brought under Certificate of Urgency pursuant to the provisions of section 79G of the *Civil Procedure Act* cap 21 Laws of Kenya and order 51, *Civil Procedure Rules* 2010. The Application seeks for extension of time within which to file an Appeal from the judgement and decree in Kisumu ELC No. 24 of 2017 dated August 5, 2022 and for leave to file appeal out of time.
2. The grounds upon which the application is brought as shown on the face of the application and the supporting affidavit are that the judgement was delivered on 5/8/2022 and the applicant is desirous to appeal against the whole of the judgement but failed to do so within the prescribed time. The explanation for the delay and failure to file the appeal within the time prescribed by law is that he was not notified in time by his lawyer, then on record, about delivery of the judgement. That the delay was also caused by the waiting time for the certified copies of typed proceedings. That the delay period is about one and half months and that the same is not inordinate.
3. Counsel for the applicant submitted that in determining an application for extension of time within which to file an appeal, the court is supposed to take into account the length of the delay, the reasons



for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted. Counsel submitted that the delay was not inordinate and that from the draft memorandum of appeal attached to the application, the intended appeal has an overwhelming chance of success. That no prejudice will be occasioned to the respondent if the application is allowed as the applicant is willing to abide by any just and reasonable consideration that the court may impose in allowing the application. Counsel submitted further that the right to appeal is intrinsically linked to the right to fair hearing and the right to access justice and that under article 159, justice should be done to all and hence the court should balance out the rights of all the parties. Counsel prayed that the application be allowed.

4. The plaintiff/respondent opposed the application vide Grounds of opposition dated October 4, 2022. It was his case that the application is incompetent, frivolous and vexatious, that the application does not meet the criteria for grant of the orders sought, the same is an abuse of the court process and is intended to frustrate the Plaintiff and deny him the fruits of the judgement and unnecessarily elevate expenses. That the reasons given for the delay do not exhibit any sign of good faith.
5. Relying on the case of *County Executive of Kisumu vs= County Government of Kisumu & others* (2017) eKLR and *Nicholas Kiptoo Arap Korir Salat =VS= IEBC & 7 Others*. Application No. 16 of 2014 eKLR Counsel submitted that the considerations for an application for extension of time within which to file appeal are that:
 - A. 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.
 - B. A party who seek for extension of time has the burden of laying a basis to the satisfaction of the court.
 - C. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 - D. Whether there is a reasonable reason for the delay; the delay should be explained to the satisfaction of the Court.
 - E. Whether there will be any prejudice suffered by the Respondent if the extension is granted.
 - F. Whether the application has been brought without undue delay; and
 - G. Whether in certain cases, like election petitions, public interest should be a consideration for extension of time.
6. That in the instant application, the reasons given for the delay are inconsistent, that the application has been brought with undue delay and there is therefore no merit in the application. Counsel prayed that the application be dismissed with costs.
7. The 2nd, 3rd, and 4th respondents opposed the application vide the averments contained in the replying affidavit sworn by Sarah Juma on October 3, 2022. It was their contention that the application is misconceived, vexatious and an abuse of the court process. That no explanation has been given for the delay in filing the appeal within the time stipulated by law.

Counsel filed written submissions dated November 9, 2022 on behalf of the 2nd, 3rd and 4th respondents. She submitted that the applicant has not laid a basis for grant of an order of extension of time. Counsel reiterated the under-lying consideration for grant of an order of extension of time. Relying on the case of *Andrew Kiplangat Chemaringo =VS= Paul Kipkorir Kibet* [2018] eKLR counsel submitted that anyone seeking this relief must satisfactorily explain the cause of the delay. That in this case the



applicant failed to provide sufficient explanation. Counsel submitted further that the respondents stand to suffer extreme prejudice if the order sought is granted in this otherwise concluded litigation since their rights and responsibilities which the court below have recognized and protected are likely to be infringed upon. Counsel prayed that the application be dismissed.

8. The remedy for extension of time within which to file an appeal is anchored in the proviso to section 79G of the *Civil Procedure Act*.

Section 79G provides mandatorily that appeals 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.

The proviso however allows for an appeal to 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.

The intended Appellant has a burden to satisfy the Court that he had sufficient cause for not filing the appeal in time.

9. The cause (explanation) offered by the Appellant in this case as contained on the face of the notice of motion and supporting affidavit is that the appellant was not aware that the judgement had been delivered on August 5, 2022 as his Advocate on record failed to inform him hence was not able to instruct his current Advocate in good time and secondly that the delay was caused by waiting time for certified copies of the proceedings.

10. I have examined these reasons against the evidence placed before me. There is no evidence to show the date on which the appellant learnt of the Judgement or instructed his current Advocates. A copy of the Judgement was not availed to show who was present when the Judgement was delivered. On the second ground that the delay was caused by typing of proceedings, there is no evidence as to whether or when the proceedings were applied for. While in ground (f) of the application the applicant states that the applicant had already obtained the proceedings, in paragraph 7 of the supporting affidavit he states that the proceedings were yet to be ready. What is more is that under section 79G the period necessary for preparation of the proceedings, is excluded from the computation of the 30 days once one produces certificate of delay.

11. I find that the applicant has not explained the delay as by law anticipated. The application therefore lacks merit and the same is hereby dismissed. costs to the respondents.

Orders accordingly

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 19TH DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Omondi T. Advocate for the Applicant.

Obware Advocate for the Respondent.

Osinde Advocate for 2nd, 3rd and 4th Respondents.

E. ASATI

JUDGE.

