



Silas & another v Machwanda & another (Environment & Land Miscellaneous Case E011 of 2022) [2023] KEELC 24 (KLR) (17 January 2023) (Ruling)

Neutral citation: [2023] KEELC 24 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E011 OF 2022**

**DO OHUNGO, J
JANUARY 17, 2023**

BETWEEN

LYDIA NAMUSIA SILAS 1ST APPLICANT

JANE NJERI NJENGA 2ND APPLICANT

AND

THOMAS LUTTA MACHWANDA 1ST RESPONDENT

BENEAH CHIMELENI NYAPOLA 2ND RESPONDENT

RULING

1. The applicants moved the court through notice of motion dated March 28, 2022 seeking the following orders:
 1. [Spent]
 2. That the applicants be granted leave to file memorandum of appeal and record of appeal out of time against the decree and Judgement in Kakamega Chief Magistrate’s Court ELC No E.56 of 2020.
 3. That costs be provided for.
2. The application is supported by an affidavit sworn by the first applicant. She deposed that judgement in Kakamega Chief Magistrate’s Court ELC No E.56 of 2020 was scheduled for delivery on 25th January 2022 but was not ready and was thereafter to be delivered on notice to parties. That her advocate informed her that he inquired every week at the registry and was always informed that the file was still in the trial magistrate’s chambers awaiting delivery of the judgement. That she waited for communication from her advocates in vain until 11th March 2022 when the advocate called her and informed her that the judgment was delivered on 11th February 2022 and that he had been served with an application



dated 17th February 2022, seeking to enforce the judgement. That time to file appeal had already lapsed by the time her advocate was served with the application. She further deposed that her appeal has high chances of success and urged the court to allow the application.

3. The respondents opposed the application through a replying affidavit sworn by the second respondent. He deposed that the applicants were present in court on 25th January 2022 when parties were informed that judgement would be delivered on 11th February 2022. He further deposed that the applicants' advocate was served with the application dated 17th February 2022 on 9th March 2022. In support of that contention, he annexed a copy of the duly acknowledged application and added that time for filing appeal had not yet lapsed by the time the application was served. He also deposed that the appeal has no chance of success and urged the court to dismiss the application.
4. The application was canvassed through written submissions, which both sides duly filed and exchanged. I have carefully considered the application, the affidavits, and the submissions.
5. The principles applicable to an application for extension of time were identified by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 a 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 respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; ...
6. Applying those principles to the present case, I note that the judgment and decree that is sought to be appealed against was passed by the subordinate court on February 11, 2022 in exercise of its environment and land jurisdiction pursuant to section 9 (a) of the *Magistrates' Courts Act*, 2015 as read with section 26 of the *Environment and Land Court Act*, 2011. In terms of section 16A of the *Environment and Land Court Act*, 2011, the applicants were required to file any appeal against the decree to this court within 30 days of delivery of the judgment. In other words, the appeal ought to have been filed not later than 11th March 2022. The present application was filed on 29th March 2022. There was thus a delay of 17 days. I am satisfied that the application was brought without undue delay.
 7. The respondents contend that the applicants were aware of date of delivery of the judgment and that in any case, they prompted the applicants on 9th March 2022 when they served the application dated February 17, 2022. The applicants did not file any further affidavit to controvert the allegation that they were served before time for filing appeal had lapsed. In the circumstances, I am persuaded that



the applicants were indeed prompted on 9th March 2022, some three days prior to the deadline for filing appeal. Nevertheless, the delay herein is marginal, and the demands of justice require that the applicants be given a chance to pursue their right of appeal.

8. In view of the foregoing, I am persuaded that the applicants have made a case for exercise of discretion in their favour. To ensure that there is no further delay, I will give them a limited period within which to file the appeal.
9. I therefore make the following orders:
 - a. Leave is hereby granted to the applicants to file an appeal against the judgement and decree delivered in Kakamega Chief Magistrate's Court ELC No E.56 of 2020 on February 11, 2022, out of time.
 - b. The Memorandum of Appeal to be filed and served within 14 (fourteen) days from the date of delivery of this ruling.
 - c. In default of compliance with (b) above, Notice of Motion dated 28th March 2022 shall stand dismissed with costs to the respondents.
 - d. If the applicants comply with (b) above, costs of Notice of Motion dated March 28, 2022 shall be in the appeal.

Dated, signed, and delivered at Kakamega this 17th day of January 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Juma holding brief for Mr Luchivya for the applicants

No appearance for the first respondent

Second respondent present

Court Assistant: E. Juma

ELC Misc. No. E011 of 2022 (Kakamega) Page 2 of 2

