



Barngetuny (Suing the Administrator of Estate of the Late Gideon Gari Kibarono alias Gari Kibarno) v Kirwa & another (Environment & Land Case 113 of 2021) [2023] KEELC 15892 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15892 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 113 OF 2021
MN MWANYALE, J
FEBRUARY 28, 2023
(FORMERLY ELDORET E & L CASE NO 105 OF 2019)

BETWEEN

NOAH KIPKOSGEY BARNGETUNY (SUING THE ADMINISTRATOR OF ESTATE OF THE LATE GIDEON GARI KIBARONO ALIAS GARI KIBARNO) PLAINTIFF

AND

STEPHEN KIPSS KIRWA 1ST DEFENDANT

THOMAS KIMARU SAWE 2ND DEFENDANT

RULING

1. This ruling relates to the notice of motion dated October 3, 2022 seeking the following orders;-
 - a. Spent
 - b. The Applicants be granted leave to appeal out of time.
 - c. The Honourable Court be pleased to extend time for lodging of a Memorandum of Appeal and record of appeal against the judgment of Hon. Justice M. N. Mwanyale delivered in the Environment and Land Court at Kapsabet on May 31, 2022.
 - d. The Notice of Appeal dated June 7, 2022 be deemed as property filed.
 - e. The costs of and, incidentals to this Application abide the results of the Appeal.
2. In support of the motion are grounds set out on the face of it and affidavit of Thomas Kimaru Sawe, the 2nd Defendant/Applicant. In his affidavit, the and Applicant stated that the delay in filing Notice



of Appeal on time was as a result of late assessment of Notice of Appeal dated June 7, 2022 by the Environment and Court Registry at Kapsabet.

3. The Plaintiff/Respondent opposed the Motion vide Replying Affidavit dated January 9, 2023. He deponed that the Applicant had not advanced any reason why the appeal was not filed within time. That the instant application was a tactic to delay the Respondent from enjoying the fruits of judgment in this matter.
4. Directions were given for the application to be disposed by way of written submissions, which was complied by both parties.
5. Counsel for the Applicant while relying on written submissions earlier filed on August 11, 2022, submitted that the Notice of Appeal dated 7th June 2022 was filed online but the registry failed to retrieve and assess for their client's payment until when physical copies were delivered at the registry which were then filed on 5th July 2022. That the failure to file Notice of Appeal within the stipulated time was not deliberate. They urged this Court to allow the application.
6. Submissions by Counsel for the Respondent are dated 9th January 2023 and filed on 12th January, 2023. It was submitted that the instant application did not disclose any reason why the appeal was filed out of time. Counsel relied in the case of *Mombasa County Government –vs- Kenya Ferry Services and Another* (2019) eKLR where the Supreme Court cited the Nick Salat case that set out guiding principles concerning such an application for extension of time. They submitted that the application lacks merit and urged the same be dismissed with costs.

Analysis and Determination

7. I have considered the grounds as presented in the Notice of Motion, the facts deponed in the affidavits supporting and opposing the Motion as well as rival submissions by counsels. The Applicants essentially are seeking leave of the Court to appeal out of time.
8. Before dealing with the merits of the application, it is noteworthy that the Applicant moved this Court under section 79 G of the *Civil Procedure Act* which applies to appeals from the subordinate Court to the High Court which is not the case here. The applicable law is section 7 of the *Appellate Jurisdiction Act*. In my view, quoting the wrong provision of the law is not fatal and shall proceed to cure this technicality with article 159 2 (d) of *the Constitution*.
9. Section 7 of the *Appellate Jurisdiction Act* provides as follows;-

“Power of High Court to extend time 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.”
10. From the reading of this provision, it is clear that the power of this Court is discretionary due to the use of the word “may”. This Court is guided by the principles set out by the Supreme Court in the case of *Nicholas Kiptoo arap Korir Salat –vs- IEBC and others* (2014) eKLR in exercising this discretion. The principles include: -
 - 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 seeks extension of time has the burden of laying a basis of the satisfaction of the Court.



- c) Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis.
- d) Where there is a reason for delay, it 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 delay.
- g) Whether in certain cases like election Petitions, Public interest should be a consideration for extending time.”

11. In the instant application, the substantive rule which the Applicant seeks extension is rule 75 (1) and (2) of the *Court of Appeal Rules*. This rule provides that;-

- “(1) any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the Superior Court.
- (2) every such notice shall, subject to Rules 84 and 97, be so lodged within 14 days from the date of the decision against which it is desired to appeal.”

12. It is not in dispute that judgment was delivered on May 31, 2022. An appeal against this judgment ought to have been filed within 14 days from 31st May 2022. The Notice of Appeal was filed out of time on 5th July 2022. The reason advanced by the Applicant for filing out of time was that the Environment and Land Court Registry failed to retrieve and assess the same upon e-filing. They allege that the Notice of Appeal was filed upon physical visit to the registry. There is no evidence to support the allegation that the Notice of Appeal was sent via email to the Environment and Land Court Registry for assessment. Furthermore, no explanation has been advanced as to why the Applicant’s Counsel chose to visit the registry close to a month after the alleged e-filing date. In my own view, the Applicants had a duty to satisfactorily demonstrate why the notice was filed out of time. None has been demonstrated at all.

13. That said, this Court is alive to the fact that the delay to file Notice of Appeal in this matter is less than a month. Also that this delay was occasioned by the advocate representing the Applicants and was not the fault of the Applicants. In view of the delay which was not inordinate and the fault to file appeal within time which ought not be visited upon the client, in this case Applicants, it would be just and proper to exercise my discretion to enlarge the time required for the Applicants to file appeal against judgment of this Court.

14. In light of the foregoing the application dated October 3, 2022 is allowed on the following terms;

- i) The Applicants are granted leave to appeal out of time.
- ii) The Applicant’s Notice of Appeal dated 7th June 2022 and filed on 5th July 2022 is deemed as duly filed, the same be served upon the Respondent within 7 days from the date of this ruling.
- iii) The Applicants have 60 days from the date of service of Notice of Appeal to lodge Record of Appeal and serve upon the Respondent.
- iv) Each party shall bear its own costs of the application.
- v) In default of either item (ii) or (iii), the leave granted herein shall stand lapsed.



15. Orders accordingly.

DATED AT KAPSABET THIS 28TH DAY OF FEBRUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of

Ms. Olando for the Appellant

No appearance for the Respondent

