



**Chepkorir (Suing as the personal representative of the Estate of Paul Rotich Ngeny) v Yegon & another; Chepngeno & 3 others (Interested Parties) (Environment and Land Miscellaneous Application E009 of 2022) [2023] KEELC 16106 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16106 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2022  
MC OUNDO, J  
FEBRUARY 23, 2023**

**BETWEEN**

**NANCY CHEPKORIR ..... APPLICANT  
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL  
ROTICH NGENY**

**AND**

**CHRISTOPHER KIPNGETICH YEGON ..... 1<sup>ST</sup> RESPONDENT  
ABDIKDIR ABDULAH I ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PRISCILLA CHEPNGENO & 3 OTHERS ..... INTERESTED PARTY**

**RULING**

1. In an Application dated the May 30, 2022, the Applicant herein seeks for leave to extend time limited for filing the Memorandum of Appeal herein, as well as stay of execution of the taxed costs and any other consequential orders following the ruling/order of the Magistrate's court sitting in Kericho in ELC No. E022/2020 delivered on June 9, 2021, pending the hearing and determination of the Appeal to this court.
2. The Application was supported by the grounds therein as well as on the supporting affidavit by the Applicant, Nancy Chepkorir sworn on May 27, 2022.
3. There was no response from the Respondents despite there having been service effected and leave having been granted to file their respective responses.



4. By consent on September 26, 2022, directions were taken that the application dated May 30, 2022 be disposed of by way of written submissions.
5. As I write this ruling, only the Applicant has complied with the court's directions and there are neither responses or written submissions filed by the Respondents and Interested Parties herein
6. I shall therefore proceed to determine the unopposed application on its merits.

**Applicant's written submissions.**

7. In support of their application dated May 30, 2022, the Applicant herein gave a background ground of the matter in question to the effect that the her application was precipitated by a ruling from the lower court delivered on June 9, 2021 which had upheld a Preliminary Objection challenging the jurisdiction of the Court to hear and determine her application for a temporary injunction.
8. That the lower court had found that the matter before it related to a boundary dispute and therefore was divested of jurisdiction by dint of Section 18 of the *Land Registration Act*, which provisions of the law conferred jurisdiction to hear and determine boundary disputes to the Land Registrar.
9. Being aggrieved by the decision of the lower court, the Applicant has now filed the instant application and framed her issue for determination as follows ;
  - i. Whether the Court should exercise its discretion in favour of the Applicant and grant leave to Appeal out of time.
10. The Applicant, placed her reliance on the provisions of Section 79G of the *Civil Procedure Act* to submit that Court should exercise its discretion and grant her leave to challenge the decision of the lower court, out of time because there was good and sufficient cause for not filing the Appeal in time.
11. That she had been bereaved at the time when the ruling was delivered, following the death of her husband of over 20 years who had been handling the matter personally, and thus was unable to issue instructions to her Counsel on time.
12. That secondly she had been undergoing medical procedures for a chronic kidney condition, and had been in and out of hospital and therefore was unable to issue instructions on time.
13. Finally, that the subject matter of the underlying dispute was land, whose ownership was not in dispute, but whose major contest was only on encroachment. That a full and final settlement of the dispute was therefore important.
14. The Applicant relied on the decided case in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & Others* (2014) eKLR to submit that leave to file an Appeal out of time would be granted as a matter of judicial discretion.
15. That the delay herein was excusable and was not inordinate as was held in the case of *Paul Muthini Kimongo vs. Flex Pac international Limited* [2019] eKLR wherein the court had cited with approval the decision in *Ivita vs. Kyumba* [1984] KLR 441.
16. That the delay occasioned being 10 months, was not inordinate since the she had been incapable to lodge an Appeal due to her constant illness. That it had been when her health improved that she had issued instructions to have Counsel to conduct the matter. That the Respondents will not be prejudiced in any way since they were in possession of suit parcel of land being Kericho/ Chemoiben/890 and gaining profits from structures and buildings thereon.



17. That the computation of the delay ought to be computed from the last date the Appeal ought to have been lodged and time the extension of time was sought thus making delay of lodging the Appeal to be 9 months which was not inordinate as was held in the case of *Aviation Cargo Support Ltd vs St. Mark Freight Services Ltd* [2014] eKLR.
18. That it was in the interest of justice that the court grants orders sought as to extension of time because her Appeal had a high chance of success. That the Respondents had not filed any responses signaling that they stood to suffer no prejudice were time enlarged and an Appeal is filed out of time.

#### **Determination.**

19. I have considered the Applicant's Application, where she seeks leave to Appeal out of time. The provisions of Section 79G of the *Civil Procedure Act* which give an appellate court discretion to extend time for filing an Appeal from the subordinate Court to the High Court (read Land and Environment Court) stipulates as follows;

“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 Appeal ed 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. “

20. In the case of *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR the court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the Application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the Respondent, if extension is granted;
6. whether the Application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].



21. Having this in mind the question to ask is whether the Applicant had fulfilled the above requirements so as to be granted leave to file her Appeal out of time.
22. I note that after the delivery of the ruling of June 9, 2021, the Applicant instructed Counsel to file an Appeal vide their letter dated the May 17, 2022 which was 11 months down the line. The Applicant has explained her inability to file the Appeal within time was for reasons that she had been substituted as a plaintiff in place of her deceased husband who was the original Plaintiff herein, and further that she herself had been ailing and was in and out of hospital during that period hence was not in a condition to instruct counsel to file an Appeal on time. I have taken note of the medical chits herein annexed to the Applicant's supporting affidavit to her application and marked as "NC5".
23. I have further taken into consideration the fact that Respondents did not file any response to the application and/or demonstrate the kind of prejudice, if any they would suffer if the application was allowed.
24. Having considered the Application, the supporting affidavit and the submissions hereto, I find that a plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has been a valid and clear reason, upon which discretion can be favorably exercised in the present circumstance and in the upshot, the Application for enlargement of time to enable the Applicant file their Appeal after the expiry of the statutory period is herein allowed the interim orders of status quo herein granted on the September 26, 2022 shall remain in force pending the hearing and determination of the Appeal.
25. In the meantime it is herein directed as follows;
  - i. The time within which the Applicant should file her Appeal is extended by forty-five (45) days from the date of this ruling.
  - ii. If the Applicant has not been supplied with the documents required to prepare the record of Appeal, the Applicant's Counsel to liaise with the Deputy Registrar and ensure that the same are supplied to them within fifteen (15) days of this order.
  - iii. Should the Applicant not file the Appeal within the time stipulated in (i) above the window granted to file the Appeal shall automatically lapse.
  - iv. The Applicant shall bear the costs of this Application

Orders accordingly.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

