



**Makat & 2 others (Suing as Personal Representatives of the Estate of Pulele Markat - Deceased) v Daniel (Being Sued as the Legal Representative of Malonyie Ole Nakeel Soloi - Deceased) & 5 others (Environment & Land Case 52 of 2020) [2023] KEELC 622 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 622 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 52 OF 2020**

**MN GICHERU, J  
FEBRUARY 13, 2023**

**BETWEEN**

**JOSHUA LESERE MAKAT ..... 1<sup>ST</sup> PLAINTIFF  
NTIYEYO OLE MAITUMU ..... 2<sup>ND</sup> PLAINTIFF  
TIMOTHY TISIKE ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF PULELE  
MARKAT - DECEASED**

**AND**

**KATEI OLE MAKE DANIEL (BEING SUED AS THE LEGAL REPRESENTATIVE  
OF MALONYIE OLE NAKEEL SOLOI - DECEASED) ..... 1<sup>ST</sup> DEFENDANT  
DANIEL LENGETE OLDUKUNYI (SUED AS THE SECRETARY OF – KISAJU  
GROUP RANCH) ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR KAJIADO ..... 3<sup>RD</sup> DEFENDANT  
JACOB OLE KIPURY (SUED AS THE LEGAL REPRESENTATIVE OF  
GEOFFREY KIMOISA OLONG'URO) ..... 4<sup>TH</sup> DEFENDANT  
MOKIRA OLOYIONTE OLONG'URO ..... 5<sup>TH</sup> DEFENDANT  
CLEAR RESOURCES LIMITED ..... 6<sup>TH</sup> DEFENDANT**



## RULING

1. This ruling is on the notice of motion dated November 29, 2021. The motion which is brought under section 7 of the [Appellate Jurisdiction Act](#), sections 1A, 1B and 3A of the [Civil Procedure Act](#) 2010, order 51, rule (1) of the [Civil Procedure Rules](#) and all enabling provisions of law seeks one main prayer namely.
  - a. That the plaintiffs be granted leave to appeal out of time against the ruling of Hon Justice C. Ochieng delivered in this matter on November 9, 2021 and the notice of appeal annexed hereto as PM2 be deemed as duly filed and served.
2. The motion is supported by nine grounds, a supporting affidavit sworn by Joshua Lesere Markat, the first plaintiff and two annexures which are the ruling dated November 9, 2021 and a notice of appeal dated November 29, 2021.
3. The gist of all the above material is that the ruling of the court dated November 9, 2021 did not consider the plaintiffs' submissions. As a result the court struck out the entire suit on a technicality. This would not have happened if the court had considered the plaintiffs' written submissions.

Secondly, the reason why the plaintiffs did not file the notice within the 14 days required by the law is because their previous counsel did not inform them of the ruling on the date it was delivered but on November 26, 2021. Within three (3) days of learning of the ruling, the applicants prepared the notice dated November 29, 2021 a copy of which is annexed to the current supporting affidavit.
4. The motion is opposed by the first defendant and his counsel, Bryan Moturi, has sworn a replying affidavit dated June 22, 2022 giving the following reasons.

Firstly, it is deposed that the plaintiffs' counsel was given sufficient time to file written submissions but failed to do so.

Secondly, the current counsel for the plaintiffs' came on record without complying with order 9, rule 9 of the [Civil Procedure Rules](#) which requires that the incoming counsel obtains a court order upon filing and serving an application on the outgoing counsel or filing a consent between the outgoing and incoming counsel to come on record.

Thirdly, since the outgoing counsel knew of the ruling of the court or the date it was delivered, the plaintiffs are by extension deemed to have known of the ruling on the date that it was delivered.

Finally, the application is an afterthought, bad in law, abuse of the court process and vexatious and ought to be dismissed.
5. Counsel for the parties filed written submissions on July 19, 2022 and August 3, 2022. The applicants' counsel identified one issue for determination namely,
  - i. Whether the applicant should be granted leave to file a notice of appeal out of time?

The respondent's counsel also identified one issue for determination namely,
  - ii. Whether the applicant has complied with the mandatory provisions of order 9, rule 9 of the [Civil Procedure Rules](#)?
6. I have carefully considered the application in its entirety including the affidavits, grounds, annexures, the written submissions and the law cited therein. I find that the issues as identified would resolve the application but I wish to add a third namely-



- iii. Whether the plaintiffs' submissions would have persuaded the court to reach a difficult conclusion from the one reached?
7. The Supreme Court of Kenya in the case of *Salat v IEBC and seven others*, application No 16 of 2014 set out seven principles a court should consider before allowing or rejecting an application such as this.
    - a. Extension of time is not a right of a party but an equitable remedy available only to a deserving party.
    - b. A party seeking for extension of time has the burden laying a basis to the satisfaction of the court.
    - c. The discretion of the court will be exercised on a case to case basis.
    - d. Delay should be explained to the satisfaction of the court.
    - e. The court should consider if the extension will occasion prejudice to the respondents.
    - f. Has the application been brought without undue delay?
    - g. Should public interest be a consideration for extending time in certain cases like election petitions?

My understanding of the above principles is that I should apply them in deciding on all the three issues identified above. I make the following findings on the three issues raised above.

8. On the issue of the impact of the submissions to the outcome of the ruling made by the honourable judge, I find that the plaintiffs have failed to satisfy the court. It was incumbent upon the plaintiffs to show that had the court considered a particular issue or issues that was in the submissions, the outcome would have been different. The current application is devoid of any such issue and its impact.
9. On the second issue, I find that the applicant did not comply with the mandatory provisions of order 9, rule 9 *Civil Procedure Rules*. The requirement set out above is that the incoming advocate cannot be properly on record after judgment has been passed unless the outgoing advocate has consented to the incoming counsel coming on record or an application has been filed to effect the change and has been served on all the parties.

There is no evidence on record to prove that the plaintiffs complied with order 9, rule 9 *Civil Procedure Rules*. One may ask if the ruling dated November 9, 2021 is a judgment and the answer to that question is to be found in section 2 of the *Appellate Jurisdiction Act* which provides as follows.

“Judgment” includes decree, order, sentence and decision”.

The ruling of November 9, 2021 being a decision is therefore a judgment within the meaning of section 2 of the above act.

10. On the final issue of whether the applicants should be granted leave to file a notice of appeal out of time, I find that they should not be.

The outgoing counsel should have sworn an affidavit to corroborate the deposition by the first plaintiff that he learnt of the ruling on November 26, 2021. Not only has the delay not been explained to the court but even the other underlying principles have not been satisfied by the applicants.
11. For the above stated reasons, I find no merit at all in the motion dated November 29, 2021 and I dismiss it with costs to the respondents.



It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**M.N. GICHERU**

**JUDGE**

