



**Odhiambo v Awino (Miscellaneous Application E086 of 2023)
[2024] KEHC 7642 (KLR) (25 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS APPLICATION E086 OF 2023**

**KW KIARIE, J
JUNE 25, 2024**

BETWEEN

SIPRANUS OTIENO ODHIAMBO APPLICANT

AND

CHRISTINE ATIENO AWINO RESPONDENT

RULING

1. Sipranus Otieno Odhiambo, the applicant, moved the court through a Notice of Motion dated the 14th day of December 2023. The application is brought under sections 3A & 79G of the *Civil Procedure Act*. He is seeking the following orders:
 - a. That this honourable court be pleased to grant leave for the respondents [sic] to file an appeal out of time against the whole ruling delivered on the 21st day of June 2023 by the honourable court in Homa Bay Succession Cause No.38 of 2020 in the estate of Odhiambo (deceased).
 - b. That the costs of this application be provided for.
2. The application is premised on the following grounds:
 - a. That the honourable court, on the 21st day of June 2023, delivered its ruling in favour of the respondent herein.
 - b. Equally, the applicant herein applied for a copy on the 13th day of July 2023; however, he was informed that the same was in the typing pool and, therefore, could not access the court file.
 - c. Further to the foregoing, when the applicant advocate visited the probate registry to peruse the court file, she was informed that the file was already in the typing pool and, therefore, she could not peruse the contents of the ruling.



- d. It had been four months since the applicant herein applied to be furnished with certified proceedings, which were only issued on the 28th day of November 2023.
 - e. That it is the applicant's supplication that the delay in filing this appeal was inadvertently occasioned by the judiciary officers at the probate registry as the court file and the certified copy of the ruling could not be accessed to file an appeal within the stipulated time for filing an appeal.
 - f. That the time within which a party can file an appeal has since lapsed, and the applicant herein seeks leave of court to file an appeal out of time.
 - g. That the applicant herein has moved this court swiftly and without unreasonable delay, and the appeal herein has a high probability of success.
3. The respondent opposed the application on the following grounds:
 - a. That the appeal is incompetent.
 - b. That the application lacks merit.
 4. The applicant blames the registry staff for failing to give him a copy of the ruling in time. This is not true. After twenty-one days of the ruling, he applied if we assume his statement is true. He had only nine days to appeal. A certificate of delay does not accompany this contention caused by typing the certified copy. It cannot, therefore, be true. Section 79G of the *Civil Procedure Act* provides:

Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed 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.
 5. The applicant did not attach the certificate by the lower court as envisaged under section 79G of the *Civil Procedure Act*.
 6. The rationale for observing the timelines to appeal provided for in the *Civil Procedure Act* was explained in *Velji Shahmad vs Shamji Bros. and Popatlal Karman & Co.* [1957] EA 438, where the Court stated:

In the interests of the public, the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.
 7. The applicant filed the current application five months and three weeks after the time to file the appeal had lapsed. The explanation given is not satisfactory. In my view, the delay was inordinate.
 8. I, therefore, dismiss the application with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF JUNE 2024

KIARIE WAWERU KIARIE



JUDGE

