



**Okoth & another v Okoth (Miscellaneous Civil Case
E001 of 2023) [2023] KEHC 21535 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL CASE E001 OF 2023**

KW KIARIE, J

JULY 31, 2023

BETWEEN

SALOME APIYO OKOTH 1ST APPLICANT

EDWARD OBONYO OKOTH 2ND APPLICANT

AND

VALENTINE ABONGO OKOTH RESPONDENT

RULING

1. The applicants moved the court by way of Notice of Motion dated January 11, 2023. The application is brought under sections 79 & 95 of the Civil Procedure Act and Article 159 (2) d of the Constitution of Kenya. They are seeking the following orders:
 - a. That the application be certified urgent and heard ex parte in the first instance.
 - b. That the honorable court be pleased to grant the applicant leave to file appeal out of time against the ruling of Hon BO Omwansa delivered on the October 19, 2022.
 - c. That the memorandum of Appeal herein be deemed as duly filed upon payment of requisite court fees.
 - d. That the costs of this application be provided for.
2. The application is premised on the following grounds:
 - a. The honorable court delivered the ruling in the absence of the parties.
 - b. The applicants attempted to get hold of the file but were informed that the same had already been transferred to Oyugis.



- c. That the applicants are aggrieved by the decision of the court and would like to appeal against the ruling.
 - d. That the time for appeal has lapsed.
 - e. That the respondent will not suffer any prejudice on account of this application.
 - f. That it is the interest of justice to allow the instant application.
3. The application was opposed by the respondent on the following grounds:
- a. That the summons for confirmation were responded to by the applicants herein through their then advocates on record Makori Omboga & Co advocates.
 - b. That the honorable court gave directions that the summons for confirmation and the affidavit of protest be canvassed by way of written submissions and each party was given adequate time to file their submissions thereafter.
 - c. That this matter proceeded in Oyugis Court and both parties were aware of the same up until the date of delivery of judgment.
 - d. That the applicants' application is misconceived, bad in law and an abuse of the process of this honorable court and should be dismissed with costs.
4. The impugned ruling was delivered on October 19, 2022 and this application was therefore filed after about two months and 11 days after the prescribed time to appeal. In *Velji Shahmad vs Shamji Bros and Popatlal Karman & Co [1957] EA 438*, it was held that:
- 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.
5. It has been argued by the applicants that the failure to file an appeal at the appointed time was occasioned by the fact that the file had been transferred to Oyugis Court without their knowledge. They contended that they knew of the position when their advocate wrote to the deputy Registrar, High Court at Homa Bay. They have attached a letter from the deputy Registrar of this Court advising their advocate that the matter had been transferred to Oyugis magistrate's court by an order of this court on November 27, 2020.
6. The respondents have on the other hand argued that both parties were aware of the transfer and that both parties participated in the matter at Oyugis. However, nothing was attached to support this contention. In the case of *Njeri Njoroge v Joseph Maina Gichuhi & another [2018] eKLR* the Court of Appeal (Odek JA) stated:
- Whether or not to grant extension of time depends on circumstances of each case. There is no limit to the number of factors that a court should consider in an application for extension of time, so long as they are relevant. Some of the factors to bear in mind include the period of delay; the reason for the delay; the degree of prejudice the respondent stands to suffer; justice should be administered without undue regard to procedural technicalities and that justice should not be delayed.
- In my view, the delay in the circumstances as explained by the applicants cannot be described as inordinate. It was also justified under the prevailing circumstances.



7. I am inclined therefore to allow the application and order the applicant to file the memorandum of appeal together with the record of appeal within 14 days.
8. Costs be in the cause.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

