

**IN THE COURT OF
APPEAL AT KISUMU**

**(CORAM: OMONDI, JA (IN
CHAMBERS))**

**CIVIL APPLICATION NO. EI92 OF
2024 BETWEEN**

**GEORGE NYAKUNDI OMAMBA
*suing as the legal administrator
of the estate of KERUBO OSIEMO (Deceased)***

APPLICANT AND

**TURUSIRA OSIEMO 1ST
RESPONDENT THE KISII DISTRICT COUNTY
LAND REGISTRAR.....2ND
RESPONDENT
THE ATTORNEY GENERAL 3RD
RESPONDENT**

*(Being an application seeking leave to file an appeal out of
time against the Judgment and Decree of the Environment
and Land Court at Kisii (Munyao, J.) dated 16th May 2024*

in

HCCC No. 28 of 2018)

RULING

1. The applicant's father had four wives, among them being Trusira, the 1st respondent herein whom he accused of trespassing onto his mother's land, carving a portion of it; and through fraudulent actions resulted in issuance of a title deed to her, facilitated by the 2nd and 3rd respondents. He had filed a suit against the respondents at the Nyamira Environment and Land Court, seeking in a nutshell

cancellation of the title and a declaration that the
contested

land portion was an illegal subdivision. The trial court found no merit in his claim which was dismissed with costs, on 16th May 2024 (Munyao, J).

2. Aggrieved by the outcome, he is desirous of filing an appeal, but realises that the statutory time within which to file the appeal has lapsed. The gist of the applicant's contention is that he duly applied for certified copies of the proceedings and the judgment on 16th May 2024 but the same were not availed to him until 24th September 2024; the applicant also timeously applied for a signed and certified decree but these were not supplied to him until 7th June 2024; and he was ultimately issued with a certificate of delay by the Deputy Registrar Kisii High Court. The applicant explains that he had erroneously applied for leave to file the appeal out of time at Kisii High Court instead of the Court of Appeal at Kisumu, pushing to about 80 days late as at the time of filing this application.
3. Thus by a Notice of Motion dated 13th December 2024, supported by the affidavit of the applicant, sworn on even date, he seeks extension of time within which to file his appeal. The applicant states that his intended appeal has

high chances of success as disclosed in the draft Memorandum of Appeal annexed to this application.

4. There is no response nor written submissions filed by the respondents.
5. This Court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time for any step intended to be done within the period stipulated by the Rules in **Paul Wanjohi Mathane vs. Duncan Gichare Mathenge [2013] eKLR** this Court held thus:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

6. The record shows that by a letter dated 20th May 2024, the applicant indeed applied for copies of the proceedings and judgment in a timely manner, but these were not availed to him until 24th September 2024; and consequently, the Deputy Registrar of the High Court issued the applicant with a Certificate of Delay. It is clear to me that the prevailing circumstances were beyond the applicant's control, and he has demonstrated that he exercised due diligence in trying to have his appeal filed within the

required time. The applicant

is not to blame for the delay and has given a satisfactory explanation. On the issue as to whether or not the intended appeal has no chance of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of **Athuman Nasura Juma vs. Afwa Mohammed Ramadhan [2016] eKLR:**

“...this court has to be careful to ensure that whether the intended appeal has merit or not is not an issue to be determined with finality by a single Judge”.

7. I bear in mind the afore-going principles whilst determining this application and find that there are arguable grounds set out. The applicant has demonstrated that he was vigilant and diligent and in the premises therefore, the application is allowed. The applicant is granted extension of time to lodge and serve the appeal. The same shall be filed and served within fourteen (14) days of today's date. There shall be no orders as to costs.

Dated and delivered at Kisumu this 3rd day of October, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR