Otieno & 2 others v Aoko (Sued as the legal representative of the Estate of the Late Elizabeth Aoko Gumbo) (Civil Appeal (Application) E153 of 2024) [2026] KECA 150 (KLR) (30 January 2026) (Ruling)

Neutral citation: [2026] KECA 150 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL (APPLICATION) E153 OF 2024

HA OMONDI, JA

JANUARY 30, 2026

BETWEEN

ELISHA OKOTH OTIENO ..... 1ST APPLICANT

FANUEL ACHOLA OTIENO ..... 2ND APPLICANT

ISAIAH OJOWI OTIENO ..... 3RD APPLICANT

AND

JARED OTIENO AOKO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ELIZABETH AOKO GUMBO) ..... RESPONDENT

(Being an application from the judgment of the Environment and Land Court of Kenya at Homa Bay (G.M.A. Ong'ondo, J.) dated 28th April 2022)

RULING

1. By a Notice of Motion dated 4th April 2025, made pursuant to Rule 58 (1-4) of the Court of Appeal Rule, the applicants seek that this court do set aside the orders made on 19th February 2025 which dismissed an application dated 18th June 2024; and to direct that the application be reinstated for inter-partes hearing. The dismissed application had sought orders of stay of execution pending hearing of the appeal.

2. The applicants' counsel explains that although she was served with the hearing notice, due to administrative issues in her office, the date was not entered in the diary, leading to her failure to attend court on the date of hearing. The applicants only learnt about the dismissal on 30th April 2025, long after the lapse of the requisite 30 days for filing such an application as the present one.

3. In urging this court to allow the prayers sought, the applicants state that the failure to attend court was due to an oversight by counsel, which should not be visited on the litigant; that the appeal is arguable; the applicants face imminent eviction; and no prejudice will be occasioned to the respondents.

4. The application is opposed vide grounds of opposition dated 17th November 2025, which describes the application as defective and bad in law; discloses no justifiable reason to warrant favourable exercise of this Court's discretion and urges that the application be dismissed ex debitio justitiae. In their written submissions, the respondents argue that the "Administrative issues" referred to are not substantiated nor disclosed, neither does the applicants' counsel demonstrate how the alleged administrative issues prevented diarizing the matter or attending court; that the respondent's counsel seems unaware of the practice of the court of appeal as regards notification of hearing dates and practice of the court

5. For purposes of clarity, the respondents point out that this Court starts its hearing process as follows:

    a. Pre-trial session undertaken and directions given on the hearing of application.

    b. A hearing notice is served upon the parties and evidence availed to court confirming service.

    c. The CTS which is accessible to all parties is updated.

    d. Message prompt is sent to advocates reminding parties of the hearing date or steps made which corresponds with details in the CTS.

    e. On the eve of the hearing day, the court sends cause list together with the link to all advocates.

    f. Logging in and testing to confirm that all advocates and parties have their gadgets working properly for the virtual sessions.

6. It is submitted that the applicants' Advocate has not disclosed that all the above steps were undertaken, thus obviating and defeating the purported failure to diarize the case, as there are many triggers and preliminary promptings preceding the hearing date to which makes it not necessarily that advocates will only remember the hearing date based on the entry on the hearing date; that advocate is thus not honest and has not approached this court with clean hands; and besides that, this Court is busy court and meticulous by nature, yet the applicant's advocates are casual with the matter since even after the dismissal, the instant application was brought in excess of 2 months which, and it is required that a delay for even a day must be accounted for. The Court is urged to find that the Application is thus lacking in merit and is otherwise an abuse of the court process.

7. The instant application is brought pursuant to Rule 58(3) &

4. of the Court of Appeal Rules which states as follows:

> Where an application has been dismissed or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to rehear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.
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> An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days after that party's first hearing of that decision.

8. In this matter, the application is made after the lapse of the requisite 30 days, there is no formal application for extension of time, but the prayer to have the same admitted out of time is included in the written submissions. What was the reason for the delay? No reason is offered. How long was the

delay? 2 months. The applicants are not explicit as to what led to the delay in filing this application but maintains that the delay is not inordinate, and invokes the decision in Leo Sila Mutiso vs. Hellen Wangari Mwangi [1999] 2 EA 231 which stated thus:

> "...that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent."

9. Certainly, there is a procedural lapse in the manner this court's discretion is sought, and as much as I would say it ought not to defeat the substance of the applicants' desire, I concur with the respondent's counsel that the approach adopted by the applicants is rather casual, not a scintilla of reason as to what caused the delay, almost suggesting that the Court ought to wish away the lapses; and just indulge the two months delay. I opine that the rules set timelines for a specific reason, and those timelines cannot be subjected to ornamental treatment. Discretion may be an equitable remedy, but equity does not aid the indolent.

10. In the circumstances, the applicant was required, in the first instance, to seek extension of time to be granted leave to file the present application because the same was filed beyond the thirty (30) days period provided by the Rules of this Court. The application is therefore incompetently before this Court. In the premises therefore, the application is hereby ordered struck

11. There is a second limb to the application seeking setting aside of dismissal orders made by a full bench in relation to the application which had sought stay of execution pending hearing of the appeal. In my view, this is obviously a bid to kill two birds with one stone, presented to the Court as an "omnibus" application. An omnibus application is an application where an applicant has sought two prayers, one of which cannot be granted by the Court sitting as a single Judge. In the present application, in prayer for setting aside orders dismissing prayers for orders of stay cannot be granted by a single Judge of the Court. Rule 55 of the Court of Appeal Rules which states that:

> "(1) Each application, other than an application specified in sub rule (2), shall be heard by a signal Judge. Provided that such application may be adjourned by the Judge for determination by the Court.
>
> 2. This rule shall not apply to:
>
> a. an application for leave to appeal
>
> b. an application for stay of execution, injunctions or stay of further proceedings
>
> c. an application to strike out a notice of appeal or an appeal
>
> d. an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of the hearing"
>
> 6. It is therefore clear that this Court, sitting as a single Judge, does not have jurisdiction to consider prayer seeking setting aside of the dismissal sought by the applicant. This Court will therefore not render a decision in respect of the same. The applicant shall be at liberty to list that prayer for determination by the full bench of the Court.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2026.

H.A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR