



Akuma (As Administrator of Teresa Ombeo (Deceased)) v Araka & another (Civil Application E146 of 2024) [2025] KECA 709 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KECA 709 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E146 OF 2024
LK KIMARU, JA
APRIL 25, 2025**

BETWEEN

**DANIEL OMBEO AKUMA APPLICANT
AS ADMINISTRATOR OF TERESA OMBEO (DECEASED)**

AND

**PETER NYAMAGWA ARAKA 1ST RESPONDENT
NELSON ONDIEKI MARIGIRI 2ND RESPONDENT**

(Being an application for extension of time to file and serve the record of appeal out of time from the Judgment of the Environment and Land Court of Kenya at Kisii (S. Munyao, J) dated 21st February, 2024 in ELC Case No.37 of 2019 (OS))

RULING

1. Daniel Ombeo Akuma, the applicant herein, moved the Court in a notice of motion made under rule 4 of the *Court of Appeal Rules*, seeking to be granted leave to file the notice of appeal and the record of appeal out of time. The applicant states that he instructed his former advocate to lodge the notice of appeal but he did not do so. By the time he became aware that the notice of appeal had not been filed, the time in which the said notice was required to be lodged had lapsed. The applicant blames the delay in lodging the notice of appeal in time to miscommunication between himself and his erstwhile advocate. He urged the Court to allow the application in the interests of justice. The application is supported by the annexed affidavit of the applicant. In the affidavit, he reiterates the contents of the grounds in support of the application on the face of the motion.
2. The application is unopposed. When the respondents were served with the hearing notice, they did not file a response in opposition to the application nor filed written submissions in opposition to the application.



3. Rule 4 of the *Court of Appeal Rules* grants this Court unfettered discretion to extend time for any steps to be taken by any party beyond the period stipulated by the Rules. Although this discretion is unfettered, the applicant is required to persuade the Court that he is entitled to the exercise of discretion by the Court. He must give the reasons for the delay. The length of delay is also a factor as is the consideration whether the intended appeal to be lodged has chances of success. And finally, the Court is also required to take into account whether the respondent will be prejudiced if the order craved for for extension of time is granted. (See *Paul Wanjohi Mathane v. Duncan Gichore Mathenge* [2013] eKLR).
4. In the present application, the applicant explained the reason for the delay in lodging the appeal in time to inaction on the part of his former advocate. The judgement was delivered by the Environment and Land Court on 21st February, 2024. The applicant states that he instructed his erstwhile advocate to lodge the appeal against the decision since he was aggrieved with the same. The said advocate took no action. He only became aware that the notice of appeal had not been lodged on 13th March, 2014. By that time, the period upon which the notice of appeal was supposed to have been filed had lapsed. He instructed his new advocate who filed the present application on 25th March, 2024.
5. It is clear from the above narration that the applicant is diligent litigant. Whereas blaming the advocate for the delay in not filing the appeal or any other pleading in time is the oldest excuse in the books, in the present application, it was evident that the applicant followed up with his former advocates to establish whether or not the appeal had been filed. This was a couple of weeks after the judgment was delivered.
6. When he discovered that no steps had been taken to actualize the appeal, he did not sit down and do nothing. He immediately approached his current advocate who timeously filed the present application. This Court is persuaded that the applicant has sufficiently explained the reason for the delay. The length of delay is about 30 days. This period is not inordinate. The delay is excusable.
7. In the premises therefor, the application has merit. It is hereby allowed. The applicant is granted leave to appeal out of time. He shall lodge and serve the notice of appeal within fourteen (14) days of today's date. He shall file and serve the memorandum and record of appeal within Forty five (45) days after the service of the notice of appeal. There shall be no orders as to costs.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL, 2025.

L. KIMARU

JUDGE OF APPEAL

