



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Sule & 3 others (Civil Application E097 of 2024)
[2025] KECA 710 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KECA 710 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E097 OF 2024**

HA OMONDI, JA

APRIL 25, 2025

**IN THE MATTER OF LAND PARCEL KISUMU/WATHOREGO/916 AND THE
RESULTANT SUBDIVISION INTO KISUMU/WATHOREGO/5155, 5156 AND 5157**

AND

**IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

BETWEEN

SELINA AOKO OTIENO APPLICANT

AND

PEREZ ATIENO SULE 1ST RESPONDENT

KEVIN KEEGA OTIENO 2ND RESPONDENT

MARY AKOTH OTIENO 3RD RESPONDENT

RAYMOND ODUOR MUHULA 4TH RESPONDENT

*(Being an application for extension of time to file and serve a notice of appeal
and stay of execution from the judgment of the Environment and Land Court
at Kisumu (E. Asati, J.) dated 17th January 2023 in Case No. 38 of 2017)*

RULING

1. Perez Atieno Sule, the applicant herein, had filed a suit in the Environment and Land Court at Kisumu seeking to be declared the owner by adverse possession over land parcels No. Kisumu Wathorego/5155, 5156 5157; the suit was heard and the prayer granted on 17th January, 2023. Aggrieved by the outcome, the applicant filed a Notice of Appeal dated 18th January 2023; but failed to serve the 1st respondent



until 24th June 2024 and consequently, by a Notice of Motion dated 18th July, 2024, the applicant, moved this Court pursuant to rule 4 of the Court of Appeal Rules 2022, seeking to be granted:

- a. stay of execution of the judgment; and
 - b. leave to serve the notice of appeal out of time.
2. The application is based on the grounds stated on the face of the application and the annexed affidavit of even date sworn by the applicant. In brief, the applicant being dissatisfied with the judgment lodged the Notice of Appeal in the Environment and Land Court (ELC), but inadvertently failed to serve the respondents within the stipulated timelines. This compelled her to file the present application, simultaneously seeking stay orders for fear that the 1st respondent is likely to transfer title of the suit land to her name, a move that would be prejudicial, to the applicant and would render the appeal nugatory as the 1st respondent has already begun cultivating the land. The applicant contends that the late service is not prejudicial to the 1st respondent.
 3. The applicant explains that attempts to set aside the judgment which had also aggrieved Kevin Keega Otieno and Mary Akoth Otieno, the 2nd and 3rd respondents was dismissed by the trial court on 14th December 2023. A similar attempt by the 4th respondent Raymond Oduor Muhula, suffered a similar fate on 7th December 2023. The applicant had all along banked her hopes that one of the two applications, which sought setting aside the judgment; and hearing the matter afresh, would succeed; as a result, she did not immediately file this application.
 4. In opposing the application, the 1st respondent by her affidavit dated 21st January 2025 describes the application as an abuse of the court process, and not made in good faith; contending that from 18th January 2023, it took 18 months before the Notice of Appeal was filed; and the 1st respondent points out that the reason given for the period of delay from the time the notice of appeal was filed, is first inadvertence (whose nature is not explained) and waiting for the conclusion of the applications which had been filed to set aside the judgement; that those applications were finalized on 14th December 2023, by then the time of 60 days within which to serve had in any event lapsed on 18th February 2023. But even after the rulings on 14th December 2023, the current application was not filed until 7 (seven) months later, on 18th July 2024.
 5. In support of these arguments, the respondent refers to the case of *Bartilol & 3 Others vs. Bartilol & Another* (Civil Application 001 of 2024) [2024] KECA 607 (KLR) (24 May 2024) where this Court, differently constituted stated that a delay of 3 months was inordinate; to urge for a finding that the delay in the instant case (18 months) is too long and the leave sought should not be granted.
 6. In her written submissions, the applicant through her counsel Otieno Yogo Ojuro and Company Advocates, has set forth arguments as to why she merits orders of stay under Rule 5 (2) (b). It must be pointed out from the onset that the applicant herein has brought an omnibus application as she seeks two prayers, one of which cannot be granted by the Court sitting as a single Judge. In the present application, the prayer for an order of stay of execution of the judgment and decree of the trial court, cannot be granted by a single Judge of the Court; and can only be granted by a full bench of this Court as provided by rule 55 of the Court of Appeal Rules which states that:

“(1) Such 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) The rule shall not apply to-



- (a)
- (b) an application for stay of execution, injunctions or stay of further proceedings.
- (c) .”

7. Clearly then, this Court does not have jurisdiction to consider prayer sought for stay orders. This Court will therefore not render a decision in respect of the same despite the spirited submissions made by both parties. The applicant shall be at liberty to list that prayer for determination by the full bench of the Court.

8. As regards the prayer for extension of time within which to serve the already filed Notice of Appeal, Rule 79. Provides that:

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal. This did not happen; and the applicant seeks to salvage the situation courtesy of rule 4 of the Court of Appeal Rules provides as follows:

The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

9. Evidently, under Rule 4, this Court has unfettered discretion to extend time for any step intended to be done within the period stipulated by the Rules. This was aptly set out 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 not 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.”

10. So, in this instance, what was the period of delay? 18 months from the date the decision was delivered. What was the reason for the delay? The applicant says it was inadvertence, yet goes ahead to confirm that she had adopted the rabbit in the woods attitude, to wait and see whether the hunter’s arrow would hit the target or miss, before making a homerun. The applicant confirms that she waited to see the outcome of the applications filed by the other respondents, hoping that they would succeed; and save her the burden of pursuing the appeal. Not a very elegant reason, but even if that were to carry the day, the last application was dismissed on 14th December 2023.

11. Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. The case of *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 if the application is granted.”

12. The applicant herein waited for another 7 months after dismissal of the last application, to file this application on 18th July, 2024. The applicant does not say she mistakenly thought she had served the Notice, indeed as the respondent submits, the nature of the purported inadvertence is not disclosed; and the Court is left to guess what could have happened. The length of the delay, the reason for the delay do not predispose the applicant to a favourable outcome. I am disinclined to exercise discretion in favour of the applicant; and the application is dismissed with costs to the 1st respondent.

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

