



Okode v Adera (Civil Application E146 of 2023) [2025] KECA 922 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KECA 922 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E146 OF 2023
F TUIYOTT, JA
MAY 16, 2025
[IN CHAMBERS]**

BETWEEN

PAUL ODERA OKODE APPLICANT

AND

JOHNSON OTIENO ADREA RESPONDENT

(Being an application for extension of time to file a reference to full court out of time from the ruling of the Court of Appeal (H.A Omondi, JA) dated 7th June, 2024 in Civil Application No. E146 of 2023)

RULING

1. In the ruling dated 7th June, 2024 by H.A. Omondi JA, the learned judge of appeal sitting as a single judge, dismissed the applicant's application dated 29th September, 2023 seeking to have the time within which to file an appeal against the judgment of 29th July, 2022 extended. Dissatisfied with the decision, the applicant was required, pursuant to rule 57(1(b) of this *Court's rules*, to file a reference to Court within 7 days of the date of the ruling, but failed to do so within the requisite period. The applicant has however since filed a reference dated 26th June 2024 on 29th June, 2024 but the same was filed out of time and without leave of this court. Notice the inconsistency in the dates, a matter I shall return to.
2. Through a notice of motion dated 1st July 2024, the applicant seeks leave to file the reference out of time and to have the reference filed on 29th June, 2024 deemed as duly filed. In an affidavit in support of the application, the applicant deposes that he did not receive the impugned ruling until 28th June, 2024 and by that time the 7 days' period had already lapsed. He contends that the delay is not as inordinate as to be inexcusable and that the respondent is unlikely to suffer any prejudice if the application is granted.
3. The application is opposed by the respondent vide a replying affidavit sworn on 22nd October, 2024. He contends that the applicant has never filed a notice of appeal and has never bothered since 29th July,



2022 when the superior court delivered its judgment, to seek extension of time to do so. That the failure divests this Court of any jurisdiction to entertain the application. He further contends that while the applicant states that he obtained the ruling on 28th June, 2024, the reference was filed on 26th June, 2024 and the applicant is not being candid with the Court and thus the delay of close to one month is inordinate and inexcusable. He contends that he will suffer prejudice, especially so, as the applicant has professed that he is poor and consequently will be unable to pay his costs.

4. Both parties have filed their submissions which mirror the positions taken in their respective affidavits.
5. As a preface, the Court deals with the contention by the respondent's counsel that this Court lacks jurisdiction to entertain, hear and pronounce itself on the application before it because no notice of appeal has been filed to date, it being argued that filing of a notice of appeal is a jurisdictional prerequisite. Counsel then cites numerous decisions which he argues supports this proposition. All these decisions do not bear relevance to the matter at hand and it is startling that they are cited at all, and this Court, therefore, need not make name or discuss them.
6. It is enough to say the following. These proceedings commenced through an application by the applicant seeking leave of a single judge to institute an appeal out of time. By its very nature such an application concedes that there is no proper appeal before Court and the very objective of rule 4 is to give an opportunity to a party who has delayed in acting within time to make amends by grant of extension of time. The single judge (H.A. Omondi JA) declined the application for the reasons that it did not satisfy the principles upon which the Court exercises its discretion to extend time. The good judge did not determine the application on a jurisdictional question nor did she make a finding that no notice of appeal had been filed. Now, the applicant being dissatisfied with that decision sought to refer it to the Court under rule 57 which reads:-

“Reference from decision of a single judge

1. Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—
 - a. in a criminal matter, wishes to have his or her application determined by the Court; or
 - b. in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.
 2. At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced.”
7. Admittedly the applicant was, once more, late in applying for that reference and the simple task I am asked to undertake is to determine whether or not an extension of time to file a reference is deserved. An application such as this, for extension of time, unlike a rule 5(2)(b) application not is predicated on the existence of a duly filed notice of appeal.



8. The unfettered discretion granted to this Court under rule 4 for extension of time is guided by the well settled considerations restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR) to be, *inter alia*: -

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors...”

9. The reason proffered by the applicant for the delay is that he did not receive the ruling of the single judge dated 7th June 2024 until 28th June 2024 when the time to file a reference had lapsed. The applicant seeks to have his reference already lodged in Court on 26th June 2024 deemed as duly filed in time (the reference is also dated 26th June 2024 but is erroneously said to be dated 26th July 2024 and filed on 29th June 2024 in the motion). But there lies an apparent inconsistency which the respondent makes heavy weather of. The respondent doubts the candour of the applicant because the applicant has not explained why he would be filing a reference on 26th June 2024 when he came to learn of the ruling on 28th June 2024, two days later.
10. I have agonised over what to make of this apparent inconsistency and whether to excuse it. On the one hand it is expected that the applicant would file a further affidavit to explain this inconsistency but he has not done so. On the other, it is evident that the applicant has been rather sloppy with his dates. In the body of the motion he states that the late reference is dated 26th July 2024 when the annexed reference is dated 26th June 2024. Again, in the body of the motion, it is said to have been filed on 29th June 2024 when it was lodged on 26th June 2024. Weighing one thing against the other, I would rather attribute the inconsistency in the dates to be a clerical mix up of dates than to lack of candour.
11. In reaching that decision, I have considered that even if the applicant had learnt of the ruling on whichever date after it as delivered on 7th June 2024, the late filing on 26th June 2024 would be just about 12 days late. That is not inordinate delay and can be excused. Also, to the applicant’s credit, the application before Court is brought just about 17 days after the deadline.
12. On another matter, would the respondent suffer prejudice if I were to grant the order of extension for filing a reference because of the further delay that would come with the grant of the extension or because the applicant could be impecunious as alleged by the respondent? Regarding the former, a reference under rule 57 is a right of a party dissatisfied with the decision of a single judge. Given my analysis of the delay here it is apparent that a grant of the order sought simply delays the exercise of that right by a short time. In respect to the latter concern, that is an issue to be raised before the Court which shall hear the reference.
13. The upshot is that the application dated 1st July 2024 is hereby allowed. The reference dated 26th June 2024 and filed on the same date is hereby deemed as duly filed and served. Costs shall be in the reference.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF MAY, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of original.



signed

DEPUTY REGISTRAR.

