



REPUBLIC OF KENYA



Odeny (Suing as the Representative of the Estate of Odeny Otieno - Deceased) v Obongo & another (Civil Application E163 of 2024) [2025] KECA 1060 (KLR) (13 June 2025) (Ruling)

Neutral citation: [2025] KECA 1060 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E163 OF 2024
MSA MAKHANDIA, JA
JUNE 13, 2025**

BETWEEN

PAUL AUGO ODENY (SUING AS THE REPRESENTATIVE OF THE ESTATE OF ODENY OTIENO - DECEASED) APPLICANT

AND

MARGARET AJWANG OBONGO 1ST RESPONDENT

BRIAN OCHIENG ONYANGO 2ND RESPONDENT

(Being an Application for leave to file Appeal out of time from the Judgment and Decree of the Environment and Land Court at Kisumu, (Okongo, J.) dated 1st February 2024 in ELC No. 62 of 2020 (OS))

RULING

1. The application before Court is dated 25th September, 2024.

The substantive prayers sought are: that the applicant be granted leave to file and serve record of appeal out of time from the Judgment and Decree of the Environment and Land Court at Kisumu, “the ELC” (Okongo, J.) dated 1st February 2024. Secondly, that the annexed memorandum of appeal be deemed as properly filed upon payment of requisite court fees.

2. The application is supported by the grounds on its face as well as the applicant’s own affidavit deposed on 25th September, 2024.

In short, the applicant seeks to invoke the Court’s discretion for extension of time on the following pleaded facts:

3. The case in the ELC was initiated by the respondents. The respondents claimed that they had acquired all that piece or parcel of land known as North Nyakach/ Gem Rae/ 567, “the suit property”, by way



of adverse possession. Of course, their claim was contested by the applicant. Upon the plenary hearing of the suit Okongo J in a judgment rendered on 1st February, 2024 allowed the claim.

4. The applicant says that the judgment was delivered without his notice, since his previous counsel had failed to generally update him of the progress of the suit and in particular to notify him of the date of judgment. Somehow and through his own initiative he came to know of the judgment and immediately instructed his then counsel to lodge an appeal. After prolonged period of inquiry and the counsel lying to him constantly that he had filed the notice of appeal and was pursuing copies of the judgment and proceedings for him to file the appeal, it came to pass that all along that counsel had been lying to him as he had not taken any of the above steps. It was then that he instructed his current counsel to take up the matter. However, by then the timelines set by the rules of this Court for the filing of the notice and record of appeal respectively had long expired, thereby necessitating the instant application.
5. This series of events, the applicant insists, are responsible for the delay in filing a Notice and Record of Appeal. These misadventures, the applicant says, are not of his authorship – but are, instead, conspired by factors beyond his control. In particular, the applicant seems to place the blame on his previous counsel: for failure to update him on the progress of the case as well as lying to him that he was in the process of filing the appeal when he had no intention doing so.
6. The respondents have not opposed the application since no papers in opposition to the application have been filed by them or on their behalf despite being served with the application and the hearing notice. It is also not lost on me that this application last came for hearing before W. Korir JA., on 6th February, 2025, when it was adjourned on the grounds that there was no evidence of service of the application on the respondents. The court then directed the applicant to serve the respondents with the application and submissions within 7 days. And that upon such service, the respondents will have 14 days to file and serve their responses and submissions. Upon the lapse of 21 days the Deputy Registrar shall be at liberty to relist the application for hearing. Whereas the applicant has fully complied with directions having filed an affidavit of service of the application, written submissions and hearing notice, the respondents have not. I therefore take it that the application is unopposed.
7. The application was argued by way of written submissions of the applicant only. The submissions rehash the narratives Of the applicant in his grounds and affidavit in support of the application.
8. I have considered the application, the affidavit in support thereof and the written submissions by the applicant. The only question for determination is whether the applicant has met the threshold for the exercise of this Court’s discretion to grant leave for him to file Appeal out of time.
9. This Court is empowered to grant extension of time under Rule 4 of the Court of Appeal Rules which provides that:

“The Court may, on such terms as it thinks 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.”

10. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay,



secondly the reasons 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.”

11. In the present case, the impugned judgment was delivered on 1st February 2024. The present application was filed on 5th September 2024. That was therefore a delay of about 7 months. The Notice of Appeal is statutorily required to be filed within 14 days of delivery of the judgment. Therefore, the first action taken by the applicant to perfect his appeal came at least 7 months late.
12. The question for resolution is whether the delay is excusable, and if not, whether it is inordinate. The ostensible reasons given by the applicant for the delay is twofold: first, his advocate never kept him abreast with the developments in the suit and lying to him that he had initiated the appellate process as per his instructions when he had not. That narrative is not contested at all by the respondents. Thus, it must be taken to be true.
13. The applicant’s narrative appears to me to be in good faith and candid. Both of these are factors which I should take in to account in exercising my unfettered discretion in his favour. I am not persuaded that they are an afterthought. The delay is accordingly excusable. I have perused the draft memorandum of appeal annexed to the application and I am satisfied that they are not frivolous. Similarly, the applicant has deposed to the fact that Paul Augo Odeny, Otieno Keens Odeny, Diston Odhiambo Odeny, Collins Ochieng Odeny and Joshua Juma Odeny, 5 surviving beneficiaries entitled to benefit from the suit property will be highly be prejudiced if the applicant is denied the right to prosecute the intended appeal by the dismissal of this application which will render grave injustice.
14. In these circumstances, the Court is inclined to exercise its discretion on behalf of the applicant and I hereby do so.
15. The result is that the Application dated September 25, 2024 is allowed. The applicant is hereby granted leave to file and serve record of appeal out of time. Secondly, the annexed memorandum of appeal be and is hereby deemed as properly filed upon payment of requisite court fees.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

