



Onyango & 3 others (All Suing as the Legal Representatives of the Estate of Jared Abuoro Auma alias Abuoro Auma - Deceased) v Aboge & another (Civil Application E120 of 2021) [2025] KECA 1055 (KLR) (13 June 2025) (Ruling)

Neutral citation: [2025] KECA 1055 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E120 OF 2021
MSA MAKHANDIA, JA
JUNE 13, 2025**

BETWEEN

**JACTONE OTIENO ONYANGO 1ST APPLICANT
LAWI AUMA ABUORO 2ND APPLICANT
MICHAEL OCHIENG' OMBOGA 3RD APPLICANT
MAURICE OGINGA ABUORO 4TH APPLICANT
ALL SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JARED
ABUORO AUMA ALIAS ABUORO AUMA - DECEASED**

AND

**DONALD OCHIENG ABOGE 1ST RESPONDENT
DAVID OCHIENG OKOTH 2ND RESPONDENT**

(Being an Application for leave to file Notice and Record of Appeal out of time from the Judgment and decree of the Environment & Land Court at Kisumu, (Ombwayo, J.) dated 30th April, 2021 in ELC Appeal No. 25 of 2019)

RULING

1. The application dated 12th August, 2021, contains one substantive prayer to wit that; the applicants be granted leave to file Notice as well as the Record of Appeal against the whole Judgment of Ombwayo J., dated 30th April, 2021 in Kisumu Environment and Land Court "ELC" Appeal No. 25 of 2019 out of time.



2. Briefly, the background to this application is as follows. The applicants filed a suit in the Principal Magistrate’s Court at Bondo against the respondents and successfully obtained a restraining order in respect of Land Parcel No 3686 “the suit property”.
3. The respondents were aggrieved by the ruling and order aforesaid and consequently lodged an interlocutory appeal in the ELC at Kisumu being ELC Appeal No. 25 of 2019. The appeal was eventually heard by Ombwayo J and in a decision rendered on 30th April, 2021, the appeal was allowed and the restraining order which had been granted in the applicants’ favour by the lower court was set aside. The applicants are desirous of appealing that decision in this court. However, they have not been able to lodge the notice as well the record of appeal within the statutory timelines. The present application is aimed at regularizing that aspect. They say that they did not file their Notice and Record of Appeal on time because the judgment of the ELC was delivered in their absence and without notice to them. That judgment had been reserved for delivery by the ELC on 15th April 2021. However, on the appointed date, it was not delivered since the court was not sitting on that day.
4. The applicants’ counsel was then advised by the court registry staff, particularly Ms. Bolo, that the judgment would then be delivered on notice. However, on 4th April, 2021, the applicants’ counsel, Mr. Muga, stumbled upon the judgment on the judiciary website portal whilst researching for another matter. Counsel noted that the judgment in the appeal had in fact been delivered on 30th April 2021 without any notice to the parties. Counsel then immediately contacted the applicants and forwarded a copy of the judgment. In response, the applicants immediately instructed counsel to lodge an appeal against the ruling and order. However, the time for doing so under the rules of this Court had long expired, hence the instant application.
5. The applicants say that they have an arguable appeal because the learned Judge was wrong to entertain an incompetent appeal; in holding that the trial court did not exercise its discretion properly in granting the injunction; and in holding that the threshold for the granting temporary injunction had not been met.
6. It would appear that the application is unopposed since I have not seen any papers in opposition to the application filed by the respondent. From the record, it is evident that the respondents were served with the application.
7. Again, only the applicants filed written submissions as directed by the Deputy Registrar. Their submissions, in large part, reiterated their depositions in the supporting affidavit. The thrust of their argument, is that, whereas the delay in filing application case though inordinate, they do not take the blame. Instead, it is the court that should bear the blame for not notifying them of the judgment date. They also argue that the respondent will not be prejudiced by allowing the extension of time. Finally, they argue that arguability of an appeal is a factor to consider in an application for extension of time; and that they have demonstrated that their appeal is arguable. They point out that they have attached a Memorandum of Appeal with grounds of appeal which are eminently arguable.
8. Extension of time is governed by Rule 4 of the Court of Appeal Rules. The Rule 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.



9. 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 into 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.

10. In the present case, the impugned judgment was delivered on 30th April, 2021 without any notice to the parties. The present application was filed on 12th August 2021 – about four months later. The uncontested explanation for the delay by the applicants is that the court failed to notify them of the date of delivery of the judgment. In my view, the applicants have explained to my satisfaction the delay and the reasons for the delay. I am satisfied upon perusing the draft memorandum of appeal that the intended appeal is not frivolous. In the absence of any response by the respondents, I am unable to gauge the degree of prejudice to the respondent if the application is granted.

11. In my view therefore, the applicants have brought themselves within the equitable embrace of Rule 4 of the Court of Appeal Rules.

12. Consequently, the application dated 12th August, 2023 is for allowing, and I hereby do so with costs being in the appeal. The applicants' Notice of Appeal filed on 5th August 2021 is accordingly deemed as properly filed and served on the respondents. From the date of this ruling, the applicants shall have forty-five (45) days within which to file and serve their record of appeal.

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

