



REPUBLIC OF KENYA



**Dishon v Oyugi (Civil Application E248 of 2023)
[2024] KECA 406 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 406 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E248 OF 2023**

**JM NGUGI, JA
APRIL 26, 2024**

BETWEEN

PHILIP MORAIRA DISHON APPLICANT

AND

JENNIFER OYUGI RESPONDENT

(Being an Application for Extension/Enlargement of time to file and serve the Record of Appeal out of time and/or deem the Record of Appeal dated 5th October, 2023 and filed on the 9th October, 2023 vide KISUMU COURT OF APPEAL CIVIL APPEAL NO.E248 OF 2023 as properly filed before this Honourable Court against the Judgment of the Environment and Land Court at Migori, (Kullow, J.) dated 27th April, 2023 in ELC Appeal No. E031 of 2021)

RULING

1. The application before the Court is dated 16th October, 2023. It is supported by the supporting affidavit of Philip Moraira Dishon, the applicant. Its prayers are thus:
 1. That the Honourable Court be pleased to Extend and/or enlarge time to the Applicant, within which to file and serve the Record of Appeal against the Judgment and Decree of the Superior Court made on the made on the 15th day of June 2021 vide Homa- Bay ELC No. 60 of 2021 (O.S).
2. In the alternative, the Honourable Court be pleased to deem the Record of Appeal dated 5th October 2023 and filed on the 9th October 2023 vide Kisumu Court of Appeal Civil Appeal No. E248 of 2023 as property filed before this Honourable Court.
3. Costs of this Application be provided for.



2. The background to the application, as gleaned from the supporting affidavit, is, briefly, as follows. The applicant filed suit against the respondent at the Rongo Principal Magistrate's Court. The suit was for vacant possession of the parcels of land known as LR No.s Kamagambo/Kanyajuok/296 and Kamagambo/Kanyajuok/1199.
3. The verdict at the subordinate court was that the applicant succeeded with respect to the former property but not the latter one. He was dissatisfied with the judgment. He filed an appeal to the Migori Environment and Land Court. The appeal was Migori ELC Appeal No. E031 of 2021. Judgment was delivered on 27th April, 2023. The appeal was dismissed in its entirety and the applicant was condemned to pay costs.
4. The applicant, still dissatisfied with the outcome, and desirous of appealing against it, timeously filed a Notice of Appeal on 10th May, 2023. Through his advocates, he also wrote a letter bespeaking proceedings (under Rule 84 of the *Court of Appeal Rules*) on the same day.
5. The applicant says that, thereafter, he lost touch with his advocates. This was, he says, a product of three unfortunate events. First, he lost his phone – the one that his lawyers would ordinarily use to communicate with him. Second, his postal address – that is – Post Office Box Number 17xx6-20100, Nakuru, was terminated due to non-payment of arrears. Third, the applicant lost three members of his family in quick succession rendering him emotionally disturbed, unstable and otherwise disoriented.
6. The result of the first two events is that the applicant's lawyers could not trace him to advise him that the Honourable Deputy Registrar of the superior court had written to certify that the certified copies of the proceedings were ready to be collected on 26th July, 2023. The result of the third event was that the applicant did not have the presence of mind to call his advocates to check on his appeal until mental calm returned. Unfortunately for him, when he got in touch with his advocates again to give instructions on the appeal, the 60-day period provided in the Rules had elapsed.
7. These are circumstances that triggered the present application. The applicant says that the circumstances truly amount to excusable delay; and that the actual delay is quite short since it is only thirteen (13) days. This is because, he says, he had 60 days to lodge the Record of Appeal since 26th July, 2023.
8. The application has not been responded to.
9. I have considered the application and the affidavit in support thereto and its annexures – including the judgment of the ELC. The only question for determination is whether the applicants have met the threshold for the exercise of the Court's discretion to grant leave for them to file an appeal out of time.
10. 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.”



11. 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* 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.”

12. In the present case, by dint of the proviso to Rule 84(1) of the Rules of the *Court of Appeal Rules*, given the fact that the applicant wrote a letter bespeaking proceedings and served it on the respondent, the appeal was to be lodged within sixty days of 26th July, 2023. This was the day the certified proceedings were ready for collection. That would take the outer limit for the lodgement of the appeal to 26th September, 2023. The present application was filed on 16th October, 2023. That would make it about twenty days late (although the applicant says it is thirteen probably because he, incorrectly, does not count weekends).

13. Is that period of delay inordinate given the reasons therefor given by the applicant? I do not think so. I think the delay is excusable. I believed the applicant when he said he initially lost contact with his lawyers; and then he lost three family members which caused him to be disoriented. The reasons seem, without contestation by the respondent, to be plausible. I also find the delay short and not inordinate. Finally, the applicant has attached a Memorandum of Appeal which shows that the appeal is not an idle one; it is arguable.

14. In the circumstances, I allow the application dated 16th October, 2023 in terms of prayer 2 in the application. The applicant is hereby permitted to file and serve a memorandum and record of appeal within seven (7) days from the date hereof. There will be no order as to costs.

15. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

