



**Osoma & another v Opot (Civil Application E130 of 2023)  
[2024] KECA 472 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 472 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E130 OF 2023**

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

**BETWEEN**

**JAMES AWIMBO OSOMA ..... 1<sup>ST</sup> APPLICANT**

**DANIEL OTIENO ATIENO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GEORGE OHALO OPOT ..... RESPONDENT**

*(Being an Application for Extension of time to file an appeal out of time  
against the Judgment of the Environment and Land Court at Siaya,  
(Koross, J.) dated 23rd March, 2023 in ELC Case No. 26 of 2021 (O.S.))*

**RULING**

1. The respondent herein was the plaintiff in Siaya ELC (OS) Case No. 26 of 2021. The applicants were the respondents in the suit. The cause of action was, mainly, one for adverse possession of certain parcels of land. In a judgment dated 23<sup>rd</sup> March, 2023, the Environment and Land Court (Koross, J.) allowed the respondent's claims.
2. The applicants (who were the respondents at the Environment and Land Court) were aggrieved by that judgment. They timeously filed a Notice of Appeal dated 31<sup>st</sup> March, 2023 which was lodged in Court on 3<sup>rd</sup> April, 2023.
3. By our Rules, the applicants were required to lodge, in this Court, the Memorandum of Appeal and record of appeal within sixty (60) days after the date when they filed the Notice of Appeal (see Rule 84(1) of the [Court of Appeal Rules](#)).
4. It would appear that the applicants failed to institute the appeal within the stipulated time. They have now approached this Court with an application dated 2<sup>nd</sup> October, 2023. It seeks the following prayers:



1. – Spent -
2. That the Honourable Court be pleased to extend time for filing the Memorandum of Appeal against Siaya ELC (OS) Case No. 26 of 2021.
3. That upon granting prayer 2, the Honourable Court provides timelines for filing the Memorandum of Appeal.
4. That costs of this Application abide the outcome of the Appeal.
  1. The application is supported by the affidavit of Charles Madowo, who describes himself as a senior partner at CSA Advocates, deponed on 2<sup>nd</sup> October, 2023. He is, presumably, the counsel who has conduct of the matter although the affidavit does not say so. It is also unclear why it is the advocate and not his client who swore the affidavit in support of the application. In any event, both the affidavit simply states the ostensible reason for the delay in filing the Memorandum of Appeal in paragraph 6 which states:

“The delay in filing the Memorandum of Appeal was not inordinate as the Appellant was awaiting- the outcome of the application before the High Court.”
6. The same reason is repeated word for word on the face of the application.
7. The application whose outcome the applicants say they were waiting for is one dated 6<sup>th</sup> April, 2023. It was filed at the Environment and Land Court. It sought a stay of execution of the impugned judgment. The applicants say that the ruling determining the application was given on 21<sup>st</sup> September, 2023. The applicants do not disclose what the outcome of the application was and neither do they attach a copy of that ruling. We are left to guess that it must have been declined.
8. The application is opposed by the respondent through a replying affidavit sworn by his lawyer, Agnes Akinyi, sworn on 20<sup>th</sup> February, 2024. The respondent also filed written submissions. The applicants did not file any.
9. Both in the replying affidavit and written submissions, the respondent makes three points:
  - a. First, that the application is fatally defective because it incorrectly seeks for extension of time to file a Memorandum of Appeal rather than a record of appeal.
  - b. Second, that the applicants have not attached the application they ostensibly filed at the Environment and Land Court; and neither have they attached the ruling thereof.
  - c. Third, that the applicants have not explained how the application they filed before the Environment and Land affected their filing of the appeal.
10. I have considered the application, the affidavit in support thereto and its annexures – including the judgment of the Environment and Law Court, the replying affidavit and the written submissions by the respondent. 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.



11. 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.”

12. 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.”

13. In determining whether to extend time under Rule 4, as the authorities cited above make clear, the reason given for the delay is the most important consideration. In this case, the reason given is that the applicants had filed an application seeking stay at the Environment and Land Court; and that they were awaiting its determination before filing the appeal. As the respondent correctly points out, this reason is confounding. An application for stay of execution filed at the trial court has nothing at all to do with the process of perfecting an appeal. Indeed, the opposite could be said: a party is expected to perfect their appeal as a condition precedent for being granted a stay of execution pending the hearing of that appeal. It appears eminently illogical to let an appeal expire by reason of failure to institute the record of appeal as one awaits the outcome of an application for stay of execution which is predicated on the self- same appeal.

14. Differently put, the applicants have given no reasonable or rational explanation why they needed to wait for the determination of the application for stay of execution before filing their appeal. Indeed, they proceeded to timeously file a Notice of Appeal. Using their logic, that, too, should have awaited the outcome of the application for stay.

15. In my view, therefore, the applicants have given no reason at all for their delay in filing the Memorandum of Appeal and Record of Appeal. If they had done so, I would be perfectly willing to treat their failure to explicitly mention “record of appeal” in their application as a talismanic technicality curable under Article 159(2)(d) of the [Constitution](#). However, the applicants have given no excusable reason for the delay. Considering that the present application was brought more than three months after the applicants were due to lodge their appeal; and considering that they have not even indicated or provided proof that they took any steps to get the record of appeal – like requesting for a certified copy of the proceedings and copying such request to the respondents – the application before the Court is not salvageable.

16. The upshot is that the application dated 2<sup>nd</sup> October, 2023 is hereby dismissed with costs to the respondent.

17. 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**

