



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Omollo v Ombidi (Civil Application E104 of 2023)  
[2024] KECA 337 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KECA 337 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E104 OF 2023  
HA OMONDI, JA  
APRIL 5, 2024**

**BETWEEN**

**BERNARD ODHIAMBO OMOLLO ..... APPLICANT**

**AND**

**PAUL JUMA OMBIDI ..... RESPONDENT**

*(Being an application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time from the Environment and Land Court at Homabay (G.M.A Ong'odo, J.) dated 31st October 2023 in ELC O.S. No. 32 of 2021)*

**RULING**

1. The application dated 4<sup>th</sup> July 2023 brought pursuant to rule 4 *Court of Appeal Rules*, 2010 seeks stay of execution in Homabay ELC OS 32 of 2021 pending the hearing and determination of the application and intended appeal; and that time within which to file appeal against the judgment in Homabay ELC OS 2 of 2021, be extended; and costs be provided. The application is supported by affidavit of even date, sworn by Nancy Nyarige.
2. The background to this matter is that the respondent sued the applicant in Homabay ELC OS 2 of 2021.
3. There is a Replying Affidavit on record by the respondent Paul Juma Ombidi dated 1<sup>st</sup> September 2023.

**Applicant's Case.**

- i. Judgment was entered on 31<sup>st</sup> October 2022.
- ii. That the Notice of Appeal and letter requesting proceedings both dated 25<sup>th</sup> November 2022 was lodged.
- iii. That the Notice of Appeal was inadvertently filed out of time.



- iv. That the applicant then applied to the trial court to withdraw the notice of appeal and apply for leave for the notice and record of appeal to be filed out of time, which application was denied on the grounds that the court did not have jurisdiction.
- v. The respondent is likely to execute the decree at any time.
- vi. That the appeal raises serious issues of law.

### **Respondent's case**

- i. That the application is not merited and an afterthought.
- ii. Both conditions for stay as well as extension of time have not been met.
- iii. That the delay in filing intended appeal is inordinate and no proper reason given for said delay.

### **Issue for Determination**

- a) Has the applicant met the prerequisites for granting relief under Rule 4 of the *Court of Appeal Rules*?
4. Rule 4 of the *Court of Appeal Rules* gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso v Rose Wangari Mwangi Civil Application No. Nai. 255/97* (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka v Waruguru Kithaki & 2 Others* (2013) eKLR.
5. M’Inoti, J, had this to say concerning Rule 4 in *Imperial Bank (IR) & Anor v Alnashir Popat and Others* [2018] eKLR:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”
6. Discretion also depends on circumstances of each case as per *Mongira & Another v Makori & Another* [2005] eKLR.

The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR sets down these principles as follows:

- i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
- iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.



- v. Whether there will be any prejudice suffered by the Respondent if extension is granted.
- vi. Whether the application has been brought without undue delay.
- vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of *Julius Kamau Kitheka* (*supra*) is whether prima facie of the intended Appeal/Appeals has chances of success or is a mere frivolity.

- 7. The applicant's advocate in my view has failed to try to explain the delay in serving the Record of appeal.
- 8. The applicant has not met and satisfied the principles set out for this Court to exercise its discretion in his favor and grant the extension.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

Deputy Registrar

