



REPUBLIC OF KENYA



KENYA LAW
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**Omino v Agola & 2 others (Civil Application E134 of 2023)
[2024] KECA 581 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KECA 581 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E134 OF 2023
HA OMONDI, JA
MAY 23, 2024**

BETWEEN

ALBERT OMINO APPELLANT

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

SUSAN AGOLA 2ND RESPONDENT

MARK MUHAMBE EHETE 3RD RESPONDENT

(An application for extension of time to deem the already filed Notice of Appeal as having been properly filed and served within time from the Judgment of the Environment and Land Court at Kisumu (E. Asati, J.) dated 5 October, 2023)

RULING

1. By a notice of motion dated 30th November 2023, supported by the affidavit sworn by Sharon Achieng Omollo (but not annexed to the application), the applicant seeks orders of extension of time to file their Notice of Appeal out of time to the judgment in Ksm. ELC No. E060 of 2021 (Asati, J.) (although the applicant refers to it as HCCA No. 60 of 2021) delivered on 5th October 2023; that the Notice of Appeal thereon dated 25th October, 2023 and filed on 26th October 2023 be deemed as having been filed and served within time.
2. The background to this application is that the applicant had filed a suit against the respondents (the nature of the claim, and the prayers sought is not clear as the contested decision is also not annexed). The suit was dismissed, and the applicant being aggrieved by the outcome, is desirous of filing an appeal.



3. The applicant acknowledges that the Notice has been filed within a period of seven (7) days from the date it ought to have been lodged pursuant, but explains that the delay was due to an oversight on the part of counsel for the applicant; and that the 7 days delay was not deliberate but innocent mistake.
4. In opposing the said application, the 1st and 3rd respondents filed a replying affidavit sworn by Mark Muhambe Ehete, dated 15th February 2024, in which they contend that the instant application is brought in bad faith and intended to scuttle the process of justice and the realization of the fruits of the judgment in favour of themselves; and that litigation must come. It is pointed out that judgment was delivered in the presence of counsel for both parties, the history of the litigation having begun in Maseno magistrate's court in Maseno ELC No. 64 where the applicant's suit was dismissed with costs to the respondents necessitating the filing of the appeal ELCA No. E060 of 2021, which appeal the applicant equally lost. That the applicant's desire to prefer a second appeal to this Court, must be considered in the light of the fact that the respondent has been in court for a period of more than 10 years in the instant suit; and litigation must come to an end.
5. The applicant did not file any written submissions. I echo the well-known refrain that rule 4 of the Rules of this Court gives unfettered discretion to extend the time for the doing of any act authorized or required by these Rules, whether before or after the doing of the act. The respondents in their submission urge that even in exercise of that discretion, it is prudent to draw from the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR which set out the considerations to guide a court in exercising its discretion in cases of this nature as not being a right of a part, but an equitable remedy that is only available to a deserving party at the discretion of the court; the burden of laying a basis to the satisfaction of the court, lies on the party applying for extension; among other issues to be considered is whether there will be any prejudice suffered by the respondents if the extension is granted; whether there is a reasonable reason for the delay.
6. Certainly, in granting leave, the court equally has to balance the competing interests of the applicant with those of the respondent, a position well stated in M/S Portreitz Maternity v James Karanga Kabia Gisi Appeal No. 63 of 1997. Whereas the delay cannot be described as inordinate, there is a lot of lack of information that would enable me to exercise my discretion in a fair, and balanced manner. As I have pointed out, the supporting affidavit is not annexed, it is not disclosed what led to the oversight being touted, the nature of prayers that had been sought can only be gleaned from what the respondent says, as the impugned judgment is not annexed, no submissions to aid the court in considering issues being argued. I am hesitant to use the term indolent, yet the entire manner in which this application has been presented leave me with no option but to echo the equitable maxim that equity does not aid the indolent....which unfortunately is the scenario played here. Consequently, I find no basis upon which to exercise my discretion in favour of the applicant, and the application is dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed



DEPUTY REGISTRAR

