Ouma & another v Oduo (Civil Application E125 of 2023)
[2024] KECA 724 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 724 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E125 OF 2023

JM NGUGI, JA

JUNE 21, 2024

BETWEEN

MONICA ATIENO OUMA ..... 1ST APPLICANT

WILLIS ODHIAMBO OUMA ..... 2ND APPLICANT

AND

RHODA AWUOR ODUO ..... RESPONDENT

(Being an Application for Extension and/or Enlargement of time within which to file and serve the Record of Appeal out of time against the Judgment and Decree of the Environment and Land Court at Homabay, (Ongondo, J.) dated 15th June, 2021 in ELC Cause No. 60 of 2021 Formerly Migori ELC Case No. 674 of 2017 (O.S.))

RULING

1. The application dated 9th October, 2023 has the following prayers:
    1. The Honourable Court be pleased to extend and/or enlarge time to the Applicants, within which to file and serve the Record of Appeal against the Judgment and Decree of the Superior Court made on the 15th day of June, 2021 vide Homa-bay ELC No.60 of2021 (O.S).
    2. Consequent to prayer (1) being granted, the Honourable Court be pleased to issue the timelines within the Applicants to file and serve the Record of Appeal.
    3. Costs of this application be provided for.
    4. Such further and/or other orders as the Court may deem fit and expedient.
2. The brief uncontroverted facts leading to the filing of the application are as follows.

3. The respondent brought an action before the Environment and Land Court – first in Migori before it was transferred to Homabay

   – seeking, in the main, for a declaration that she was the lawful owner of the parcel of land known as LR No. Kasipul/Kotieno Kokech/67 having legally purchased it. She also sought for orders of vacant possession, and for a transfer to be made in her name. The suit was against the two applicants. The respondent prevailed in the suit at the superior court. The judgment was delivered on 15th June, 2021.

4. Both applicants were dissatisfied with the judgment of the superior court. They timeously filed, respectively, Notices of Appeal dated 24th June, 2021 and 28th}June, 2021. They followed this up with letters requesting for certified copies of the proceedings and judgment dated 22nd June, 2021 and 28th June, 2021 respectively.

5. The learned advocate for the applicants says she did not receive any information from the registry until 22nd April, 2022 when a member of her staff called on the registry to check on progress. It was only then, the advocate states through the mouth of her client, that she and her clients learnt that the certified proceedings were ready. They, then, proceeded to lodge the Record of Appeal on 20th June, 2022. The applicants imply that in doing so their lawyer was confident that she was within the statutory timelines of sixty days after taking into consideration the period taken in making the certified copies of the proceedings and judgment ready.

6. However, the actual Certificate of Delay issued by the Deputy Registrar of the superior court states that the certified copies of the proceedings and judgment were ready for collection, and the learned counsel for the applicants was so informed on 22nd March, 2022.

7. It was on the basis of that Certificate of Delay so issued that the respondent filed an application dated 27th June, 2022 seeking inter-alia orders to strike out the Record of Appeal on grounds that same was lodged outside the statutory timelines and without leave of Court. The application was heard on 29th November, 2022. A ruling was delivered on 6th October 2023 whereby the Record of Appeal *vide* Kisumu Court of Appeal Civil Appeal No. E142 Of 2022 was struck out with costs to the Respondent.

8. During the hearing of the application, the applicant's lawyer argued that the Certificate of Delay contained an error: that it showed that they had been notified about the readiness of the certified copies of the proceedings on 22nd March, 2022 while, in fact, they had been so notified on 22nd April, 2022. The Court pointed out that the Certificate of Delay is deemed correct on its face unless speficially challenged. It was pointed out to the counsel that she had taken no steps to have the Honourable Deputy Registrar to correct the Certificate or otherwise demonstrate the error apparent on its face. Yet, the learned counsel persists in the narrative in the present application.

9. In any event, the applicants now seek to be permitted to file the record of appeal out of time. They argue that the original delay in filing the record of appeal was only twenty-seven (27) days; and that the mistake was not really theirs but the superior court's since the Certificate of Delay contains the wrong dates. Thus, they argue that the delay is excusable. Finally, they argue that they brought the present application within three days of their previous record of appeal being struck out.

10. The application is opposed. The respondent filed a brief replying affidavit deponed on 16th October, 2023. In it, she blames the applicants' advocates for the delay for refusing to concede that they had filed their record of appeal late when the respondent's application to strike came up for plenary hearing on 29th November, 2022. The respondent points out that the Court prodded the applicants' counsel to concede to the "incontestable" fact that the Certificate of Delay unmistakably showed that the applicants were late in filing their record of appeal. Rather than concede to the Court's prodding, the

applicants insisted on the application being heard as a result of which almost a year more was lost as the parties awaited the ruling. In the circumstances, the respondent strongly urges that the applicants are undeserving of the Court's exercise of discretion in their favour.

11. Both parties filed written submissions. I have considered the written submissions, the application, the affidavit in support thereto and its annextures, and the replying affidavit 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 the record of appeal out of time.

12. 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."

13. 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."

14. In the present case, the length of the delay was originally twenty- seven (27) days. That delay has balooned to more than two years in large part due to the conduct of the applicants' lawyers. If the counsel had conceded to the respondent's application, which the Court referred to as "uncontestable", during the plenary hearing on 29th November, 2022, she would have shaved almost two years off the life of this litigation. It is even probable that the respondent would have acceded to extension of time by consent. As it were, the applicants' counsel backed her clients into what the respondent calls a "cul-de-sac."

15. Is this reason enough to deny the exercise of discretion on behalf of the applicants? I do not think so. I do think it is reason enough to decry the counsel's conduct of the case – but it is a classic case where the lawyer's tactical mistakes should not be visited on her client. Vigilant applicants should not be penalized for the fault of their counsel on whose actions they have no control as in the instant case. Had the applicants been guilty of inordinate delay, the considerations would be different because that would signal lack of vigilance on their part. In the present case, however, the original delay was only 27 days; and the present application was brought only 3 days after the record of appeal was struck out. Consequently, the applicants deserve the Court's equitable embrace in the circumstances. A primary consideration in reaching this conclusion is the fact that this is a first appeal on a matter whose subject matter is land for which there is a strong judicial policy preference for determining on the merits of the case. Hence, the applicants should only be driven from the seat of justice on the most serious lapses on their part which prejudice the respondent.

16. The upshot is that the application dated 9th October, 2022 is allowed. The applicants shall file and serve the Record of Appeal against the Judgment and Decree of the Superior Court made on the 15th day of June, 2021 vide Homa-bay ELC No. 60 of 2021 (O.S) within seven (7) days of today.

17. In view of the conduct of the applicants' counsel discussed in this ruling in paragraphs *14* and *15* (and which were alluded to in the Court's ruling dated 6th October, 2023), the applicants shall pay the costs of this application to the respondent.

18. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2024.

JOEL NGUGI

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.JUDGE OF APPEAL