



**Oteng v Rakiro & 2 others (Civil Application E021 of 2024)
[2024] KECA 652 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 652 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E021 OF 2024
HA OMONDI, JA
JUNE 7, 2024**

BETWEEN

SILVANO OTUNGA OTENG APPLICANT

AND

ISABELLA BELLIAH RAKIRO 1ST RESPONDENT

LAND REGISTRAR, HOMA BAY 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

*(Being an application for extension of time to file and serve Notice of Appeal
and Record of Appeal from the Environment and Land Court Homa Bay
(G.M.A. Ong'ondo, J.) dated 22nd March 2023 in ELC Case No. E024 of 2022)*

RULING

1. The application dated 19th January 2024 brought pursuant to Rules 4, 77, 79 and 84 of the Court of Appeal Rules, 2022, seeks that the time within which to file an appeal against the judgment in Homa Bay ELC case No. E024 of 2022, and delivered on 22nd March 2023 be extended; and costs of the application be provided for. The application is supported by an affidavit of even date sworn by Silvano Otunge Oteng, the applicant.
2. The applicant was the appellant in Homa Bay ELC Case No. E024 of 2022 which was dismissed with costs on 22nd March, 2023; and being desirous of appealing against the said judgement, he immediately instructed his then advocate, Mr. William O. Ochuka, to appeal against that decision; and to file and serve the necessary Notice of Appeal. The Notice of appeal was lodged on 28th March 2023, within the stipulated time, and the official receipt issued to him on payment for the requisite court fees. The advocate, also informed him, that contemporaneously with the Notice of Appeal he had also applied



for copies of the proceedings; that the Notice of Appeal had been signed by the Deputy Registrar and served upon the respondents.

3. The applicant only came to discover much later in the year (around October, 2023) that the Notice of Appeal had in fact not been served in time or at all. He thus instructed Moses J. A. Orengo, advocate, to take over the appeal from his previous advocate, and he in turn wrote to court on 16th May, 2023, requesting for proceedings and a certified copy of the decree; eventually the said proceedings were supplied to his current advocate on 3rd July, 2023, followed by a copy of the decree as well as a certificate of delay dated 12th September, 2023.
4. Whereas his advocate was then ready to compile and file the Record of Appeal, it became apparent that the applicant's previous advocate, had not included copies of the Notice of Appeal among the documents he handed over to Mr. Orengo. Subsequently in the month of October, 2023, the applicant went personally to the Environment and Land Court registry at Homa Bay in an attempt to obtain copies of the elusive Notice of Appeal from the court file; and that is when he learnt for the first time that actually, the Notice of Appeal dated 28th March, 2023 was indeed in the Court file, but had never been signed by the Deputy Registrar of that Court, therefore had not even been served.
5. The court registry further informed the applicant that at that stage they could not sign and release to him the Notice of Appeal bearing the date 28th March, 2023, and that it was necessary to draw a fresh one and seek leave to have it filed and served out of time. That is what brings this application into the fore.
6. The applicant urges this Court to find that the failure to file and serve the Notice of Appeal within the stipulated time, which in turn led to the failure to file and serve the Record of Appeal, was occasioned solely by an error or mistake in the offices of his previous advocate, in assuming that the Notice of Appeal dated and lodged in court on 28th March 2023, had indeed been signed by the Deputy Registrar and served within time.
7. The applicant acknowledges that in terms of the provisions of rule 77(2) of the Court of Appeal Rules, the Notice of Appeal against that judgement was required to be lodged in this Court within fourteen days from 22nd March, 2023, and the applicant was further required by Rule 79(1) to serve copies thereof within seven days after lodging it. The applicant's appeal was dismissed with costs vide judgment of 22nd March 2023. He urges this Court to consider that the Notice of Appeal was prepared in good time, but through inadvertence, it was not signed by the Deputy Registrar. In this regard, the applicant elaborates that the failure to file and serve the Notice of Appeal within the stipulated time allowed by the law, which also led to the failure to file and serve the Record of Appeal, was occasioned solely by an error or mistake in the offices of the applicant's previous advocate, in assuming that the Notice of Appeal had been signed by the Deputy Registrar and served within time, when in fact it had not even been signed and therefore not served. He urges me to find that he had no role to play in the delay; and laments that this Court intervenes at the earliest time possible to enlarge the time, the applicant will suffer irreparable loss.
8. In opposing the application, the respondents by a Replying Affidavit dated 4th March 2024, sworn by Isabella Bellia Rakiro, the 1st respondent, contend that the application is made in bad faith; that applicant in blaming his former advocate for the delay, is denying her the fruit of her judgment. According to the respondent, the applicant after delivery of judgment informed the 1st respondent that he did not intend to appeal only for him to turn around and file notice of appeal. The respondent



avers that the applicant has not explained the delay of over a year; and that there is no proof that the applicant instructed his first advocate on record to lodge the notice of appeal.

9. Has the applicant met the prerequisites for granting relief under rule 4 of the Court of Appeal Rules? 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) it was 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.

10. 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.”

11. 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 which include inter alia that:

Extension of time is not a right to a party, but an equitable remedy that is only available to a deserving party at the discretion of the court; the party who seeks extension of time has the burden of laying basis to the satisfaction of the court, and the delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent if extension is granted; and whether the application has been brought without undue delay.

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

12. The applicant only states that his previous advocate on record erred in failing to ensure that the notice of appeal was duly signed. Surely the applicant, or his current advocate had the option to request the former advocate on record to swear an affidavit to bolster the applicant’s case for extension of time, as whatever the applicant is alleging was an error is only hearsay.

13. I agree with the respondent that there is unexplained delay in regards to lodging the appeal as well as the instant application for leave. The applicant in my view is simply engaging on a fishing expedition, in one breath, blaming his former advocate, and in the next breath, leaving the tub at the door of the court for failure to sign the Notice. The applicant has failed to explain satisfactorily the delay in filing the appeal; and has failed to meet and satisfy the principles set out for this Court to exercise its discretion in his favor and grant the extension. The application is thus dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 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

