



Otieno & 2 others v Aoko (Sued as the legal representative of the Estate of the Late Elizafan Aoko Gumbo) (Civil Application E162 of 2023) [2024] KECA 661 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KECA 661 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E162 OF 2023
HA OMONDI, JA
JUNE 7, 2024**

BETWEEN

**ELISHA OKOTH OTIENO 1ST APPLICANT
FANUEL ACHOLA OTIENO 2ND APPLICANT
ISAIAH OJOWI OTIENO 3RD APPLICANT**

AND

JARED OTIENO AOKO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ELIZAFAN AOKO GUMBO) RESPONDENT

(An application to enlarge time to file A fresh Notice of Appeal from the judgment and decree of the Environment and Land Court at Homabay (G.M.A. Ong'ondo, J.) dated 28th April 2022 in)

RULING

1. The Notice of Motion dated 13th December 2023 brought pursuant to rule 4 of the Court of Appeal Rules, seeks time be enlarged so as to enable the applicants to file a fresh Notice of Appeal against the judgment delivered on 28th April 2022 in Homabay Environment and Land Court (ELC) Case No. 15 of 2021, (Ong'ondo, J.); that the applicant's fresh Notice and Record of Appeal be deemed as properly and duly filed; and costs be provided for. The application is supported by an affidavit of even date sworn by Elisha Okoth Otieno, the 1st applicant on behalf of the other applicants.
2. There is a no replying affidavit on record by the respondent, who has however filed submissions.
3. The applicants had filed a suit vide Homa Bay ELC CasemNo. 15 of 2021, seeking a declaration that the respondent was holding land parcel No. Kamagambo/Kongidi/1111 measuring 1.57 hectares, in trust for them; an order cancelling the registration of the suit land in the respondent's name, and directing that the land be registered in favour of the applicants; and the Deputy Registrar be directed to sign the Land Control Board Consent forms, and transfer documents to facilitate the



registration; and an injunction to permanently restrain the respondent from interfering with the said parcel. The respondent had filed a counterclaim seeking injunctive orders restraining the 1st applicant from interfering with the suit property in any manner; and an order for mesne profits.

4. Judgment was delivered on 28th April 2022 (Ongondo, J.) dismissing the applicant's suit on one hand and allowing the respondent's counterclaim on the other. Aggrieved the applicants lodged a notice of appeal through their then advocates, Oguttu Mboya Ochwal & Partners, who had been instructed to pursue the appeal. On 30th November 2023, the respondent served the applicants with an application dated 28th July 2023 seeking to have the applicants notice of appeal marked as withdrawn pursuant to Rule 85.
5. The applicants were assured by their then advocates on record that they would handle the application. When the applicants attended court for ruling, they found that the said application had already been allowed with no objection from their then advocates who did not even attend.
6. It then came to the applicants' attention that the said advocates had written to court on 28th November 2023 expressing their disinterest in pursuing the matter as they had no further instructions. This realization came late in the day hence delay in filing the application now before court.
7. The applicants lament that they are now exposed to imminent eviction from the suit property as there is no longer an appeal to pursue.
8. The respondent submits that the applicants, despite filing their Notice of Appeal had failed to act any further; and were outside the statutory period by over 100 days. The respondent thus went ahead to file the application under rule 85 of this Court's Rules. Apparently, at the hearing of the application on 6th December 2023, the applicant's counsel did not attend court as they had on 28th November 2023 written to the court expressing that they had no instructions, but the applicants, however maintain they were in court on said date. Therefore, there being no response to the application for withdrawal, the same was allowed as prayed.
9. The respondent contends that the applicants have failed to adequately explain the delay; nor have they demonstrated that the appeal is arguable.
10. Have the applicants 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 vs. 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 vs. Waruguru Kithaki & 2 Others](#) (2013) eKLR.
11. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of [Nicholas Kiptoo Korir Arap Salat vs. 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 the intended Appeal/Appeal has chances of success or is a mere frivolity.

- 12. Under Rule 85 (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.
- 13. It is clear from the record that they had instructed the firm of Oguttu Mboya Ochwal & Partners to pursue appeal and a Notice of appeal was filed by said firm to that effect. In my view the said firm of advocates were deemed to be properly and firmly on record, until they removed themselves by way of proper notice especially to the applicants; and in my view a letter to the court did not suffice. I do not think this was proper. How were the applicants to know to respond to the application when as far as they knew, they had counsel on record, who did not bother to inform the applicants that they were withdrawing their services; and did not even respond to the application which they were served with well in advance?
- 14. The applicants were blindsided by their then advocates on record.

In my view the applicants have satisfactorily explained the delay in filing the appeal; and merit the exercise of discretion in the applicants' favour. The application is thus allowed; the annexed Notice of Appeal be and is hereby deemed as properly filed and served. The applicants are directed to file and serve a record of appeal within seven (7) days of this ruling. Costs shall abide the appeal.

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

