



Odeny v Aboge (Sued in his capacity as the administrator of the Estate of Polentinus Owaga - Deceased) & another (Civil Application E142 of 2023) [2024] KECA 659 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KECA 659 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E142 OF 2023
HA OMONDI, JA
JUNE 7, 2024**

BETWEEN

HENRY OCHIENG ODENY APPLICANT

AND

JOSEPH DALMAS ABOGE (SUED IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF POLENTINUS OWAGA - DECEASED) 1ST RESPONDENT

MICHAEL OLANGO NYANGWECHA 2ND RESPONDENT

(Being an application for enlargement of time to file a record of appeal from the Judgment of the Environment & Land Court of Kenya at Migori (N. Kullow, J.) dated 27th April, 2023 in ELC Case No. 23 of 2020 (O.S))

RULING

1. The Notice of motion dated 16th October brought pursuant to rule 4 and 84 of the [Court of Appeal Rules](#), seeks enlargement of time limited for filing a record of appeal to enable the applicant pursue an appeal against the judgement of the Environment & Land Court of Kenya at Migori (Kullow, J) which was delivered on 27th April, 2023 in Migori ELC No 23 of 2020 (OS). The applicant also prays that costs of this application be provided for. The application is supported by the annexed affidavit of even date, sworn by Henry Ochieng Odeny.
2. The background to this matter is that the applicant had filed Migori ELC No 23 of 2020 by way of an originating summons against the respondents; upon hearing the matter judgement was entered in favour of the respondents and the suit was dismissed with costs. Being aggrieved by the decision the applicant instructed his advocate to file an appeal.



3. On 8th May, 2023 the applicant’s advocate wrote a letter to the Deputy Registrar requesting for a certified copy of the judgment for appeal purposes; the letter was only filed as received on 26th May, 2023 as the file could not be traced; meanwhile a Notice of Appeal was duly filed on 12th May, 2023; subsequently on 12th June 2023, the applicant filed a Memorandum of Appeal dated 9th June 2023 being constant visits to the court registry to follow up on the status of the typed proceedings would meet the response “not ready as the court file was still in the typing pool”.
4. It was until 28th September, 2023 that that the typed proceedings were ready for collection; the applicant was thus unable to compile a record of appeal and have the same filed timeously, due to the delay in issuance of the certified typed proceedings and decree by the court.
5. The applicant explains that he is ready to lodge his record of appeal once enlargement of time to file a record of appeal is granted; that he has an arguable appeal; and stands to suffer substantial, irreparable loss and prejudice if the prayer is not granted.
6. The respondent has not filed any affidavit in response to the application, nor filed any written submissions. Drawing from the Supreme Court’s pronouncements in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, which set out principles to be considered in an application seeking extension of time, must be made timeously without undue delay, the applicant in his written submissions points out that the delay is not inordinate pointing to the period between the date judgment was on 27th April, 2023; by 8th May, 2023, a letter to the Deputy Registrar requesting for the typed proceedings was written; filed in the High Court on 26th May, 2023 only because the file could not be traced; and that the Notice of Appeal was promptly lodged on 12th April, 2023 within 14 days of delivery of judgment. The applicant alludes to his zeal in pursuing the appeal process; but reiterates that it was until, four months later on the 28th September, 2023 that the proceedings were ready for collection; and the present application was lodged on 16th October 2023, 19 days from the date of receipt. Drawing from the case of *George Kiptabut Lelei & another v Fanikiwa Limited* [2019] eKLR which held that 7 months delay was not inordinate, to argue that the period in this instance cannot be described as inordinate hence this Court should exercise its discretion in his favour.
7. The history of the entire process in attempting to have the record of appeal filed in a timely fashion, has been adequately demonstrated by the applicant. From the date that the request for certified typed proceedings was made, to the date the court finally informed him they were ready, it is clear to me that the delay in lodging the record of appeal was occasioned by factors beyond his control.
8. On the issue as to whether or not the intended appeal has no chance of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of *Athuman Nasura Juma v Afwa Mohammed Ramadhan* [2016] eKLR:

“...this court has to be careful to ensure that the intended appeal has merit or not is not an issue to be determined with finality by a single Judge”.

A look at the annexed memorandum of appeal shows that this is not a frivolous appeal, I shall say no more.

9. The delay has been adequately explained, and I do not consider it inordinate and the applicant herein, has made the present application without delay; he has met and satisfied the principles set out for this Court to exercise its discretion in her favour and grant the extension. The applicant is therefore, in my view deserving of the orders sought, to the extent that leave is granted to the applicant to file and serve



the Record of Appeal within 14 (Fourteen) days from the date of this ruling. The 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

