



REPUBLIC OF KENYA



Okode v Adera (Civil Application E146 of 2023) [2024] KECA 653 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KECA 653 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E146 OF 2023
HA OMONDI, JA
JUNE 7, 2024**

BETWEEN

PAUL ODERA OKODE APPLICANT

AND

JOHNSON OTIENO ADERA RESPONDENT

(An application for extension of time to file the appeal out of time in an intended appeal from the judgment of the Environment and Land Court at Migori (M. N. Kullow, J.) dated 29th July 2022 in ELC Case No. 296 of 2017)

RULING

1. The application dated 29th September 2023 brought pursuant to rule 4 *Court of Appeal Rules*, 2010, seeks that:
 - i. The Honorable court be pleased to extend the time within which to file the memorandum of appeal from the judgment delivered on 29th July 2022.
 - ii. The applicant be granted leave to file appeal out of time against the judgment delivered on 29th July 2022.
 - iii. Costs.
2. The application is supported by the affidavit of even date sworn by Paul Odera Okode, the applicant.
3. The respondent who described himself as the owner of Land Title No. Kamagambo/Kanyimach/787 within Migori County, filed a suit against the applicant seeking an order of eviction and demolition from the said parcel; a mandatory injunction compelling the applicant by himself, and/his agents; to forthwith vacate the said parcel of land; and give vacant possession to the applicant; a permanent injunction from occupying, trespassing on, tilling or in any other way dealing with the suit land; general damages for trespass; plus costs and interest. It was his claim that the applicant being the registered



owner of parcel number LR No. Kamagambo/Kanyimach/579, and with whom he shared a common boundary, had demolished his house on the suit parcel, forcefully trespassed upon and occupied his parcel of land; and erected a residential structure, claiming the entire parcel as his own. Further, that the applicant's occupation had prevented him from accessing the property or developing and using the same. It is also his case

4. The Environment and Land Court at Migori (Kullow, J.), delivered a judgment on 29th July 2022, in the respondent's favour directing that: mandatory injunction be issued, compelling the applicant or his agents, to forthwith vacate suit land and hand over vacant possession thereof to the respondent within 60 days from the date of this Judgment; a permanent injunction restraining the applicant from occupying, trespassing on, tilling or in any other way dealing with the suit land; and costs of the suit to be borne by the applicant.
5. According to the applicant, the decision was delivered without his knowledge; and upon learning from his neighbours that he was to be evicted, the applicant immediately visited the ELC registry in Migori and confirmed that judgment had been entered in the respondent's favour.
6. The applicant in his supporting affidavit, explains that he asked his then advocate on record about the suit; and the latter claimed he was not aware of the judgment; he then sourced for funds to look for another advocate on record, namely MOA Advocates LLP, by when the stipulated time to file appeal had lapsed, yet he has a good appeal with high chances of success as demonstrated by the draft memorandum of appeal.
7. In a replying affidavit dated 26th September 2023 sworn by Johnson Otieno Adera, the respondent is contended that this Court has no jurisdiction to entertain the instant application as appellate jurisdiction is only invoked on filing a notice of appeal yet none exists and/or has been annexed; that the applicant was aware of the judgment as it was delivered in his presence; the respondent is guilty of material non-disclosure as he was served with the decree in ELC case No. 296 of 2017 at Migori on 6th January 2023, and there is an affidavit of service to that effect on record; as such the applicant cannot claim to have learnt of the judgment on 31st July 2023.
8. The respondent further argues that the applicant has not demonstrated any of the established principles for granting of extension of time; and cannot fall back on mistake of counsel of drawn lament to buttress his application.
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 this 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) 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 [See *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 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. The applicant only states that his previous advocate on record was not aware of the judgment and as such erred in failing to file notice of appeal. 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 matters stand as whatever the applicant is alleging was an error remains a mere allegation- at best, a lame excuse. I agree with the respondent that there is unexplained delay in regard to lodging the appeal as well as the instant application for leave.
13. I would also agree with the respondent that it is not possible for the applicant to have learnt of the judgment on 31st July 2023 whereas there is evidence on record that the applicant was served with the decree of the superior court on 6th January 2023.
14. I also note that this application was filed on 21st September 2023. Even if the applicant was to be given the benefit of the doubt, judgment was entered on 29th July 2022, it has been almost a year down the line and it is not even clear when MOA Advocates LLP came on record. I find that the applicant 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 thus lacks merit, and is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 2024.

H. A. OMONDI

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

