



**Odhiambo v Koske & another (Civil Appeal (Application)  
E039 of 2023) [2024] KECA 1329 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1329 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL (APPLICATION) E039 OF 2023  
MA WARSAME, JM MATIVO & PM GACHOKA, JJA  
SEPTEMBER 27, 2024**

**BETWEEN**

**MARTIN MAURICE ODHIAMBO ..... APPLICANT**

**AND**

**CHARLES KIPLANGAT KOSKE ..... 1<sup>ST</sup> RESPONDENT**

**PASCALIA CHEPKORIR CHUMA ..... 2<sup>ND</sup> RESPONDENT**

*(Being a reference from the decision of ( Ochieng, JA) dated 10th November  
2023 in an application seeking to extend time to file a notice of appeal against  
the Judgment Environment and Land Court at Kericho in ELC No. 71 of 2018)*

**RULING**

1. This is a reference to the full Court, under Rule 57 of this Court’s Rules, from the decision of a single Judge (Ochieng, JA) dated 10<sup>th</sup> November, 2023. The learned single Judge’s ruling was made pursuant to an application brought under Rule 4 of the Rules, for extension of time to file a notice of appeal out of time against the ruling of the judgment of the Environment and Land Court (ELC) (Oundo, J.) dated 27<sup>th</sup> February, 2023.
2. Briefly, the facts precipitating the filing of the application are that the parties entered into a sale agreement for the applicant’s property. The sale did not proceed due to lack of spousal consent and the parties entered into a mediation agreement dated 6<sup>th</sup> October 2022, to wit, that the applicant would refund Kshs.5,509,272.00 already paid for the property, that the applicant would facilitate the payment process so that it is finalised within 14 days and that the court would determine the interest rates. He failed to abide by the terms of the mediation agreement and judgment was entered against him on 27<sup>th</sup> February 2023, wherein the court ordered him to pay the balance within 14 days with interest of 20% on the principal sum.



3. Aggrieved the applicant filed a notice of appeal out of time, being 2<sup>nd</sup> May 2023 and filed an application seeking extension of time to file his notice of appeal. The reasons for the delay were inter alia, that he had suffered a stroke and was admitted on 3<sup>rd</sup> March 2023 to 28<sup>th</sup> April 2023, that the learned Judge misinterpreted the mediation agreement which only required him to give information from his bankers and that he had already refunded Kshs.3,000,000.00 and made arrangements with his bank to pay the balance.
4. In dismissing the application, the learned judge rendered himself thus:

“The applicant told the court that he was admitted on 3<sup>rd</sup> March, 2023. However, the discharge summary attached to the applicant’s affidavit indicates that the applicant was admitted on 30<sup>th</sup> March, 2023.

... I find no explanation as to why he misstated the date of his admission.

I also note that the applicant has not requested for typed proceedings and a certified copy of the judgment, to enable him prepare a record of appeal. He only states that he has an arguable appeal with high chances of success. The applicant has also indicated that he is making payments towards refunding the respondents. He stated that what remains in a balance of Kshs.2,509,272/- and he has made arrangements with the bank to pay the same. It is in this regard that I am unable to reconcile these actions with what the applicant would want to appeal against, since he is already in the process of honouring the judgment.

...In my considered view, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)*. The delay herein has not been satisfactorily explained. Secondly, the applicant has not demonstrated that he has an arguable appeal.”
5. The applicant in his written submissions contends that the single judge erred by failing to consider his replying affidavit dated 30<sup>th</sup> May 2023 which succinctly explained the reason for his failure to comply with the 14-day timeline and also contained certified medical records that showed he was indeed unwell. He further submitted that his appeal was arguable given that the single judge and the trial Court incorrectly interpreted the mediation award and that the 14-day timeline stated was to ensure he relayed information from his bank and not to refund the outstanding balance. Lastly, he stated that the respondents were frustrating the loan repayment through his bank by refusing to release the title to the property.
6. The respondents in their submissions maintain that the learned judge exercised his discretion correctly and emphasised that the applicant was already in the process of honouring the judgment.
7. We have carefully considered the facts, the submissions of parties, the ruling of the learned single judge, and are of the view that the reference turns on, whether the single judge judiciously exercised his discretion. The applicant in an application such as this, must demonstrate that the learned single Judge disregarded a relevant matter, regarded an irrelevant matter or acted on a misapprehension of evidence or applicable law. (*Simeon Okingo & 4 others vs Benta Juma Nyakako [2021] eKLR*).
8. From the impugned ruling of the learned single Judge, we note that the Court appreciated the inexhaustive list of factors to be considered in an application for extension of time as stated in *Muringa Company Ltd vs Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019*.
9. In this instance, the applicant ought to have explained the 51- day delay in filing the notice of appeal between 13<sup>th</sup> March 2023 and 2<sup>nd</sup> May 2023. Despite being sympathetic to the applicant’s sickness, the court noted that even though the applicant stated that he had been hospitalised on 3<sup>rd</sup> March, 2023



and was unable to file the notice, the discharge summary attached to his affidavit indicated that the applicant was admitted on 30<sup>th</sup> March, 2023. Consequently, no cogent explanation was given as to why the document could not be filed before 30<sup>th</sup> March, 2023.

10. In addition, the leaned judge noted that the that the applicant had failed to request for typed proceedings and a certified copy of the judgment, and that he was in the process of paying the balance of the refund in line with the judgment.
11. It is clear to us that the applicant is not contesting the fact that he owes the judgment sum. In fact, he has admitted the whole sum and that he is in the process of paying the balance but has hit a snag with processing the loan from the bank. These considerations rightly led the learned Judge to conclude that the intended appeal had no substance and to dismiss the application on the twin principles that; there was unsatisfactory explanation by the applicant of the delay and that the appeal was not arguable.
12. Based on the material placed before the learned Judge, we are satisfied that he did not consider any irrelevant matters or disregard any relevant matters that would have influenced his decision. We are satisfied that the learned Judge acted judiciously and find no basis to interfere with his judicial discretion. As in the case of the single judge, the applicant is a party who entered into a sale agreement with the respondent but is unwilling or unable to settle the debt rightly due and owing. The main objective of the applicant coming to court is to delay a clear eventuality. The process he is undertaking is nothing but a delaying tactics, in order to punish the respondent, who is pursuing repayment of his money but is kept away through the court process. We think, nothing will be achieved by the pursuit of mirage by the applicant
13. We find this reference devoid of merit and dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**DEPUTY REGISTRAR**

