



Kenya Sunny Industries Companied Ltd v Ocharo & 2 others (Civil Appeal (Application) E030 of 2024) [2024] KECA 1241 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1241 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E030 OF 2024
JM NGUGI, JA
SEPTEMBER 20, 2024**

BETWEEN

KENYA SUNNY INDUSTRIES COMPANIED LTD APPLICANT

AND

MICHAEL OMOLE OCHARO 1ST RESPONDENT

KITIGU RESOURCES LTD 2ND RESPONDENT

LAND REGISTRAR – VIHIGA COUNTY 3RD RESPONDENT

(Being an ex-parte application for the court to direct that service of the substantive appeal Kisumu Civil Appeal No. E030 OF 2024 upon the 3rd respondent to be dispensed with for want of participation in Vihiga ELC No. E002 of 2023)

RULING

1. This is an unusual application. The main objective of the application is to obtain a direction by the Court under Rule 79(1) of the Court of Appeal Rules, that the applicant is not obligated to serve the 3rd respondent with the Notice of Appeal on account of his non-participation during the trial.
2. That would have been a straightforward application – one that the rule is explicit may be brought ex parte. In the present case, however, there is a twist. Rule 79(1) states as follows:

“ An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal.

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”



3. As is readily obvious, the rule is also explicit that the application must be brought within seven days of the lodgement of the Notice of Appeal.
4. In the present case, the applicant is desirous of taking advantage of the proviso to Rule 79(1) by getting a direction from the Court that it does not need to serve the 3rd respondent, who was a named party in the trial court. It has brought that application ex parte as Rule 79(1) permits it to. However, the applicant failed to bring the application within seven days as Rule 79(1) requires. This twist, then, explains the twin prayers in the applicant's application dated 11th February, 2024. The application has the following prayers:
 - a. That this Court be pleased to extend time within which this application is filed or otherwise allow the same out of time and deem it as being duly filed.
 - b. That this Court be pleased to give directions that service of the substantive appeal Kisumu Civil Appeal No. E030/2024 upon the 3rd respondent to be dispensed with for want of participation in the Vihiga Environment and Land Court in ELC No. E002/2023.
 - c. That the costs of and incidental to this application do abide the outcome of the Appeal.
5. As intimated above, the prayer for extension of time is necessitated by the fact that the application for the prayer under Rule 79(1) was not timeously brought. That means that this prayer for extension of time is, in fact, brought under Rule 4 of the Court of Appeal Rules. That is the only Rule that permits the Court to extend time. It reads as follows:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
6. There is no doubt that in an appropriate case this Court can, in an application before a single Judge, extend time as prayed in prayer 1 of the applicant's application dated 11th February, 2024. The only sticking point is that such an application cannot be entertained ex parte: it must be served on the other parties who must, then, be given the opportunity to be heard on the application.
7. This, then, is the difficulty the applicant faces with its application here – and, perhaps, that difficulty demonstrates rather psychedelically if distressingly so – why the practice of this Court is to discourage “omnibus” applications. The prayer for extension of time is brought under Rule 4 and must be heard inter partes. It ought to have been served and listed for hearing before a single Judge. Only thereafter, assuming a favourable ruling, could the applicant bring the ex parte application under Rule 79(1) of the Court of Appeal Rules. Of course, the applicant could have made things easier on itself by serving the present application anyway. Rule 79(1) permits an application to be brought ex parte but does not compel that it must be so brought. In the circumstances here, the dictates of Rule 4 applicable to its first prayer would have counseled the applicant to serve the application.
8. This is to say that the application, as drawn, cannot succeed. The first prayer – for extension of time – cannot be granted because it has to be served on the other parties under Rule 4 of the Court of Appeal Rules and it was not so served. The second prayer – to be absolved from serving the Notice of Appeal on the 3rd respondent – cannot be granted because it is not timeous. It bears pointing out, however, and, hopefully to the consolation of the applicant, that both prayers are declined without prejudice – on procedural grounds. The Court has not undertaken any analysis of either prayers on the merits.



9. The result, arrived at without relish, is that the application dated 11th February, 2024 is dismissed with no order as to costs.

10. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

