



**Oketch v Jamba & 3 others (Civil Application E036 of 2024)
[2024] KECA 1244 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1244 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E036 OF 2024
JM NGUGI, JA
SEPTEMBER 20, 2024**

BETWEEN

JUMA JACOB OKETCH APPLICANT

AND

CHRISPINE OTIENO JAMBA 1ST RESPONDENT

ALOYCE ODHIAMBO OKOTH 2ND RESPONDENT

CLEOPHAS OUMA JUMA 3RD RESPONDENT

JUDITH ADHIAMBO AKONGO 4TH RESPONDENT

(Being an Application for Extension of time to lodge and serve the Notice of Appeal and Record of Appeal out of time, from the Judgment and Order of the Environment and Land Court at Siaya, (Koross, J.) dated 20th January, 2022 in ELC Case No. 26 of 2021 (O.S))

RULING

1. The application before the Court is dated 4th February, 2024. It is framed as being grounded on Rule 4 of the [Court of Appeal Rules](#) and Article 159(2)(d) of the [Constitution](#). In the main, it seeks for leave to lodge and serve both a Notice of Appeal and Record of Appeal out of time.
2. The application is supported by the applicant's affidavit deponed on 4th February, 2024. The essential facts emerging from the supporting affidavit are as follows.
3. The applicant was the plaintiff in a suit filed at the Environment and Land Court at Siaya. The suit, Siaya ELC (OS) No 26 of 2021, was an originating summons seeking prayers for adverse possession against the respondents. The suit was heard and a judgment delivered by the Koros, J. on 30th January, 2022. The learned Judge dismissed the suit.



4. The applicant says he was dissatisfied with the judgment and intended to appeal against it. Although he was aware of the judgment, he did not take any action until now. He now explains that although he was aware of the timelines for filing a Notice of Appeal, he was unable to file one because he is a pauper and had no finances to hire a lawyer to file the appeal on his behalf.
5. The applicant says that he was completely unable to gather sufficient resources to instruct a lawyer; and that he finally approached his present lawyers who, upon hearing his plight, agreed to take up the case on a pro bono basis. He prays to be allowed to urge his appeal so that it can be determined on the merits because he believes that his appeal has a high likelihood of success. He has attached a Draft Memorandum of Appeal to demonstrate the arguability of his intended appeal. He pleads with the Court not to punish him for the delay by denying him
a chance at the seat of justice, as that would amount to punishing him for being indigent.
6. Finally, the applicant argues that the respondents would not suffer any prejudice if his application is granted; and he pledges to timeously abide by any directions given by the Court.
7. The application is opposed. The respondents filed written submissions pursuant to the directions given by the Court. The applicant, likewise, filed written submissions.
8. In short, the respondents impugn the narrative given by the applicant, stating that it is illogical and is only meant to create a pretext for the inordinate delay in bringing the application. The respondents point out that the applicant has attached a Notice of Appeal which was drawn on 22nd July, 2022 but without any explanation why it was not filed then. Since the Notice is drawn by the present firm of advocates, the respondents argue that the narrative about the applicant being indigent is likely pretextual and not one to be believed.
9. In his submissions, the applicant pleads with the Court to exercise its unfettered discretion and allow him file the appeal out of time. In so doing the applicant relies in the Supreme Court’s decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, where the Supreme Court held that:

“ ... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favor of the applicant.”
10. On their part, the respondents rely on: *University of Eldoret & another v Hosea Sitinei & 3 others* [2020] eKLR; *Nicholas Kiptoo Case (supra)*; *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR; and *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR. In the last case, this Court stated:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to the period of delay, the reasons for the delay, the degree of prejudice to respondent if the application is granted and whether the matter raises issues of public importance amongst others.”
11. I have considered the application, the affidavit in support thereto and its annexures – including the judgment of the Environment and Law Court, the replying affidavit and the written submissions by both parties. The only question for determination is whether the applicants have met the threshold



for the exercise of the Court’s discretion to grant leave for them to file a notice and record of appeal out of time.

12. The application is governed by Rule 4 of the *Court of Appeal Rules* which provides that:

“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.”

13. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

14. In the present case, the applicant blames his indigent status for the more than two-year delay in bringing this application. I have, however, found the proffered reason unpersuasive for two main reasons. First, as the respondents note, the applicant has displayed a Notice of Appeal which was drawn on 22nd July, 2022 – more than 18 months before the present application was filed. That Notice was drawn by the firm of advocates presently

representing the applicant. This Notice impugns the applicant’s narrative in three ways. One, it raises doubts about this narrative that he is a pauper and has only recently found his present advocates to represent him on a pro bono basis. Two, it draws attention to the fact that the applicant was, in fact, represented at trial before the trial court. He does not explain when he became indigent and lost his ability to retain the lawyer who had represented him at trial. Three, it makes it clear that the present firm of advocates had instructions as early as July, 2022. Yet, no explanation has been given why the application for extension of time was not sought at that time.

15. Second, the narrative given by the applicant is made more incredulous by the fact that what he failed to file was not the appeal itself but a Notice of Appeal. That simple document does not require legal literacy to draw and file.

16. All said and done, while one may look with sympathy at the initial delay for up to July, 2022, there is absolutely no explanation for the delay from July, 2022 to February, 2024 – a period just short of eighteen (18) months. This delay is inordinate. It is also inexcusable. No attempt has been made to explain it. And it is not true that it not prejudicial to the respondents. The respondents have a right not to be vexed anew with litigation more than two years after they had reasonably thought they had completed.

17. There is simply no good reason to exercise the Court’s discretion for the benefit of the applicant in this case. The delay is not only inordinately long; it is also not satisfactorily explained.

18. The upshot is that the application dated 4th February, 2024 is hereby dismissed with costs to the respondents.

19. 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

