



**Okayo & another v Otieno & 7 others (Civil Application
E090 of 2024) [2024] KECA 1841 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1841 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E090 OF 2024
MSA MAKHANDIA, JA
DECEMBER 20, 2024**

BETWEEN

RICHARD JUMA OKAYO 1ST APPLICANT

**KIAMOKAMA FARMERS CO-OPERATIVE SOCIETY LIMITED 2ND
APPLICANT**

AND

PHILIP ONYANDO OKINDO 1ST RESPONDENT

FLORENCE KWAMBOKA OTIENO 2ND RESPONDENT

LUTAFALI RAJWAN T/A QUASAR LIMITED 3RD RESPONDENT

PETROLEUM PRODUCTS LIMITED 4TH RESPONDENT

QUASAR LIMITED 5TH RESPONDENT

VISHA BROTHERS LIMITED 6TH RESPONDENT

PRIME BANK LIMITED 7TH RESPONDENT

KISII PETROLEUM PRODUCTS LIMITED 8TH RESPONDENT

*(An application for extension of time and leave to file record of appeal out of
time against the judgment and decree of the Environment and Land Court
at Kisii (Onyango, J.) dated 29th June 2023 in ELCC Case No. 1140 of 2016)*

RULING

1. This ruling relates to the applicants' notice of motion dated 4th July 2024 brought under Article 50 of *the Constitution* of Kenya, sections 1A, 1B and 3A of the *Appellate Jurisdiction Act*, Orders 50 rule 6 and 51, rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The application



seeks extension of time within which the applicants should file the memorandum of appeal and that the memorandum of appeal annexed to the application be deemed as properly filed upon payment of the requisite fees. Finally, the applicant prays that the costs of the application be provided for.

2. The application is supported by the affidavit of the 1st applicant who swore it on his own behalf and on behalf of the other applicant. It is the applicants' case that the applicants were dissatisfied by the judgment and decree of the Environment and Land Court ("ELC") at Kisii delivered on 29th June 2023. Accordingly, they on 12th July, 2023 filed a Notice of Appeal. On the same day, their counsel wrote a letter bespeaking proceedings. Thereafter, the 1st applicant became ill, was operated upon, and was bedridden for some time. He could not therefore convene as the Chairman of the 2nd applicant a meeting to pass a resolution to instruct counsel for purposes of pursuing the appeal. That therefore, the delay was not deliberate but occasioned by factors beyond their control.
3. The applicants are of the view that the intended appeal has overwhelming chances of success; that the application has been made timeously and it will be in the interest of justice that it be allowed. Finally, it is claimed that the respondent will not suffer any prejudice if the application is allowed.
4. Though the application was served on the respondents, they did not consider it worthwhile to file any response to it. Therefore, I will consider the application as unopposed.
5. The threshold for the grant of leave in applications of this nature was set out in the case of *Nicholas Kiptoo arap Salat vs. IEBC* [2014] eKLR where the Supreme Court of Kenya 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 the delay in making the application for extension of time and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant..."

6. Again, this Court in the case of *Edith Gichugu Koine vs. Stephen Njagi Thoithi* [2014] eKLR stated as follows about the extension of time:

"Nevertheless, it ought to be guided by the 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 the respondent if the application is granted and whether the matter raises issues of public importance, amongst others

There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before Court..."

7. The applicants have attributed the delay on the fact that the 1st applicant who is the Chairman of the 2nd applicant fell sick and had to undergo an operation which caused him to be bedridden and could not therefore convene a meeting of the 2nd applicant to pass resolution to instruct counsel to appeal. In a bid to demonstrate this fact, the 1st applicant has annexed several medical notes as well as medical reports. I am satisfied with the reason for the delay. In any event, it has not been countered by the respondents.
8. I am also satisfied that it will be in the interest of justice to allow the applicants to exercise their undoubted right to exhaust the appellate process. The respondents having not demonstrated the prejudice that they may suffer in the event the application is allowed, I would hold that no such prejudice would befall them.



9. In the end, I allow the application to the extent that leave is granted to the applicants to file and serve the memorandum of appeal within the next thirty (30) days from the date hereof, failing which leave hereby granted shall automatically lapse. Costs of the application shall abide the outcome of the intended appeal.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

