



**Okendo v Oyuko & 2 others (Civil Application E087 of 2024)
[2024] KECA 1840 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1840 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E087 OF 2024
MSA MAKHANDIA, JA
DECEMBER 20, 2024**

BETWEEN

SAMSON ANGAGA OKENDO APPLICANT

AND

CHRISTINE OYUKO 1ST RESPONDENT

GAUDENCIA JUMA OKIRI 2ND RESPONDENT

ACHUNGA OKIRI 3RD 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 Kisumu (Asati, J.) dated 6th June 2024 in ELCA No. E024 of 2022)

RULING

1. By a notice of motion dated 4th July 2024, Samson Angaga Okendo, (“the applicant”), prays for extension of time within which to file a Notice of Appeal against the judgment and decree of the Environment and Land Court at Kisumu in ELCA No. E024 of 2022) dated 6th June 2024. He also prays that once leave is granted, the annexed draft Notice of Appeal as well as the memorandum of appeal be deemed as duly filed upon payment of requisite fees.
2. The application is anchored on sections 1A, 25, and 34 of the *Civil Procedure Act*, Order 51, Rule 1 of the Civil Procedure Rules and Article 159 of *the Constitution*. It is necessary to point out at this juncture that the provisions of the law cited in support of the application are irrelevant. Applications of this nature are ordinarily brought under Rule 4 of this Court’s Rules. In the past, this would have been sufficient ground to strike out the application as being incompetent. However, with the advent of the current constitutional dispensation, this Court has slowly but surely moved away from a court of technicalities to a court driven by the need to do substantive justice.



3. The reasons advanced by the applicant for failing to file a Notice of Appeal and the appeal in time were; that the applicant was sick and financially down at the time of delivery of the judgment. He had also entrusted his advocates to lodge the appeal but apparently, the advocates did not heed the instructions. He otherwise believes that the intended appeal has high chances of success going by the draft memorandum of appeal annexed to the application; that the application has been filed without undue delay; that no prejudice will be occasioned to the respondents, and finally, that it is in the interest of justice that the application be allowed.
4. Though the application was served on the respondents, they did not deem it necessary and worthwhile to file any response to the application. Accordingly, the application is taken as unopposed so that whatever has been alleged by the applicant is uncontroverted and therefore true.
5. Rule 4 of this Court's Rules provides, inter alia:

“The Court may, on such terms as may be just, by order extend the time limited by these Rules, or by any decision of the Court, or the superior court, for 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. Over time and in several decisions of this Court and the Supreme Court, this provision has been interpreted and parameters to guide the Court in applications of this nature set out. See for instance the case of *Nkorui vs. Meru South Farmers Co-operative Society Limited* [2024] KE ELC 781 (KLR), where the Supreme Court provided the following guidelines when a court is entertaining an application for extension of time:
 - i. Extension of time is not a right of 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 for extension of time has the burden of laying a basis to the satisfaction of the Court;
 - iii. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a 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 respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time
7. I may also add that there is now a duty on this Court pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#) to ensure that the above factors are consonant with the overriding objective of civil litigation being the just, expeditious, proportionate and affordable resolution of disputes before the Court.
8. I have already set out what the applicant attributes to the delay. In the absence of any evidence to the contrary, I am satisfied that the applicant has given sufficient reasons thereof. I will treat the mistake of the applicant's advocates on not acting on instructions of the applicant, as one which cannot be



visited upon an innocent client. On prejudice, I believe that the applicant will be more prejudiced if leave sought is withheld than the respondents.

9. In the end, I allow the application in the following terms:
- a. Leave is granted to the applicant to file the Notice of Appeal and subsequent appeal within the next thirty (30) days from the date of this ruling.
 - b. In default, leave hereby granted shall automatically lapse.
 - c. Costs shall be in the 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

