



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Abuya v Olang & another (Civil Application E005 of 2023)
[2023] KECA 657 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 657 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E005 OF 2023**

M NGUGI, JA

MAY 26, 2023

BETWEEN

MAURICE OTUNGA ABUYA APPLICANT

AND

OMULO JARED OLANG 1ST RESPONDENT

MARGARET ADHIAMBO ODHIAMBO 2ND RESPONDENT

(Being an application for extension of time within which to file a notice of appeal out of time, to lodge the appeal and to serve the record of appeal out of time arising from the judgment of the Environment and Land Court in Homa Bay (G.M.A. Ongondo, J.) dated 18th October, 2022 in Homa Bay High Court ELC (O.S) Case No. 13 of 2021)

RULING

1. In his application dated January 9, 2023, the applicant asks this Court to extend the time within which to file his notice of appeal and record of appeal, and to serve them out of time, against the judgment of G M A. Ong'ondo J delivered on 16th October, 2022. He also prays for the costs of the application.
2. The application is brought under Rules 4 and 41 of the [Court of Appeal Rules](#) and is supported by an affidavit sworn by the applicant on January 9, 2023 and on the grounds set out on the face of the application. The applicant avers that he is dissatisfied with the decision of the learned judge and intends to appeal against it. He had informed his advocate that he intended to appeal, and his advocate had informed him that he had thirty (30) days to file the notice of appeal. Thereafter, his advocate informed him that he needed to find another advocate.
3. The applicant further avers that he had gone to the court and, thinking that the thirty days were about to expire, had filed a notice of appeal on November 14, 2022 only to learn that the notice of appeal should have been filed within fourteen days from the date of the judgment. He states that he has exhibited the notice in his affidavit as annexure MOA001. I note, however, that the only document



'annexed' to his affidavit is the certificate of confirmation of grant to the estate of David Abuya Juma alias Abuya Juma dated July 31, 2015.

4. The applicant avers that he was not indolent and had even inquired from his advocates about the filing of the appeal immediately after the judgment on October 18, 2022. He has an arguable appeal as the trial court misdirected itself in, among other things, failing to find that the subject of the suit, West Kasipul/ KK /89, was family land; that the respondents had entered thereon after the death of the deceased owner; and had further failed to make a determination that the respondents' entry was not hostile but under the terms of a written agreement between the 1st respondent and the widow of the deceased whose terms were expressly contingent on obtaining letters of administration intestate.
5. The appellant asks this Court to extend time for him to file his notice of appeal or alternatively, to deem the notice filed on November 14, 2022 as properly filed, and that he be allowed to file his memorandum of appeal.
6. The applicant had not filed submissions with respect to his application by the time it came up for hearing on March 9, 2023.
7. The application is opposed by an affidavit sworn by Omulo Jared Olang, the 1st respondent, on March 7, 2022. Mr Olang deposes that as the impugned decision was delivered on October 18, 2022, the notice of appeal ought to have been filed on or before November 4, 2022 and served on the respondents on or before November 12, 2022. The applicant filed the notice of appeal on November 14, 2022 and served it upon the respondent on November 15, 2022.
8. The 1st respondent deposes further that the applicant applied for certified copies of the proceedings on October 26, 2022 but failed to copy the letter bespeaking proceedings upon the respondents, contrary to Rule 84 of this Court's Rules.
9. According to the respondents, even though the applicant seeks extension of time, the notice of appeal lodged on November 14, 2022 is still alive and thus a fresh notice of appeal cannot be lodged. Further, that though the applicant faults his advocate for having misled him, there is no affidavit sworn by the said advocate to substantiate the allegations.
10. The respondents filed submissions dated March 7, 2023 through the firm of Ogutu Mboya, Ochwal & Partners. They reiterate in these submissions the facts set out in the affidavit in opposition to the application. They further submit that the present application offends the mandatory provisions of Rule 9 and 10 of the Oaths and Statutory Declarations Rules as there are various documents accompanying the applicant's supporting affidavit which have not been serialised as provided in Rule 9 which requires all exhibits to affidavits to be securely sealed thereto under the seal of a Commissioner for Oaths and to be marked with serial letters of identification. In their view, the purported exhibits accompanying the supporting affidavit are just 'flying papers' with no legal basis. They rely in support on the case of *Solomon Omwenga Omache & Anor v Zachary O Ayieko & 2 Others* [2016] eKLR in which Mutungi J decried the failure to mark exhibits annexed to an affidavit and found them to be of no value.
11. The respondents further submit that while the applicant is seeking an order of extension of time to file a notice of appeal and record of appeal, he had filed a notice of appeal on November 14, 2022, albeit without leave. He had served the notice on the respondents on November 15, 2022. It is their submission that accordingly, the orders for extension of time within which to file the Notice of Appeal and serve out of time cannot stand. In their view, filing yet another notice of appeal will be tantamount to abuse of the court process as the notice already lodged is still in existence, and no fresh notice of appeal can be lodged during the life time of the other.



12. They argue, further, that no leave can issue to the applicant to file another notice of appeal while the other is in existence.

Reliance for this submission is placed on the case of *Rajnikant Karsandas Somalia v Oriental Commercial Bank Of Kenya Limited (Formerly Delphis Bank Limited) & 5 Others* [2007] eKLR in which the court cited the case of *South Nyanza Sugar Co Ltd v Hesson Onyuro Civil Application No Nai 233 of 2000* and *Fortune Finance Ltd v Geoffrey Ngugi Gitbaiga CA No NAI 22 of 1999*.

13. Regarding the application to file the record of appeal out of time, the respondents submit that the applicant has demonstrated that he applied for certified copies of the proceedings and even paid for them on October 26, 2022. He failed, however, to serve the respondents. He has not explained or demonstrated to the Court that he is now in possession of the typed proceedings. Further, that the applicant has not annexed either the Record of Appeal or the memorandum of appeal to his application.
14. The respondents finally submit that had the applicant been seeking extension of time pursuant to Rule 4 of the Rules, reliance should be placed on the decision of the Supreme Court in *Fabim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR and *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR. The respondents pray that the application be dismissed with costs to him.
15. I have considered the application and the affidavit in support, as well as the affidavit and submissions in opposition to the application. Rule 4 of the Court of Appeal Rules vests discretion in this Court to extend time. In exercising this discretion, the Court is guided by the principles set in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 E A 231 in which the Court stated:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason 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.”

16. In its decision in the Nick Salat case above, the Supreme Court expounded on the exercise of discretion in an application for extension of time as follows:

“... 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 favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;



3. whether the Court should exercise the discretion to extend time is a consideration to be made on a case- to- case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; ...”
17. In the present case, the applicant readily concedes that he did not file his notice of appeal on time. Judgment was delivered on October 18, 2022. He filed the notice of appeal, in person, on November 14, 2022, outside the prescribed time. He explains that he had been informed by his advocate that the notice of appeal is required to be filed within 30 days from the date of the judgment. Upon realising that he should have filed it within 14 days, he filed the present application for extension of time. He asks this Court to either extend time for the filing of the notice or to deem the notice of appeal as properly filed.
18. It is not in dispute that the applicant has filed a notice of appeal, outside the time allowed by this Court’s Rules, without leave. In its decision in *Sea Angel Services Station Limited v Yusuf Abdul* [2021] eKLR this Court cited with approval the decision in *Fortune Finance Ltd vs Geoffrey Ngugi Githaiga* CA No NAI 22 of 1999 in which the Court observed that:
- “A notice of appeal is a primary document within the meaning of rule 85 of the Rules and the learned Judge had clearly no jurisdiction to make an order for filing a fresh Notice of Appeal while the original was still extant.”
19. In *South Nyanza Sugar Co Ltd v Hesbon Onyuro* [2000] eKLR the Court, in dismissing an application for extension of time to file a notice of appeal, observed that:
- “In this regard, I fully agree with counsel for the respondent in that so long as the original Notice of Appeal is still on record, I have no jurisdiction to extend time for yet another Notice of Appeal to be filed.
20. It seems to me, however, that a notice filed out of time, without leave, could be cured by an appropriate application to validate and cure the infirmity in the notice, for sufficient reasons placed before the Court, in the interests of justice. This was the view adopted by the Court in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR where the Court held that:
- “The failure of counsel to include a prayer for validation of the incompetent notice of appeal is no justification for failure to grant the relief. The court has mandate to invoke both the inherent power of the Court enshrined in Rule 1(2) of the Court of Appeal Rules and Article 159 (2)(d) of the *Constitution* to cure that default for [the] ends of justice to be met in the matter.”
21. In this case, and bearing in mind the principles enunciated in Leo Sila Mutiso and the Nick Salat case, I am inclined to exercise discretion in favour of the applicant. The judgment in the matter sought to be appealed from was delivered on October 18, 2022. The applicant filed the notice of appeal on November 14, 2022, so there was a delay of about 10 days from the date when it should have been filed, November 4, 2022. I find that this period of delay was not inordinate.



22. I also find that the reasons for the delay are excusable. The applicant attributes the failure to file the notice of appeal in time on the wrong advice that he was given by his previous advocate. As soon as he learnt that he had been misled with respect to the time for filing his notice of appeal, he immediately filed the notice of appeal dated November 14, 2022. The respondents concede that the applicant served them with this notice on November 15, 2022. While they contend that the applicant's previous advocate did not swear an affidavit to confirm the applicant's averment that they had informed him that he had thirty days to file his notice of appeal, I find that it would be unrealistic to expect an advocate to admit, on oath, misleading a client on a matter of law. In any event, I am not satisfied that the failure of a counsel to swear an affidavit admitting such failure can be laid at the feet of his client.
23. As to whether the applicant has an arguable appeal, he has averred that the trial court erred in not finding that the land in dispute is family land, and that the entry of the respondents was on the basis of a sale agreement that was subject to the widow of the deceased obtaining letters of administration. These are arguable issues, in my view. Finally, I am not satisfied that the respondents would suffer any prejudice should the present application be allowed.
24. I accordingly find that the application dated January 9, 2023 is merited. The notice of appeal dated November 14, 2022 is hereby deemed as duly filed. The applicant is directed to file his record of appeal within 45 days from today, failing which the leave granted shall lapse. The costs of this application shall be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF MAY, 2023

MUMBI NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

