



**Momanyi v Monyenche (Civil Application E002 of 2023)
[2023] KECA 605 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 605 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E002 OF 2023**

M NGUGI, JA

MAY 26, 2023

BETWEEN

NACKSON ONYANCHA MOMANYI APPLICANT

AND

JOHN NYANGAU MONYENCHE RESPONDENT

*(Being an application seeking for leave to file an appeal out of time
from the judgment of the Environment and Land Court at Nyamira
(Mugo Kamau, J.) dated 22nd April, 2022 in ELC NO. 35 OF 2021)*

RULING

1. In his application dated January 4, 2023 brought under Rule 4 of the [Court of Appeal Rules](#), the applicant seeks extension of time within which to file and serve his record of appeal. The grounds in support of the application are that a notice of appeal was filed within time. However, the typed proceedings and a copy of the judgment were obtained on December 6, 2022 after the expiry of the prescribed period within which to file the record of appeal. The record of appeal could not be lodged without the typed proceedings, and the failure to lodge the record of appeal on time was not intentional.
2. In his affidavit in support of the application sworn on January 4, 2023, the applicant, Nackson Onyancha Momanyi, avers that he filed his notice of appeal on April 28, 2022. He had requested for typed proceedings by a letter dated December 23, 2022 and paid for them, but the proceedings were obtained on December 6, 2022 outside the prescribed period within which to file appeal. He avers that the delay and failure to file the record of appeal on time is due to the fact that the proceedings were obtained way after the expiry of the 60 days stipulated period.
3. The judgment against which the applicant seeks to appeal was rendered on April 22, 2022. Under Rule 77 of the [Court of Appeal Rules](#), the applicant should have filed and served his notice of appeal within 14



days of that date. He deposes in his affidavit sworn in support of the application that he filed the notice of appeal on April 28, 2022, and refers to a copy of the notice as annexed to his affidavit as annexure 'NOM(1)'. There is, however, no such document annexed to his affidavit.

4. The applicant further avers that he applied for the proceedings on December 23, 2022, which would be eight (8) months after the decision he seeks to appeal from. Under Rule 84 of the Rules of this court, an applicant is required to apply in writing for certified copies of the proceedings within 30 days of the decision which he seeks to appeal against. A copy of the letter bespeaking the proceedings must also be served on the opposite party. In this case, the appellant avers that he sent a letter dated December 23, 2022 requesting for the proceedings. The letter is not annexed to the applicant's affidavit as NOM2(a) as he deposes, though it is to be found in the bundle of documents forming the application, between the judgment and the proceedings.
5. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*- (Civil Application No. Nai. 251 of 1997 (UR) that addressed the issue of extension of time under Rule 4, this court stated:

“It is now well settled that the decision whether or not to extend 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 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.”
6. I have serious reservations about the competency of the application filed by the firm of S. M. Sagwe Advocates on behalf of the applicant. The decision sought to be appealed against was delivered on April 22, 2022. While it is alleged that a notice of appeal was lodged on April 28, 2022, no copy of such notice was placed before the Court.
7. Assuming a notice of appeal had been lodged as the applicant avers, he was required to file his record of appeal within 60 days from the date of the notice. This would be by 28th of June 2022.
8. By his own averments, the applicant did not apply for the proceedings until December 23, 2022. Interestingly, he avers that he received the proceedings on December 6, 2022, some three weeks prior to his application for the proceedings.
9. The notice of appeal allegedly lodged on April 28, 2022 has not been placed before the court. The request for proceedings was made on December 23, 2022 in respect of a judgment delivered on April 22, 2022. Proceedings were allegedly received on December 6, 2022. This application is dated January 4, 2023.
10. The delay in lodging the record of appeal is in excess of eight months. No reasons have been given for the delay, and the averments and documents placed before the court do not lend any credence to the averments by the applicant. All in all, I find no merit in the application before me.
11. I would have dismissed the application with costs to the respondent, but there is no response or submissions filed by the respondent, though there is also no evidence of service of the application upon him.
12. The application is therefore dismissed with no order as to costs.

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

MUMBI NGUGI



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

