



**Omoso & another v Kebaso & 2 others (Civil Application  
E004 of 2023) [2023] KECA 606 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 606 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E004 OF 2023**

**M NGUGI, JA**

**MAY 26, 2023**

**BETWEEN**

**SIMION ONGERI OMOSO ..... 1<sup>ST</sup> APPLICANT**

**FRED MOBURI OMOSO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DAVID MOSES KEBASO ..... 1<sup>ST</sup> RESPONDENT**

**EVANS MAOSA MOSE ..... 2<sup>ND</sup> RESPONDENT**

**CHARLES MOSE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to file a notice and record  
of appeal out of time in an intended appeal from the judgment of the  
Environment and Land Court at Nyamira (Mugo Kamau, J.) dated 16th  
November 2022 in ELC No. 32 of 2021 formerly Kisii ELC No. 1020 of 2016)*

**RULING**

1. In their application dated December 15, 2022, the applicants pray to be granted leave to file their notice of appeal out of time; time within which to file their record of appeal; and for this Court to extend time to 'file and serve notice of and records of appeal'. The application is brought under rule 4 of the [Court of Appeal Rules](#) and is based on the grounds that the applicants became aware of the judgment when the time for lodging a notice of appeal had expired, and that neither they nor their advocates on record were ever served with a notice of delivery of judgment. They further contend that the respondents misled them that the matter could be settled without pursuing an appeal.
2. Under rule 4 of the [Court of Appeal Rules](#), the Court has the discretion to "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". In exercising its discretion



under this Rule, this Court is required to consider certain factors. These were enunciated in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - (Civil Application No. Nai. 251 of 1997 (UR) in which the 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.” (Emphasis added)

3. The application is based on the grounds set out in the application and the affidavit in support sworn by the 1<sup>st</sup> applicant, Simion Onger, on December 16, 2022. These are that the applicants have a meritorious appeal with high chances of success; that they came to learn of the judgment when time for lodging the notice of appeal had expired; and that no notice of delivery of judgment was issued to them or their counsel. They further contend that their counsel did not inform them of the outcome of their case. It is contended further that the respondents misled the applicants to believe that the matter could be settled without the applicants pursuing an appeal.
4. In their written submissions, the applicants contend that the judgment in the matter was delivered on November 16, 2022. On November 17, 2022, the applicants applied for the proceedings and paid the requisite fee. The proceedings were delivered to them on December 6, 2022, which was after the expiry of 14 days, and thus after the stipulated period, and the notice of appeal was therefore not filed. The applicants repeat their contention that they were also misled by the respondents into believing that they could settle the matter without an appeal, but later came to find that the respondents were playing a game with them.
5. Rule 77 of the *Court of Appeal Rules* provides as follows:
  1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
  2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against... which appeal is lodged.
6. The applicants have not indicated in their affidavit in support of the application when they learnt that the decision against which they seek to appeal had been rendered. They aver only that they were not notified of the date of the judgment. However, they submit that the judgment was delivered on November 16, 2022, and that they applied for the proceedings on November 17, 2022. There is however, annexed to the application, though not as an annexure to the affidavit in support of the application, a letter written by the 1<sup>st</sup> applicant, Mr. Onger, on November 17, 2022, applying for the proceedings. The proceedings placed before the court also show that on the date of delivery of the judgment, the applicants were represented by counsel, Mr. Wanyama, who applied and was granted stay of execution for 30 days.
7. I have considered the application and affidavit in support, as well as the applicants’ submissions. Contrary to their averments, the applicants were fully aware, and were represented by counsel, when the judgment they seek to appeal against was delivered. They applied for the proceedings the following day. They are therefore uttering falsehoods when they state on oath that they were unaware of the delivery of the judgment, and that they came to learn of its delivery after the time for lodging the notice of appeal had expired.



8. The applicants, and perhaps their counsel also, seem to be under the misapprehension that they could only lodge their notice of appeal after they obtained the proceedings, which they state they did on December 6, 2022. I have set out above the provisions of rule 77, so the fact that they received the proceedings on December 6, 2022 does not excuse their failure to file the notice of appeal in time.
9. As for the possibility of the appeal succeeding if the application is granted, I have read the judgment of the trial court and noted the applicants' grounds of appeal. In the memorandum of appeal dated 16<sup>th</sup> December 2022 annexed to their application, the applicants argue that the trial judge erred in law by dealing with only one title, Matutu Settlement Scheme/154, leaving out other titles- East Kitutu/ Kebirichi/795 and East Kitutu/Kebirichi/792- which belonged to the late Kebaso Onsango; that the learned trial judge in Succession Cause No 104 of 1999 at Kisii High Court (dealt) with only two titles of the deceased, that is land parcel number Matutu Settlement Scheme/154 and East Kitutu/ Kebirichi/792; and that this was the root cause of the problem; that the trial judge erred in law by not (dealing) with the historical injustice made by the 'petitioners against the respondents' as the deceased "Kebaso Onsongo had three wives who were by right to be sub-divided equitably" (sic); and that the trial judge's judgment was bad in law and against the weight of evidence.
10. I note from the judgment of the trial court that in his plaint, the initial plaintiff had sought, inter alia, a declaration that he was entitled to exclusive and unimpeded possession of land title number Matutu/Settlement Scheme/619; a declaration that the defendants were unlawfully and wrongfully in occupation and use of the suit property; and an order (for their) eviction from or vacant possession of the suit property.
11. I remind myself that it is not the role of a single judge in an application such as this to inquire into the merits of an appeal. However, I do note that the applicants did not tender any evidence before the trial court; they seem to be challenging, in their memorandum of appeal, not just the judgment that they seek to appeal from but also a succession matter that is not the subject of the appeal. I note further, that the 1<sup>st</sup> appellant had been charged and convicted of forcible detainer in respect of the land the subject of the judgment he seeks to appeal from. On the face of it, the chances of success of the appeal do not seem too high.
12. Finally, the applicants contend that they were misled by the respondents that they could resolve the issue without their filing an appeal. Nothing has been placed before the Court to show that such a discussion on resolving the issue took place. However, even if it had, the Court can only deal with an application such as this on the basis of the law and jurisprudence. A litigant who is 'misled' by the successful party to litigation and fails to pursue the remedies available to him in law cannot seek to rely on conversations, if any, outside the legal process to further his position.
13. It is, in the result, my finding that the present application has no merit. It is hereby dismissed with no order as to costs in view of the fact that there is no response from the respondents on record.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF MAY, 2023**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original*

*Signed*



**DEPUTY REGISTRAR**

