



**Aketch (Suing as the Legal Representative of the Late Jethro Akech Odongo) v
Onyango (Sued as the Administrator of the Estate of Joash Onyango Ochieng)
(Civil Application E132 of 2022) [2023] KECA 783 (KLR) (23 June 2023) (Ruling)**

Neutral citation: [2023] KECA 783 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E132 OF 2022**

F TUIYOTT, JA

JUNE 23, 2023

(IN CHAMBERS)

BETWEEN

**NARKISO OYUGI AKETCH (SUING AS THE LEGAL REPRESENTATIVE OF
THE LATE JETHRO AKECH ODONGO) APPLICANT**

AND

**ELIJAH ODHIAMBO ONYANGO (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF JOASH ONYANGO OCHIENG) RESPONDENT**

*(Being an Application for extension of time to lodge an appeal out of time
from the Judgment of the Environment and Land Court of Kenya at Homa
Bay (G.M.A. Ongondo, J.) Dated 27th September, 2022 in ELC No. 30 of 2021)*

RULING

1. Narkiso Oyugi Aketch, the applicant is aggrieved by the decision of G.M.A Ongondo, J delivered on September 27, 2022 in Homa Bay ELC Case No 30 of 2021, but has breached the timeline set by Rule 77 of the [Court of Appeal Rules, 2022](#) for lodging notice of appeal.
2. That Rule requires a person who desires to appeal to this Court to lodge a notice of appeal with the relevant registry of the Superior court within fourteen (14) days after the date of the decision.
3. The applicant is now before this Court through a Notice of Motion dated November 11, 2022 in which he pleads to this Court to extend time for the filing of the notice of appeal and appeal out of time.
4. In his affidavit, sworn on November 11, 2022, the applicant explains the delay. He states that he became aware of the judgement on October 20, 2022 when he went to inquire about the judgment from his then advocates Oluoch Aminwa & Company Advocates. Angry that his erstwhile advocates had not



informed him of the decision timeously, he instructed Kijana & Company Advocates on November 5, 2022 to file an appeal on his behalf. He thinks that his intended appeal has merit and has annexed a draft memorandum of appeal to his affidavit.

5. The respondent has not filed any replying affidavit but resists the application through submissions dated December 2, 2022.
6. I have considered those submissions as I have the submissions of counsel for the applicant dated November 24, 2022 and the arguments in supplementary submissions of March 3, 2023.
7. There is convergence as to the parameters that guides a single Judge's discretion when dealing with an application for extension of time under Rule 4 of the Rules of this Court. In the decision cited by counsel for respondent, Koome, JA (as she then was) in *Karney Zaharya & another v Shalom Levi* Civil Application No 80 of 2018 stated:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason (s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single Judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal.”

8. If the applicant is to be believed, the time for filing a notice of appeal against the judgement of September 27, 2022 had already passed when he was informed of the decision on October 20, 2022 by his former advocate; as the deadline was October 11, 2022. While he blames his advocate for this delay, that may not be a good reason why time should be extended. That said, I lean towards excusing that delay as the present application has brought without undue delay, coming 30 days after the deadline for filing the notice of appeal. In this benign gesture I also note that the respondent has neither argued nor demonstrated through evidence or otherwise that extension of time will prejudice the Estate of the deceased.
9. As it whether the intended appeal is arguable, the threshold to be reached is low as it is not the role of a single Judge to definitively determine the merits of an intended appeal. Looking at the grounds the memorandum of appeal, I am unable to say that the intended appeal is frivolous. Take for example the holding by the ELC that the dispute between the parties over the suitland had been previously adjudicated upon with finality.
10. I allow the Notice of Motion dated November 11, 2022. The notice of appeal shall be filed and served within 14 days of this Ruling and the record of appeal filed and served thereafter within 60 days of today. Costs of the application shall abide the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

