



REPUBLIC OF KENYA



KENYA LAW
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Odeny v Ooko (Civil Application E046 of 2022) [2023] KECA 781 (KLR) (23 June 2023) (Ruling)

Neutral citation: [2023] KECA 781 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E046 OF 2022
F TUIYOTI, JA
JUNE 23, 2023

BETWEEN

JOHN OLOO ODENY APPLICANT

AND

WILLIAM MASARA OOKO RESPONDENT

(Being an Application for extension of time to file and serve record of appeal out of time from the Ruling of the High Court of Kenya at Kakamega (W. Musyoka, J) Dated 22nd May, 2020 in H.C Succession Cause No. 341 of 2001)

RULING

- [1] Said to be brought pursuant to Rule 82 of the [Court of Appeal Rules, 2010](#) is a Notice of Motion dated April 4, 2022 seeking two substantive orders:
- (1) That the applicant be given leave to file its record of appeal out of time.
 - (2) That in the event that leave is granted and time enlarged as prayed hereinabove, then the record of appeal filed April 5, 2022, be deemed to be properly filed and served on the respondents in compliance with the rules of this Honourable Court.'
- [2] John Oloo Odeny, the applicant, is the administrator of the Estate of William Odeny Masara (Deceased) and is dissatisfied with the Ruling of Musyoka J delivered in Kakamega High Court Succession Cause No 341 of 2001. In an affidavit sworn on April 4, 2022 in support of the application he deposes that although the Ruling was delivered in his absence on May 22, 2020, he filed a Notice of Appeal and requested for typed proceedings. Annexed to affidavit is a Notice of Appeal lodged in the High Court at Kakamega on June 4, 2020 but the supposed letter bespeaking proceedings is not shown.



- [3] Explaining his delay in preparing and filing the record of appeal, the applicant states that he filed an application for stay of execution of the Judge's orders, which was allowed but that he could not access some crucial documents from the court record necessary for the record as the file was in the judge's chambers pending the ruling. Further, that he was hospitalized in February and March 2022 having contracted Covid-19 and due to his advanced age, the illness took a huge toll on him and he could not perform his day to day duties.
- [4] He further states that he is currently unemployed and is dependent on third parties and well wishers who support him financially and that due to the effect of Covid-19, it was not easy to immediately secure funds to enable him prepare and file the record of appeal in good time.
- [5] The applicant states that his intended appeal has overwhelming prospects of success. Annexed to his affidavit is a draft memorandum of appeal.
- [6] Rule 4 of the Court of Appeal Rules, 2010 and those of 2022 grants the Court power to extend time for the doing of any act authorized or required by the Rules. In a matter such as this that does not involve public interest, this discretionary power is to be exercised on consideration of the period of delay, the reason for the delay, the degree of prejudice to the respondent if the application is granted and, possibly but never decisive, the chances of the appeal succeeding if the application is granted
- [7] Although no response has been filed to the application, it is still my duty to interrogate whether the application deserves a favourable exercise of my discretion.
- [8] As the Notice of Appeal was lodged on June 4, 2020, the record of appeal ought to have been filed on or before August 4, 2020, instead it was filed on April 5, 2022. This delay of over two years is considerable delay. Has it been adequately explained?
- [9] I am afraid not. First, there is no evidence that the applicant ever bespoke proceedings so that the period required for their preparation and delivery could be excluded from computation of time (see Rule 82(1) of the 2010 Rules, now Rule 84(1)).
- [10] Second, while delay is blamed on the non-availability of the court file because it was supposedly before the learned Judge pending delivery of a ruling, the dates when the file was not available is not disclosed. At any rate the applicant has not shown what steps he took to access the file, say by writing to court for assistance.
- [11] While the delay is also partly blamed on illness of the applicant, it has to be observed that the illness was in February and March 2022 when the filing of the record of appeal was at least 18 months late, a long period.
- [12] Whichever way one looks at it, the long delay has not been satisfactorily explained and is therefore not excusable.
- [13] The Notice of Motion dated April 14, 2022 is therefore without merit and is hereby dismissed but as the respondent did participate in these proceedings, there shall be no order as to costs.
- [14] Last, this Ruling has been long coming for the reason stated by the Deputy Registrar of this Court in her Notice to parties dated May 3, 2023. For this I apologize.

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.

