



REPUBLIC OF KENYA



KENYA LAW
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**Oongo v Chore & 2 others (Civil Application E136 of 2022)
[2023] KECA 782 (KLR) (23 June 2023) (Ruling)**

Neutral citation: [2023] KECA 782 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E136 OF 2022
F TUIYOTT, JA
JUNE 23, 2023**

BETWEEN

ANTIPA MOLO OONGO APPLICANT

AND

PETER OCHIENG' CHORE 1ST RESPONDENT

MAURICE ACHOLA CHORE 2ND RESPONDENT

DANIEL OKOTH CHORE 3RD RESPONDENT

*(Being an Application for extension of time to file record of appeal out of time
from the Judgement of the Environment and Land Court of Kenya at Siaya
(A.Y. Koross, J) Dated 17th February, 2022 in Siaya ELC No. 54 of 2021)*

RULING

[1] Antipa Molo Oongo, the applicant, was the plaintiff in Siaya ELC Case No 54 of 2021 Antipa Molo Oongo v Peter Ochieng Chore, Maurice Achola Chore and Daniel Okoth Chore. On February 17, 2022, AY Koross, J dismissed his suit with costs, a decision that aggrieves him. The applicant is late in instituting an appeal and seeks the following orders in the application dated November 23, 2022;

- (1) Extension of time to lodge an appeal against the judgment of the Honourable Justice AY Koross delivered on the February 17, 2022, in the original Siaya ELC Court Case No 54 of 2021 between the same parties.
- (2) Seeking timelines within which the intended record of appeal is to be filed and served.”

[2] Before the Superior court below, as here, the applicant appointed an Attorney, his nephew one John Opiyo Agida to act for him.



- [3] It is not controversial that following delivery of the judgement, the applicant (through his attorney) timeously lodged a Notice of Appeal against the decision at the ELC on February 25, 2022. Earlier, on February 17, 2022 (although the letter reads February 17, 2021,) the attorney applied for certified copies of the proceedings and judgement. What is controversial is whether the Notice of Appeal and the letter bespeaking the proceedings were ever served on the respondents or their advocate.
- [4] In an affidavit sworn on November 23, 2022, the applicant states that he was unable to file the appeal on time because a serious accident befell him, and it took a long time for him to recover. He seeks to demonstrate this through copies of medical documents annexed to his affidavit. The applicant pleads that the delay in filing the appeal was caused by circumstances beyond his control.
- [5] The applicant contends that his intended appeal has overwhelming prospects of success and shown to Court is a draft memorandum of appeal.
- [6] The respondents resist the application through a replying affidavit sworn on February 28, 2023 by Winnie Anuro, an advocate in the firm of Owiti, Otieno & Ragot Advocates which has the conduct of this matter on their behalf. Counsel denies that the Notice of Appeal and the letter bespeaking proceedings were ever served upon them. Counsel states that from the time when the appeal ought to have been instituted, which the counsel proposes was April 30, 2022, to the date when the instant application was filed on November 25, 2022, is a delay of 209 days.
- [7] Counsel asserts that the medical documents before the Court shows that the applicant was discharged on March 22, 2022 and this does not explain the delay in the period between April 30, 2022 to November 25, 2022. That at any rate, it has not been explained why his attorney who had acted speedily in respect of the Notice of Appeal and request for proceedings could not file the record of appeal on time. Counsel contends that there is always prejudice to the other side and to the general public whose interests is to have justice disposed without undue delay and who, like the respondents, have acquired a vested right following a decision.
- [8] I have read and understood the submissions by parties herein.
- [9] The Court is asked to exercise the discretion granted to it by law under Rule 4 of the *Rules* of this Court. A discretion which must be exercised within the parameters set out in *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR;
- “The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso vs Mwangi* Civil Appl NAI 255 of 1997 (ur), *Mwangi vs Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl NAI 8/2000 (ur) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
- [10] The substantial reason for inaction on the part of the applicant is blamed on poor health. To support this position, the applicant has placed before Court documents from various hospitals in which he was attended. What do those documents show?



- [11] A discharge summary from Siaya County Referral shows that he was admitted in that hospital on February 17, 2022 and discharged on the next day, February 18, 2022. This admission follows a referral of February 17, 2022 from St Elizabeth Lwak Mission Hospital. There is also evidence that the applicant was again admitted in hospital, this time at Oasis Health from March 16, 2022 to March 22, 2022. The discharge summary from the Hospital shows that the applicant was to return to the hospital on clinic on April 5, 2022 and there is evidence that he indeed bought some medicine from that Hospital on that return date.
- [12] As it readily apparent from those medical documents, the injuries suffered by the applicant were serious involving a multiple fracture to his tibia and fibula. It is also evident that the applicant is elderly. The medical notes put his age at 81 years. Although there are no medical documents showing that he required medical attention after April 5, 2022, I am ready to believe the applicant when he says his bad health lingered on for sometime.
- [13] What has not been explained is why there would also be inaction on the part of his attorney who had acted for him in proceedings before the trial court and who, in alacrity, filed the Notice of Appeal but did not, with similar diligence, prepare the record of appeal. The applicant is studiously silent on this and it does not help his cause.
- [14] Even if it is assumed that the Notice of Appeal was served upon the respondents and therefore meets the requirement of Rules 77 and 79 of the *Court of Appeal Rules*, 2022, then by dint of Rule 84, the appeal ought to have been instituted within sixty (60) days after the date when the notice of appeal was lodged. Rule 84 reads:

84.

- (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged:
 - (a) a memorandum of appeal, in four copies;
 - (b) the record of appeal, in four copies
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.



(3) The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction

[15]. As is apparent, the applicant cannot avail to himself the benefit of excluding the period required for preparation and delivery of proceedings by the superior court below as it has not been demonstrated that the letter bespeaking the proceedings was served on the respondents.

[16] As the Notice of Appeal was lodged on February 28, 2022, the record of appeal ought to have been filed by April 27, 2022. This application was filed on November 25, 2022, more than 200 days later. This is not a short delay and because the reasons of the inaction of the attorney has not been explained, the delay has not been satisfactorily explained to the Court. Matters are worse still because the Notice of Appeal upon which the extension of time to file the record of appeal is predicated is itself not competent because it was not served upon the respondents.

[17] The application of November 23, 2022 is dismissed with costs.

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.

