



REPUBLIC OF KENYA



**Ogutu v Onyango (Sued as the Personal Representative of the Estate of Onyango Homo - Deceased) (Civil Application E131 of 2022) [2023] KECA 686 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 686 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E131 OF 2022**

**F TUIYOTT, JA**

**JUNE 9, 2023**

**BETWEEN**

**MIDIMO OKELO OGUTU ..... APPLICANT**

**AND**

**JOSEPH OSEWE ONYANGO (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ONYANGO HOMO - DECEASED) ..... RESPONDENT**

*(Being an Application for extension of time to file an appeal against the Judgment of the Environment and Land Court at Siaya (A.Y. Koross, J) Dated 10th February, 2022 in ELC No. 32 of 2021)*

**RULING**

1. Judgment in Siaya Environment and Land Court Case No 32 of 2021 (OS) *Midimo Okelo Ogutu Vs Joseph Osewe Onyango (sued) as the personal representative of the Estate of Onyango Homo (the deceased)* was delivered on February 10, 2022. Promptly, the advocate for Midomo Okelo Ogutu (the applicant hereof) lodged a Notice of Appeal against the judgment on February 18, 2022 but do not serve it upon the advocate for the respondent until May 21, 2022 at 16.26hours, obviously out of time as Rule 77(1) of the *Court of Appeal Rules*, 2010 (now Rule 79 (1)) requires that an intended appellant shall, before or within seven days of lodging a notice of appeal, serve copies of it on all persons directly affected by the appeal.
2. The applicant is now before this Court in a Notice of Motion dated October 27, 2022 where he invokes various provisions of the Rules of this Court including Rule 4 and seeks leave to file the notice of appeal out of time and that the notice of Appeal filed on February 18, 2022 be deemed as duly filed and served.



3. The applicant swore an affidavit dated October 27, 2022 in support of the application. He depones:  

“That the delay in filing the memorandum and record of appeal was because I did not have the necessary funds to instruct my counsel to prosecute the appeal, thus they could not go on with the appeal on my behalf.”
4. This disposition does not correlate with first predicament that the applicant faces which is that the notice of appeal was served 90 days late. There is no explanation why, although filed on time, the notice was served many months later. Is it possibly the case that the advocate accepted instructions to file the notice of appeal but did not have instructions to serve it? I cannot speculate because no reason is proffered.
5. The submissions filed by counsel for the applicant does not make it any better. Counsel states that upon filing the notice of appeal,  

“the applicant averred that he had no further funds to pay us in order to successfully prosecute the appeal on his behalf and needed sufficient time to source the same.” That funds became available on October 26, 2022 when he prepared and filed the current application. Counsel proceeds as though there is no breach of the timelines for service of the notice. The reason for this lapse, again, is not explained. While on another occasion a delay of 90 days may not be considered inordinate, it inexcusable if not explained and more so because it is a failure to carry out such a simple task as service.
6. It also has to be observed that when an applicant cites impecunity as the reason for delay then, just as for any other reason, it must be proved. I imagine that one way of doing so is by filing an affidavit of means. Here, no such proof is offered.
7. In exercising the discretion granted to this Court by Rule 4, a judge ought to bear in mind such factors as the length of delay, the reason for delay, the degree of prejudice to the respondent if the application is granted, whether the matter raises issues of public importance and, possibly, whether the intended appeal has chances of success. I am not satisfied the applicant has demonstrated that he was unable to adequately instruct his advocates on time because of lack of fees.
8. The application of October 27, 2022 lacks merit and is hereby dismissed with costs.

**DATED AND DELIVERED AT KISUMU THIS 9<sup>TH</sup> 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.**

