



**Omido & another v Mbarak & 4 others (Civil Application  
E029 of 2022) [2023] KECA 972 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 972 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E029 OF 2022  
GV ODUNGA, JA  
JULY 28, 2023**

**BETWEEN**

**WILL W OMIDO ..... 1<sup>ST</sup> APPELLANT**

**JANET A OMIDO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HAMID ABDALLA MBARAK ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> RESPONDENT**

**RENE SCHILLER ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KILIFI ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application for extension of time within which to file a Memorandum  
of Appeal against the judgment in the ELC of Kenya at Malindi by Hon.  
Justice J. O. Olola on 17th June, 2020 in ELC Petition No. 20 of 2017)*

**RULING**

1. By a Motion on Notice expressed to be brought pursuant to Rules 4 and 42 of the Court of Appeal Rules, 2010 and Article 159(2) (d) of the [Constitution](#), 2010 and dated 30<sup>th</sup> November, 2022 the Applicants herein, Willy W. Omido and Janet A. Omido are seeking extension of time to file the Memorandum of Appeal and a Record of Appeal from the judgment of the Employment and Labour Relations Court at Nairobi (sic) delivered by Hon. Justice J. O. Olola delivered on 17<sup>th</sup> June, 2020 in ELC Petition No.20 of 2017. Accordingly, they seek that the draft memorandum of appeal be deemed as properly filed.



2. The Motion is supported by an affidavit sworn on even date by Victor Olewe, the Applicants' advocate. According to the Applicants, aggrieved by the judgement delivered on 17<sup>th</sup> June, 2020, they formally filed a Notice of Appeal dated 23<sup>rd</sup> June, 2020 lodged on 24<sup>th</sup> June, 2020 and vide a letter dated 22<sup>nd</sup> June, 2020, they applied for certified copies of the proceedings and judgement which were not made available till 13<sup>th</sup> October, 2022 and a certified of delay to that effect was issued on 4<sup>th</sup> November, 2022 by the Deputy Registrar of the ELC.
3. According to the Applicants the delay and the additional time taken to prepare the Memorandum and Record of Appeal was due to lack of proceedings and judgement within the prescribed period. It was the Applicants' view that no prejudice is likely to be occasioned to the Respondent by the grant of the orders sought herein, yet the intended appeal is merited, arguable and has high chances of success hence not frivolous.
4. The Motion was however opposed by the Respondent.  
According to the Respondent, the Notice of Appeal itself was served out of time, an action which has been challenged by the Respondent and is an indication of the lethargy exhibited by the Applicants. According to the Respondents, a Memorandum of Appeal is different from the Record of Appeal and that one does not require proceedings and judgement to file the Memorandum of Appeal. It was further averred that the fact that the annexures do not include the copies of the proceedings and judgement is an indication that the said documents were never required in lodging the appeal.
5. It was therefore contended that no proper reason has been given for the delay of almost two years in lodging the appeal.  
It was noted that the copy of the letter requesting for proceedings was never served on the Respondents.
6. At the virtual hearing of the Motion on 15<sup>th</sup> June, 2023, Learned Counsel, Mr Olewe appeared for the Applicants, Mr Furaha held brief for Mr Adhoch for the 1<sup>st</sup> Respondent while Ms Lutta appeared for the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> and 4<sup>th</sup> Respondent though duly served were not represented. Mr Olewe entirely relied on his submissions. In opposing the application, Mr Furaha apart from relying on his replying affidavit and submissions, pointed out that the Motion was brought under the 2020 edition of the Court of Appeal Rules as opposed to the 2022 edition. Ms Lutta, on the other hand complained that todate, they have not been served with the Notice of Appeal.
7. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon.
8. It is contended that the fact that the Motion is brought under the 2010 edition of the Court of Appeal Rules as opposed to the 2022 edition is fatal to the application. In my view, the recital of the Rules which are no longer in force is not fatal to the application as long as no prejudice has been occasioned by the failure to cite the correct rules. As regards the 2<sup>nd</sup> Respondent's contention that they have never been served with the Notice, of Appeal, there is a recourse available in law for that omission and that recourse is not the denial of an extension of time to lodge the record of appeal.
9. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is



arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

10. Those principles were restated by Waki, JA in *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... 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 vs. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

11. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, (supra) while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.
12. In *Leo Sila Mutiso vs. Helen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
13. In this case, the Applicant’s ground for seeking extension is that copies of the proceedings and judgment were supplied outside the prescribed period. The Respondents however contend that the letter requesting for proceedings was not copied to them. In my view, it is the very fact that the letter requesting for proceedings was not copied that the Applicants are seeking for extension of time. Had that letter been copied, the Applicants would have had the benefit of the proviso to rule 84(1) of the Rules of this Court. As was held by this Court in *Lucy Wambui Maina & 2 Others v Peter Sundra Maina* Civil Application No. Nai. 330 of 2004:

“The mere fact that the letter bespeaking proceedings was not copied to the Respondents only disentitles the applicants from taking advantage of the proviso to rule 81 of the Court of Appeal Rules but does not preclude them from relying on the certificate of delay to explain that they were not at fault in obtaining proceedings when they did...Where the mistake in preparing and delivery of the documents for the appeal records was due to the fact that the



Registrar for some reason took six months to prepare and supply copies of the proceedings and he certified that in writing, this transgression ought not to have been visited on the applicants or their advocates.”

14. It was contended that nothing stopped the Applicants from filing the Memorandum of Appeal even without the copies of the proceedings and judgement. Rule 84(1) of the Court of Appeal Rules, 2022 provides that:

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.

15. A cursory consideration of the said provision would reveal that nothing bars an appellant from filing the memorandum of appeal and then, upon obtaining the copies of the proceedings and judgement, filing the record of appeal. However, a consideration of the other rules shows that that may not necessarily be the case. For example, rule 94(1) of the Rules provides that:

The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81.

16. The above rule contemplates that the memorandum and the record of appeal are to be served together. The practice, which in my view is more logical, is therefore that the memorandum of appeal is filed with and is usually incorporated in the record of appeal. Accordingly, the Applicants cannot be penalised for adhering to a rule of practice which can be said to have acquired a force of law.

17. I have considered the submissions made in this matter and it is my view that this is a proper case for the court to exercise its discretion in favour of the Applicants. It is appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See *Philip Chemwolo & Another vs. Augustine Kubende* [1986] KLR 492; (1982-88) KAR 103.

18. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.

19. In my view, the delay involved which delay has been explained, in these circumstances cannot be the basis of denying the applicants the opportunity of exercising their right to appeal.



20. In the premises, I allow the Notice of Motion dated 30<sup>th</sup> November, 2022 and I extend time for filing and serving the memorandum and Record of Appeal from the judgment of the ELC delivered by Hon. Justice J. O. Olola delivered on 17<sup>th</sup> June, 2020 in ELC Petition No.20 of 2017. Let the same be filed and served within 21 days. The costs of this application are awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

21. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

