



Indeche (As the Legal Representative of the Estate of Ann Seyenza Itanyukhu Deceased) v Musambai (Civil Application E046 of 2023) [2023] KECA 1077 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1077 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E046 OF 2023
F TUIYOTT, JA
SEPTEMBER 22, 2023**

BETWEEN

MESHACK MUNJURU INDECHE (AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANN SEYENZA ITANYUKHU DECEASED) APPLICANT

AND

TOM MAKOKHA MUSAMBAI RESPONDENT

(Being an application for extension of time to file an Appeal out of time from the judgment of Environment and Land Court at Bungoma (Boaz N. Olao, J.) Dated 18th January, 2021 in ELC Case No. 115 of 2013)

RULING

1. The Notice of Motion dated 11th April, 2023 is said to be brought under Article 159(2) of the Constitution of Kenya, section 3A and 3B of the Appellate Jurisdiction Act and rule 4 of this Court of Appeal Rules, 2022 seeking two substantive order: that the Notice of Appeal dated 25th January, 2021 be deemed valid for the purposes of Rule 83 of the Court of Appeal Rules, 2022; and that leave be granted to the applicant to file and serve an appeal out of time against the whole judgment of Olao, J, delivered on 18th January, 2021 in Environment and Land Court Case No 115 of 2013.
2. In an affidavit sworn by Omagwa Angima, counsel for the applicant, on 11th April, 2023, he states that the applicant was previously represented by Ocharo Kebira & Company Advocates who upon delivery of the judgment filed a notice of appeal and applied for certified proceedings and judgment. The said advocate was however appointed as a judge of the Employment and Labour Relations Court and was unable to pursue the matter further. In the interim, he appointed a Ms. Ratemo advocate to handle the matter but which never came to be. The bespoken proceedings were delayed and were only ready on 29th July, 2021 and therefore a certificate of delay to that effect was issued on 18th August, 2021. He



depones that when his firm finally took conduct of the matter, they could not urgently attend to it as they were based in Malindi, a considerable distance from Bungoma. This Court is urged to accept and find that the delay though considerable is explained and excusable and the applicant is only a victim of an inter-play of circumstances beyond his control.

3. The application is unopposed and the depositions in the affidavit in support are therefore uncontroverted.
4. In considering an application of this nature, this Court is enjoined to heed the settled principles restated in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 where this court said;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

5. From the record, judgment was entered on 18th January 2021. A notice of appeal dated 25th January, 2021 was lodged at the High Court registry in Bungoma on 26th January, 2021. This was therefore filed within the timelines prescribed under rule 75(2) of the *Court of Appeal Rules, 2010* (then applicable). Prayer 2 of the application was therefore unnecessary as the notice of appeal was filed on time.
6. On the second prayer for leave to file an appeal out of time, it has emerged that there is a letter dated 25th January, 2021 by Messrs. Ocharo Kebira & Company Advocates to the deputy registry Bungoma bespeaking certified copies of the proceedings for purposes of filing the appeal. There is also a certificate of delay noting that counsel for the applicant applied for the certified proceedings on 2nd February, 2021 but the same were not ready for collection until 30th July, 2021. The period up to 30th July, 2021 is excluded for reckoning time for purposes of filing the appeal (See proviso of Rule 82(1) of the *Rules* of this Court then applicable). Working out time, the appeal ought to have been filed by 28th September, 2021. This application is therefore brought nearly eighteen (18) months late. Before I exercise my discretion, I must examine the reasons for this extensive delay so as to see whether it is well explained and can be excused.
7. The applicant’s current counsel on record Messrs. Omagwa Angima & Company Advocates gives a plethora of reasons for the delay. The Court is told that one of the reasons is because the applicant’s erstwhile advocate, Mr. Ocharo Kebira was appointed as a judge of the Employment and Labour Relations Court in late 2019 and could not continue handling the matter further. The Court is further told that the applicant passed the matter to a Ms. Ratemo advocate who also found greener pastures in the Office of the Director of Public Prosecutions and could not continue handling the matter as well. Lastly, I am told that the lead clerk of Messrs. Ocharo Kebira & Company Advocates who handled the firm’s clerical matters relating to the appeal passed on in January 2022, not long after Mr. Ocharo’s departure. Counsel does not give an exact date on when they took cognizance of the matter but it is clear that after the month of January 2022, nothing was done regarding filing of the appeal. I am however not given an exact date as to when this happened and I cannot say that counsel acted promptly. Conduct of the applicant’s matter seems to have been bedeviled by confusion and laxity by both firms. The result is that a period of over 14 months, that is after January 2022, still remains unexplained. That the matter was filed in Bungoma and Messrs. Omagwa Angima & Company Advocates is based in Malindi is not a satisfactory reason why they did not follow up on filing the appeal. Even if I were to agree that a mistake or oversight of counsel should not be visited upon a diligent litigant, it would



not apply here as the applicant has not demonstrated that he fits into the category of diligent litigants. A case belongs to a litigant and not his advocates. As this Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, observed;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of litigation...parties have responsibility to show interest in and follow up their cases...”.

8. Nothing has been put forward to show that the applicant was tirelessly following up on his matter and it is his appointed advocates that let him down. Indeed, no affidavit was sworn by the applicant himself. Though the application is unopposed, the delay in filing the appeal is inordinate and inadequately explained. It would be injudicious to exercise my discretion in its favour.
9. The application dated 11th April, 2023 is without merit and is hereby dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

