



Osweta & another v Patel & 4 others; County Government of Kisumu & 2 others (Interested Parties) (Civil Application E013 of 2023) [2023] KECA 1084 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1084 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E013 OF 2023
PO KIAGE, JA
SEPTEMBER 22, 2023**

BETWEEN

MAURICE OYUGI OSWETA 1ST APPLICANT

MARTHA ACHIENG OYUGI 2ND APPLICANT

AND

JAYANTILAL G. PATEL 1ST RESPONDENT

MOHAN SINGH RUPRA 2ND RESPONDENT

NISHIT CHAUHAN 3RD RESPONDENT

HASMUKHRAI GOSAR SHAH 4TH RESPONDENT

NEMCHAND B. SHAH 5TH RESPONDENT

AND

COUNTY GOVERNMENT OF KISUMU INTERESTED PARTY

CITY MANAGER KISUMU INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

(An Application for extension of time to file and serve the Notice of Appeal and the Record of Appeal from the Judgement of the Environment and Land Court at Kisumu (Ombwayo, J.) dated 12th October 2022 in Petition No. E25 of 2021)

RULING

1. The applicants herein moved the court by a Motion dated June 19, 2023, seeking the following orders in the main;



- “1. Spent.
 2. The applicant be granted leave to file and serve a fresh Notice of Appeal out of time and within seven days from the date of the order.
 3. Upon grant of order 2 above, the applicant’s Notice of Appeal annexed hereto be deemed as duly filed and served.
 4. The applicant be granted leave to file and serve the index and Record of Appeal dated January 25, 2023 out of time.”
2. I have contemplated the application, the grounds in support thereof and the law. This being a Rule 4 application, I shall be guided by the holding of this court in *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees* [2020] eKLR where the factors to consider, in the exercise of my discretion, which is free and unfettered, were stated as;
- “Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”
3. In the matter before me, it is deposed that, following delivery of the impugned judgment on October 12, 2022, the applicants instructed their counsel on record at the time, Saroni & Stevens Advocates, to file a notice of appeal and the same was done on October 21, 2022. Their counsel further wrote to the court registry requesting for certified copies of proceedings and the judgment on the same day. The applicants contend that despite their counsel making several follow ups to check whether certified proceedings were ready, no response came forth until December 15, 2022, when they were informed that they were ready. It is averred that on December 19, 2022, counsel applied for a certificate of delay. As they waited for it, they went ahead and filed the record of appeal together with an application seeking leave to file the appeal out of time.
 4. The applicants claim that upon their counsel serving the respondents with the application for extension of time, it was brought to their attention that the notice of appeal, allegedly filed on October 21, 2022, had not been served upon the respondents. In the result the respondents filed an application dated February 25, 2023, seeking to strike out the notice of appeal, on grounds that it was not served upon the respondents within 7 days as stipulated by the rules of this court. On May 31, 2023, this court allowed that application and struck out the notice of appeal.
 5. The applicants now seek leave to file and serve, a fresh notice of appeal and the index and record of appeal dated January 25, 2023, out of time. On record is the affidavit of Mino Kimeu, an advocate from the law firm of Saroni & Stevens Advocates, who had been assigned this matter on appeal. While regretting the omission that occurred, counsel claims that prior to the respondents’ lodgment of the application to strike out the notice of appeal, she was under the mistaken belief that the notice had been served upon them.
 6. On counsel’s account, I am inclined to accept as plausible the explanation that the failure to serve the respondents with the notice of appeal was an honest mistake. Being of that mind I am amenable to



exercise my discretion in favour of the applicants, a task made easier by the absence of opposition to the application.

7. In the result the motion dated June 19, 2023, is allowed. I accordingly extend time, to the end that the applicants shall lodge the notice of appeal within seven (7) days of the date of this order and the record of appeal within thirty (30) days of this order.
8. Costs of this motion shall be in the intended appeal.

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

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

