



**Aduogo v Oturu (Suing as the administrator of the Estate of the Late Samwel Oturu Aduogo)
(Civil Application E023 of 2023) [2023] KECA 1301 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1301 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E023 OF 2023
PO KIAGE, JA
OCTOBER 27, 2023**

BETWEEN

JACKTON OKULA ADUOGO APPLICANT

AND

**FRANCIS ODHIAMBO OTURU (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE SAMWEL OTURU ADUOGO) RESPONDENT**

*(An Application for extension of time to file and serve the Record of Appeal
from the Judgment of the Environment and Land Court at Kisumu
(Kibunja, J.) dated 22nd November 2017 in ELC Case No. 830 of 2015)*

RULING

1. The applicant herein moved the Court by a Motion dated February 24, 2023, seeking the following order in the main;
2. An order be and is hereby made extending time for the service of the Record of Appeal and the Record of Appeal that was served on September 5, 2019 is deemed to have been filed within time.”
2. I have contemplated the application, the grounds in support thereof and the law. This being a Rule 4 application, I recall 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, free and unfettered, thought it be, 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 by the applicant's counsel, Mr. Richard B. O. Onsongo that, the record of appeal was filed on July 4, 2019 but served upon the respondent on September 5, 2019, later than the time prescribed under Rule 92(1) of the [Court of Appeal Rules, 2022](#). The sub-rule requires service of the memorandum and record of appeal to be effected within 7 days of their lodgment. Counsel explains the reason for the delay as being that, on the date of filing the said record of appeal, the Court Registry staff marked it as having been filed out of time; upon receipt of the record marked as 'Lodged out of time', counsel engaged the registry personnel in an attempt to demonstrate that the record was filed within time, taking into account the applicant's stay of execution application that was allowed by this Court on June 19, 2019.
4. It is contended that by the time counsel resolved with the registry staff that the record was filed within time, the 7 days within which the record ought to have been served upon the respondent had lapsed. The respondent consequently filed and served upon the applicant an application seeking to strike out the memorandum and record of appeal. That application was allowed on March 22, 2023 by this Court. The applicant thus makes the instant application seeking extension of time within which to serve the record of appeal and have it deemed duly filed.
5. In written submissions by the applicant's counsel, dated June 30, 2023, it is submitted that the application for extension of time was filed immediately after the Court delivered the ruling striking out the record of appeal, thus, there has been no delay in moving the Court. It is argued that the applicant will suffer substantial damage and loss if the orders sought are not granted since, the impugned judgment will be executed resulting in the eviction of the applicant and demolition of his home. Further, the memorandum of appeal sets out arguable grounds of appeal including, whether the respondent had capacity to prosecute the suit before the Environment and Land Court, and whether a trust was created by the registration of the suit land in the names of the respondent and the father of both the applicant and the respondent.
7. Having examined the record before me, I am inclined to accept as plausible counsel's explanation on the reason for the delay. Besides, I note that he strived to move with speed and lodged the application for extension of time while the motion for striking out was pending hearing. Being of that mind, I am amenable to exercise my discretion in favour of the applicant, a task made easier by the absence of opposition to the application.
8. In the result, the motion dated February 24, 2023, is allowed. I accordingly extend time to the end that the record of appeal filed on July 4, 2019, and served on September 5, 2019, be and is hereby deemed as having been filed within time.
9. Costs of this motion shall be in the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 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

