



**Oluwaso & 2 others v Omollo & another (Civil Application  
E013 of 2023) [2023] KECA 1240 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1240 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E013 OF 2023  
F TUIYOTT, JA  
OCTOBER 6, 2023**

**BETWEEN**

**LUCIA ACHIENG OLUWASO ..... 1<sup>ST</sup> APPLICANT**

**ANDREW ODHIAMBO OLUWASO ..... 2<sup>ND</sup> APPLICANT**

**DOMINIC OUMA AMOLO ..... 3<sup>RD</sup> APPLICANT**

**AND**

**FREDRICK ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**JUMA PAUL OMOLLO ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file notice of appeal out of time  
from the judgment of the Environment and Land Court at Siaya (A.Y.  
Koross, J) delivered on 6th October 2022 in Siaya ELC Appeal No.16 of 2021)*

**RULING**

1. In the Notice of Motion dated 31<sup>st</sup> January, 2023 said to be predicated on Rules 4 and 5(2)(b) of the *Court of Appeal Rules, 2022*, the applicants seek leave of this Court to file a notice of appeal and appeal out of time against the decision of A. Y. Koross, J. delivered on 6<sup>th</sup> October, 2022 in Siaya Environment and Land Court (ELC) Appeal No. 16 of 2021.
2. In an affidavit in support of the application sworn by Christine Musando, counsel for the applicants explains: she was aware that judgment was to be delivered on 6<sup>th</sup> October, 2022 but mistakenly diarized the date as 26<sup>th</sup> October, 2022; on the mistaken date, she appeared before court for reading of the judgment only to realize her mistake; and upon discussing the contents of the judgment with her client, she received instructions to file an appeal against it by which the time for filing the notice of appeal had since lapsed on 21<sup>st</sup> October, 2022. She pleads with this Court not to visit her mistake on her client. It



is her further averment that the application for extension of time was brought without delay and the respondents would not suffer any prejudice if the same is allowed.

3. Vide a replying affidavit sworn on 6<sup>th</sup> April, 2023 by the 2<sup>nd</sup> respondent, the respondents oppose the application and aver that the application and the averments in the supporting affidavit are not true and are concoctions meant to cover up the sloppiness of counsel in failing to attend court on the date appointed for judgment. The rest of the responses to go to the merit of the appeal sought to be filed.
4. The written submissions filed by the applicants are substantially a regurgitation of the grounds put forward in support of the motion while the respondents did not file any.
5. This is an application for extension of time to file a notice of appeal out of time and the discretion granted to this Court under Rule 4 of the Rules of the Court to extend time is guided by the well settled principles recapped in *Fakir Mohamed vs Joseph Mugambi & 2 Others* [2005] eKLR as;

“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...”

6. Rule 77(2) of the *Court of Appeal Rules, 2022* requires that a notice of appeal be lodged within fourteen days of the date of the decision intended to be appealed against. It is common ground that the judgment intended to be appealed from was delivered on 6<sup>th</sup> October, 2022, and the notice of appeal ought to have been filed on or before 21<sup>st</sup> October, 2022 but was not. How is the lateness explained?
7. Counsel for the applicants states that she mis-diarized the date for the judgment and learnt of the judgment on 26<sup>th</sup> October, 2022 and after receiving instructions from the applicants to file an appeal, could not do so since the window for filing a notice of appeal had closed. The applicants had initially filed an omnibus application on 4<sup>th</sup> November, 2022 seeking stay of execution and leave to appeal out of time. The misconceived application was withdrawn, as it had to, as the two prayers could not be presented in one application. Hence, the current application. The initial application was without doubt brought without delay but suffered the fate of being stillborn. Once that application was withdrawn at its hearing on 25<sup>th</sup> January, 2023 before a three-judge bench, the applicants moved quickly to file a fresh application just 6 days later. Looked at in this context, even the present application is not inordinately late.
8. However, as the reason for failure to meet the strict timelines pivots around mistake of counsel, the nature of mistake and perhaps the general conduct of the client in keeping watch over his case needs to be interrogated. Regarding the former, this Court in the case of *Itute Ingu & Another vs Isumael Mwakavi Mwendwa* [1994] eKLR stated:

“What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court’s rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.”



9. Counsel provided evidence of her diary which showed that she was truthful in believing the judgment would be read on 26<sup>th</sup> October, 2022 and not 6<sup>th</sup> October, 2022. This is a bona fide mistake. Second, there is no evidence or allegation that the applicants have been lethargic in pursuing their action. In a word, the moderate delay has been well explained. In addition, it has not been demonstrated that the respondents would suffer any prejudice if the application were to be granted.
10. The application is merited and is for allowing. The applicants shall within fourteen (14) days hereof file and serve a notice of appeal and thereafter, within sixty (60) days of filing and serving the notice of appeal, file and serve the record of appeal. Costs of this application shall be in the intended appeal.

**DATED AND DELIVERED AT KISUMU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR.**

