



**Ouma & another v Oduo (Civil Appeal (Application) E142 of 2022)
[2023] KECA 1244 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1244 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E142 OF 2022
J MOHAMMED, F TUIYOTT & JM NGUGI, JJA
OCTOBER 6, 2023**

BETWEEN

MONICA ATIENO OUMA 1ST APPELLANT

WILLIS ODHIAMBO OUMA 2ND APPELLANT

AND

RHODA AWUOR ODUO RESPONDENT

(Being an Application to strike out an Appeal from the Judgment of the Environment and Land Court at Homa Bay (Ongondo, J.) dated 15th June, 2021 in Homa Bay ELC No. 60 of 2021(O.S) Formerly MIGORI ELC NO. 674 OF 2017 (O.S))

RULING

1. The gentle prodding by this Court at plenary hearing of the notice of motion dated June 27, 2022 to get concession from counsel for the appellants that the motion was uncontestable came to no avail!
2. Judgment, the subject of the appeal herein, was rendered on June 15, 2021. In good time, the 2nd appellant lodged a notice of appeal at the registry of the trial court on June 24, 2021 intimating an intention to prefer an appeal against the said decision. A day earlier, on June 23, 2021, the same appellant had written to the trial court bespeaking certified proceedings. As for the 1st appellant, she lodged the notice of appeal and the letter bespeaking certified proceedings on June 28, 2021. Again, within the timelines prescribed by the Rules of this Court.
3. Proceedings took some time coming and when finally ready, the Deputy Registrar of the trial court issued a certificate of delay dated April 22, 2022 and fashioned thus:
 1. An application for copies of the proceedings and Judgement in the suit herein was made vide letter dated June 22, 2021 and filed in court on the June 23, 2021, which was within 30 days of the date of delivery of the Judgement by the Advocates for the 2nd defendant.



2. On the March 21, 2022, the defendants’ advocates were duly notified that copies of the proceedings and the Judgement were ready for collection upon payment of the requisite court fees.
3. The court fees (Deposit) in respect of the typed and certified copies of the proceedings and Judgement having been made on the June 23, 2021, the proceedings and judgement were certified and ultimately collected by the defendants’ advocates on the March 22, 2022.
4. The time taken by this Honourable court to prepare and supply the typed copies of the proceedings and Judgement was from the June 23, 2021 to the March 22, 2022, that is 273 days.
5. The certificate of delay was prepared and was ready for collection on the April 22, 2022”
4. It is on the basis of the certificate of delay that the applicant contends that the notice of appeal should have been lodged on May 21, 2022 and so when lodged on June 20, 2022, and without leave of this Court, is lodged out of time.
5. One response to the application is not entirely easy to follow.

The appellants train their guns on the manner in which the certificate of delay was prepared. They submit that because the rules of this Court prescribe that a period of days from the happening of an event or the doing of an act or thing shall be deemed exclusive of the day when the event happens or the act or thing is done then the Deputy Registrar of the Environment and Land Court (ELC) erred when she included the date, June 23, 2021 when the court fees on proceedings was paid and that computation of time ought to have commenced on the June 24, 2021. A further argument is that in computing time the Deputy Registrar ought to have excluded all the public holidays, Sundays and the December recess and/or vacation which commenced on December 21, 2021 and terminated on January 13, 2022.

6. The folly in the appellants’ attack of the manner in which the length of delay in preparation and delivery of the proceedings was worked out becomes all too clear when one considers the proviso to Rule 84(1) of the Rules of this Court. We reproduce Rule 84 in its entirety:

84. Institution of appeals

1. 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:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.



2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondent.
 3. The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”
7. What is critical is that the period taken for preparation and delivery of bespoke proceedings is to be excluded in counting time within which an appeal is to be instituted. It does not matter the number of days, in this case the impugned 273 days, stated by the Deputy Registrar of the trial court to be the time taken by the court in preparing and supplying the lodged proceedings and judgment to the appellants. What is pivotal in reckoning the time within which the appeal ought to have been instituted is the date when the proceedings and judgement were ready for delivery to the appellants. In this event the Deputy Registrar certified it to be on March 22, 2022.
8. The appellants then seek to fault this date by alleging that the advocates then on record were never notified that the proceedings were ready on March 22, 2022. Indeed, in an affidavit sworn by Winny Odhiambo Ochwal, in response to the motion, she boldly desposes;
10. That my attention has been brought to the contents of paragraph 2 of the Certificate of delay dated April 22, 2022 which alleged that the advocates on record for the Appellants were notified that the proceedings were ready for collection. For clarity, the averments therein are untrue and that there has never been any letter addressed and/or served upon the said Advocates informing them that the proceedings were ready for collection.”
9. Fielding questions of the Court at plenary hearing, Mr. Wafula appearing for the appellants conceded that the appellants collected the certificate of delay without challenging or protesting its contents. We also pointed out to counsel that it was manifestly unfair to make such damning allegations against the Deputy Registrar, who would ordinarily have no dog in the fight, in the absence of any proof and without giving her/him an opportunity of confronting the allegations. In the end, counsel conceded, as he had to, that the response to the striking out motion was not the occasion for the appellants to impugn the contents of the certificate of delay.
10. We accept the veracity of the certification that the proceedings and judgment were ready for collection and actually collected on March 22, 2022. It follows that as the appeal was instituted after the deadline of May 23, 2022, without leave, then the notice of motion of June 27, 2022 must succeed. It is hereby allowed with costs. The appeal instituted on June 20, 2022 is hereby struck out.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

