



**Otuga v Ouko & another (Civil Application E015 of 2023)
[2023] KECA 1246 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1246 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E015 OF 2023
F TUIYOTT, JA
OCTOBER 6, 2023**

BETWEEN

ENOCK OTIENO OTUGA APPLICANT

AND

MARY AUMA OUKO 1ST RESPONDENT

**ATTORNEY GENERAL (SUED ON BEHALF OF MINISTRY OF LANDS
KISUMU LANDS REGISTRY) 2ND RESPONDENT**

(An application for extension of time to file an Appeal out of time from the judgment of the Environment & Land Court of Kenya at Kisumu (A. O. Ombwayo, J) dated 22nd September, 2022 in Kisumu ELC No. 334 of 2013)

RULING

1. Before me is a notice of motion dated 30th January, 2023 said to be brought under article 159 of *the Constitution* of Kenya, 2010, sections 3, 3A, 3B of the *Appellate Jurisdiction Act*, cap 9 Laws of Kenya, rule 4, 41, and 49 of the *Court of Appeal Rules*. In the main, the motion seeks an order for leave to file an appeal out of time from the judgment of Ombwayo J. delivered on 22nd September 2022 in Kisumu ELC No. 334 of 2013 and that the Appeal filed as appeal no. E298 of 2022 on 30th December, 2022 be deemed to be duly filed, served and properly on record.
2. In the affidavit sworn on similar date by the applicant, he explains that he ordinarily resides in Sweden and was in that European Country during the pendency of the suit. Through a WhatsApp message, his counsel on record informed him that judgment had been delivered on 22nd September, 2022. Subsequently, a notice of appeal was lodged on time on 29th September, 2022. He further states that his advocate applied for copies of proceedings and judgment on the same day however it was not until 28th October, 2022 that the advocate received a letter dated 17th October, 2022 from the court's registry indicating that the same were certified ready for collection. The applicant depones that during the



period between 26th October, 2022 and 26th December, 2023 (must have meant 2022), he was in an unreachable part of the country and his phone also had technical issues and he was, therefore, unable to receive information from his advocate about copies of the proceedings and judgment being ready, and that he needed to provide fees for filing the appeal. He deposes that this information only reached him on 20th December, 2022 when he immediately took steps to inquire about the process of filing the appeal. To demonstrate the seriousness in which he and his advocate took the matter, he states that his advocate cut short his Christmas break to file the appeal on 30th December, 2022.

3. The 1st respondent filed a response via affidavit sworn on 9th March, 2023. She assails the applicant's explanation that he had challenges in communication because he is residing in Sweden as the world has advanced in numerous ways in technological communication. That in any event the email of 22nd September, 2022 shows that the applicant was immediately informed of the outcome. Similarly, the letter informing the applicant about the readiness of the proceedings was sent through email and not phone call and the applicant could still access his email. In addition, she contends that neither she nor her advocates were served with any communication requesting for the proceedings. She observes that since the applicant had already given his advocate instructions to file an appeal within the requisite timelines and having obtained the proceedings within the 60 days period, there was no reason given why the appeal could not have been lodged on time. She laments that the application is a mere afterthought and a reaction to her application dated January 18, 2023 seeking to have the appeal struck out. The court is asked to dismiss the application as the applicant has committed an illegality by filing an appeal outside time without seeking leave and should not be allowed to use the court to remedy such illegality.
4. Both parties have filed their submissions which are a mirror of their averments above.
5. Rule 84 makes provision for institution of appeals and reads: -

- “(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - 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 of 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 times 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 his application for such copy was in writing and a copy of it was served upon the respondent.
 3. The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”
6. From the record there is no evidence that the applicant served the respondents with a letter bespeaking for proceedings and he cannot benefit from the proviso to Sub-rule 1 of Rule 84. For that reason the



time within which the applicant was required to file the appeal begun to run on 29th September, 2022 when the Notice of Appeal was lodged and lapsed on or about 28th November, 2022. The appeal filed on 30th December, 2022 is about a month late and this delay is not inordinate. Nevertheless, it was filed outside the time prescribed by the Rules and without leave, and which lapse was only sought to be remedied a month later after the 1st respondent filed an application to strike out the appeal.

7. The respondent makes strong arguments against the application. It is submitted that the Court cannot simply tell whether the applicant was honestly out of touch or is simply hoodwinking the Court into excusing him for failing to file his appeal on time. It is contended that the applicant was also informed of the strict timelines of filing an appeal and ought to have been vigilant in following up on the process regardless of any personal plans he may have had. He should have set up his appeal ready while awaiting the certified copies of the proceedings and once these were provided, all that would have been needed would have been to file the appeal.
8. The 1st respondent emphasizes the applicant was only triggered into action by the respondent's application dated 18th January, 2023 as it has not been explained why after filing the record of appeal on 30th December, 2022 without leave, the applicant had to wait up to 30th January, 2023 to file the instant application for extension of time. Similarly, the reason for delay is unsubstantiated.
9. No doubt, the current application was precipitated by the 1st respondent's application of 18th January, 2023 to strike out the appeal yet the lateness in filing the appeal was 31 days or so. This was not inordinate even if the period up to 30th January, 2023, a further 30 day delay, when the application was filed is considered. In the Court's discretion, it will excuse this delay to give the applicant a chance to pursue his right of appeal, and in so doing, the Court notes that the respondents have not stated or demonstrated that, save for frustrating the 1st respondent's striking out motion, they will suffer substantial prejudice if the application were to be granted. I trust that I have considered this matter within the guidelines set out in *Fakir Mohamed vs Joseph Mugambi & 2 others* [2005] eKLR).
10. The upshot is that notice of motion dated January 30, 2023 is allowed as prayed. Costs shall be in the appeal.

DATED AND DELIVERED IN KISUMU THIS 6TH 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

