



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ongatta v Omulo & another (Civil Application E109 of 2023)  
[2023] KECA 1402 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1402 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E109 OF 2023  
HM OKWENGU, JA  
NOVEMBER 24, 2023**

**BETWEEN**

**JOAB OKETCH ONGATTA ..... APPLICANT**

**AND**

**JOHN OMULLO OMONDI ..... 1<sup>ST</sup> RESPONDENT**

**JOSINTA AKINYI OMULO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to appeal against the judgment of the Environment and Land Court at Siaya (Koross, J) dated 27th October, 2022 in ELC Case No. 33 of 2021)*

**RULING**

1. By a Notice of Motion dated 3<sup>rd</sup> August, 2023, Joab Oketch Ongatta, the applicant herein seeks orders as follows:
  - i. That leave be granted to the applicant extending time to file and serve a Notice of Appeal against the Judgment and/or Decree of the Hon. Koross, J. dated 27<sup>th</sup> October, 2023 in Siaya, HC ELC Case No. 33 of 2021.
  - ii. That the applicant be granted an extension of time to file and serve a Record of Appeal out of time against the Judgment and/or Decree of Hon. Koross, J. dated 27<sup>th</sup> October, 2022 in Siaya HC ELC Case No. 33 of 2021.
  - iii. That costs be in the cause.
2. In his affidavit sworn in support of the motion, the applicant explains that he is dissatisfied with the judgment in Siaya HC ELC Case No. 009 of 2021, in which his suit against the respondents was dismissed on 27<sup>th</sup> October, 2022. He applied for certified copies of proceedings and judgments on the



same date, but received certified copies of the proceedings and judgments on 11<sup>th</sup> July, 2023 and handed over the same to his advocate.

3. He believes that he has an arguable appeal and therefore prays for extension of time to enable him pursue the same. He contends that there is no inordinate delay in the presentation of his application and that the respondents will not suffer any prejudice. He has exhibited a copy of his letter addressed to the Registrar bespeaking copies of the proceedings.
4. The respondent has opposed the motion through a replying affidavit in which she contends that there is no evidence that the proceedings were ready for collection on 10<sup>th</sup> July, 2023 and not earlier as no certificate of delay had been exhibited; that the applicant has not filed any notice of appeal and is therefore improperly before the Court; that the applicant has not given any good reason as to why the notice of appeal or record of appeal were not filed within the statutory timelines and that the applicant's motion has been provoked by the process of execution initiated by the respondent through a notice to show cause.
5. The respondent also filed written submissions in which she urged the Court to dismiss the applicant's motion as it has been brought after an inordinate delay of 10 months which delay has not been explained.
6. The applicant has moved this Court under Rule 4 of the *Court of Appeal Rules*, which gives this Court discretion to extend time. However, such discretion must be exercised judicially, which means, that there must be a good basis for the exercise of that discretion. In particular, under that Rule, an applicant must satisfy the Court that the delay is not inordinate and that there is good reason for the delay. (*Nicholas Kiptoo Arap Salat -vs- Independent Electoral & Boundaries Commissions & 7 Others* [2014] eKLR; *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi*, [1999] 2 EA 231; and *Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet* [2018] eKLR)
7. In this case, the applicant brought his motion about 10 months after the judgment delivered on 27<sup>th</sup> October, 2022. Under Rule 84 of the *Court of Appeal Rules*, the applicant was required to file a notice of appeal within 14 days from the date of the judgment. The applicant has not given any reason as to why the notice of appeal was not filed within the required timeline. The applicant did not require any proceedings or copy of the judgment to enable him file the notice of appeal.
8. As regards the record of appeal, the same was required to be filed within 60 days from the date the notice of appeal was lodged. Be that as it may, under Rule 84 of the *Court of Appeal Rules*, the period required for preparation and supply of record of appeal can be excluded for computation of time where certain conditions are complied with.
9. The applicant has not demonstrated that he complied with the requirements of Rule 84 of the *Court of Appeal Rules*, such as to justify the exclusion of the time required for the preparation and supply of the copy of the proceedings and judgment. There is no evidence that he copied the letter bespeaking the proceedings to the respondents, nor is there any certificate of delay from the Registrar of the ELC confirming the period that was required for the supply of such documents. In truth, the applicant has not given any plausible reason for the delay in filing the notice of appeal or record of appeal.
10. In the circumstances, there is no justification for this Court to exercise its discretion in the applicant's favour. The applicant's motion is accordingly dismissed with costs.

**DATED AND DELIVERED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

