



REPUBLIC OF KENYA



**KENYA LAW**  
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**Owino v Ogolla & 2 others (Civil Application E084 of 2023)  
[2023] KECA 1370 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1370 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E084 OF 2023  
HA OMONDI, JA  
NOVEMBER 17, 2023  
(IN CHAMBERS)**

**BETWEEN**

**CHRISTOPHER OKELLO OWINO ..... APPLICANT**

**AND**

**PAUL OTIENO OGOLLA ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD OUMA OPONDO ..... 2<sup>ND</sup> RESPONDENT**

**LEONARD OCHIENG OPONDO ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time to file an Appeal out of time against  
the Order/Judgment of the Environment and Land Court at Kisumu  
(Ombwayo, J.) dated 1st October 2023 in ELC Appeal No. 52 of 2019)*

**RULING**

1. By a notice of motion dated July 18, 2023, the applicant prays to this Court to:
  - (a) Enlarge time and grant him leave to lodge an appeal out of time against the Judgment dated 1<sup>st</sup> October 2021 of the Environment & Land Court at Kisumu ELC No. 52 of 2019 (Ombwayo, J.) and delivered electronically on 1st day of October, 2021,
  - (b) order stay of execution of the Judgment and Decree thereto, and any and all attendant consequences pending hearing and determination of the Appeal in the Court of Appeal.
  - (c) issue a temporary injunction restraining the respondents by themselves, their servants, employees, workmen, agents, heirs, personal representatives or otherwise howsoever from evicting, demolishing, conveyancing, transferring, arbitrary registration or in any other manner



interfering with the appellant's right as a rightful beneficiary of the Property known as Title Number [particulars withheld], pending the inter-parties hearing of appeal.

2. The appellant had filed an appeal against the respondents in Kisumu ELC. No. 52 of 2019, which according to him, was prosecuted by the Advocate on record who had no instructions from him to lodge an Appeal at the ELC but the Counsel proceeded to prosecute the matter without his knowledge; that adverse orders were issued to the said appeal yet the Advocate on record failed to pass the information to the applicant, with the result that the thirty (30) days mandatory period for filing appeals lapsed before filing the appeal.
3. The applicant is aggrieved by the whole judgment and laments that had he known of the outcome of the orders issued and/or any appeal lodged by the then counsel on record he would have appealed immediately. As matters stand, it is at the point of execution-that he learnt of the said orders thus the instant appeal.
4. The respondents have not reacted to the application.
5. The only relevant prayer in this matter is for extension of time to file appeal. The other prayers cannot be entertained by a single Judge, and this court is conscious of the fact that it is not the role of a single Judge to determine the merits or otherwise of the appeal for grant of orders of stay or injunction, much less, the merit of the intended appeal. This court has held in the case of *Athuman Nasura Juma vs. Afwa Mohammed Ramadhan* CA 227 of 2015:

“... this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.

6. Rule 4 of the *Court of Appeal Rules* gives this Court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso vs. Rose Wangari Mwangi* CA No. Nai 255 of 1997 (unreported) held that the discretion of a single Judge under rule 4 is wide and unfettered. This discretion however must be exercised judiciously upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka vs. Waruguru Kithaki & 2 others* CA No. 14 of 2013. What becomes critical in an application of this nature is the fact that it is a discretionary relief, and the court is required to take into consideration, the period of delay, and the reason for the delay, and the degree of prejudice likely to be occasioned to the respondent.
7. Discretion also depends on circumstances of each case as per *Mongira & Another vs. Makori & another* [2005] eKLR. In any event, the Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR sets down the guiding principles to consider in the exercise of discretion. The explanation offered is that an overzealous advocate who did not have instructions to prosecute the appeal, nonetheless did so, lost, then kept mum about it. This scenario is self-defeating to the applicant's own argument surely if he was not interested or had not given instructions to pursue the appeal, which he lost anyway, then there is nothing that he loses. The only inference to draw is that the applicant wants to have a belated third bite at the cherry, by blaming the advocate who acted in the appeal, he is not being honest. He who comes to equity must come with clean hands, and since the applicant has approached with soiled hands, then the remedy sought is not available. Consequently, the application is dismissed. I make no orders on costs.

**DATED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

