



**Mokua (Suing as a legal representative and administrator of the Estate of Mokuol Olisanda) v
Mokua (Civil Application E077 of 2023) [2023] KECA 1363 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1363 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E077 OF 2023
HM OKWENGU, JA
NOVEMBER 10, 2023**

BETWEEN

**PAUL NYANGARESI MOKUA(SUING AS A LEGAL REPRESENTATIVE AND
ADMINISTRATOR OF THE ESTATE OF MOKUOL OLISANDA) .. APPLICANT**

AND

JONES MOKUA RESPONDENT

*(Being an application for extension of time to file an Appeal out of time
from the Judgment of the Environment and Land Court at Kisii (J.
M.Mutungi, J) dated 8th October 2019 in ELC SUIT NO 181 OF 2013)*

RULING

1. On 8th October 2019 the Environment and Land Court (J. M. Mutungi, J) delivered a judgment in which the learned judge dismissed a suit filed by the applicant against the respondent. The applicant had instituted the suit in his capacity as the legal representative of his deceased father's estate. He was seeking an order of injunction against the respondent and a declaration that the respondent held land parcel Central Kitutu /Daraja Mbili/1791 (the suit property) in trust for himself and the dependants of Mokuol Olisanda.
2. The applicant claimed that in June 2010, the respondent ordered him to vacate the suit property on the pretext that he, that is respondent, was the registered owner of the suit property. Upon making inquiries at the Kisii lands office, the applicant was surprised to discover that the title had on 15th April, 2002 been transferred from the name of his deceased father to the respondent for a paltry sum of KShs. 60,000/=. The applicant therefore filed a suit against the respondent questioning the propriety of the transfer.



3. The applicant has now come to this Court with a notice of motion dated 28th April, 2023 seeking enlargement of time within which to file a notice of appeal and also to have the notice of appeal dated 26th May, 2022 and lodged on 2nd June, 2022 deemed as duly filed.
4. The applicant explains that upon his suit being dismissed, he lodged an appeal through Ochoki & Company Advocates whom he instructed to take over the matter from his previous advocates Omariba & Company Advocates.
5. Following an application by the respondent to execute against the applicant for his taxed costs of Kshs.519,995/ the applicant filed an application for stay of execution in the ELC. He was surprised to learn that no notice of change of advocates, had been filed and therefore the notice of appeal that had been filed by Ochoki & Co. Advocates was defective having been filed by a 'stranger'.
6. Consequently, the applicant instructed a new advocate Bruce Odeny & Co. Advocates to file a new notice of appeal. However, the ELC court ruled that the notice of appeal was filed out of time and declined to grant the applicant the order of stay of execution. This is what prompted the applicant to move to this Court with his application for extension of time.
7. The applicant contends that the delay in filing the notice of appeal was due to the confusion and mix-up relating to the filing of a notice of change of advocate and his assumption that Ochoki & Co. Advocates were properly on record. He pleads that he has a good appeal as demonstrated by his draft memorandum of appeal, and that he stands to suffer irreparable harm if the Court does not allow his application for extension of time.
8. The applicant has filed written submissions in which he contends that the formality of the changeover between Omariba & Company Advocate and Ochoki & Company Advocates, was an issue beyond him as he had given clear instructions and left the advocates to comply. Relying on *Muringa & Company Limited v Archdiocese of Nairobi registered Trustees* [2020] eKLR, the applicant submitted that the delay in filing the notice of appeal was not inordinate; that he had offered a satisfactory explanation for the delay; and that the respondent has not shown that he would suffer any prejudice if the orders sought are granted.
9. On his part the respondent identified the issue for determination as whether the Court has jurisdiction to grant the orders sought in light of the various notices of appeal, one lodged by M/S Ochoki & Company Advocates on 22nd October, 2019, and another lodged by the applicant's current advocate on 2nd June, 2022, the latter not having been served on the respondent or the respondent's counsel.
10. The respondent pointed out that M/S Ochoki & Company Advocates were never on record for the applicant as judgment was entered when the firm of M/S Omariba & Company Advocates were the ones on record for the applicant and M/s Ochoki did not obtain leave nor was there a consent for him to come on record. The respondent argued that the notice of appeal lodged by this firm was defective having been lodged by a stranger. The respondent argued that the notice of appeal lodged on 22nd October, 2019 remained on record and the subsequent notice filed on 2nd June, 2022, was irregular as only a single notice of appeal could be filed.
11. The respondent relied on *County Government of Meru v Leopard Rock Mico Limited* [2022] KECA 462 (KLR), where the Court ruled that a proper notice is a jurisdictional prerequisite; that nothing flows from a defective notice to invoke the Court's jurisdiction to grant orders pursuant to Rule 4 of the *Court of Appeal Rules*; and that the Court has no jurisdiction to determine a motion based on a defective notice of appeal.



12. Finally, the respondent urged that the applicant's motion was an omnibus application intended to delay the course of justice and therefore ought to be dismissed.
13. The applicant has moved this Court under Rule 4 of the *Court of Appeal Rules, 2010*. That Rule gives this Court discretion to extend time for the doing of any act under the *Court of Appeal Rules*. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others*, [2014] eKLR, the Supreme Court distilled the principles for the exercise of the Court's discretion in an application for extension time as follows:
 - “ 1. Extension of time is not a right of party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the respondent if the extension is granted.
 6. Whether the application has been brought without undue delay; and
 7. whether in certain cases like election petitions public interest should be a consideration for extending time.
14. It is apparent that the applicant intended to file a notice of appeal, and that an attempt was made by an advocate whom he had instructed to do so on 22nd October, 2019. Apparently, that notice was defective as the advocate was not properly on record, the advocate not having been granted leave or consent pursuant to Order 9 Rule 10 of the *Civil Procedure Rules*, to take over the matter as he was coming in after judgment had been entered against the appellant. That the applicant intended to pursue the appeal is evident from the notice dated 22nd October, 2019. Among the annexure to the applicant's supporting affidavit was a letter dated 10th October, 2019 duly signed by Ochoki & Co. Advocates and Omariba & Co. Advocates consenting to the firm of Ochoki & Co. Advocates being allowed to come on record for the applicant in place of the firm of M/S Omariba & Company Advocates. It is not clear what happened to this consent which was addressed to the Deputy Registrar Kisii High Court.
15. Be that as it may, the applicant has explained that he only discovered that the advocate was not properly on record after his application for stay of execution filed in the ELC Court was dismissed on 25th January, 2023. In the circumstances of this case that explanation is plausible. Indeed, the applicant attempted to resolve the problem by instructing yet another advocate. It is evident that although he filed two notices of appeal, both of them were defective but the applicant is now before us seeking the exercise of this Court's discretion under Rule 4 of the *Court of Appeal Rules*.
16. As stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others*, (*supra*), whether the Court should exercise discretion in an application for extension of time is a matter that is to be determined on a case by case basis depending on the circumstances of each case. The applicant's main prayer is to have time enlarged for him to file notice of appeal against the judgement of JM Mutungi made on 8th October, 2019. But the applicant



has also sought another prayer seeking to have the notice of appeal dated 26th May, 2022, lodged on 2nd June, 2022 deemed to be properly filed and served. While I have no issue with the 1st prayer, the 2nd prayer poses problems because the second notice was filed when there was another notice of appeal on record albeit a defective one. However, this does not fetter the discretion of this Court to extend time in the interest of justice so that the applicant can rectify the position. As was stated by Nambuye, JA., in *Vishva Stone Supplies Co. Ltd v RSR Stone (2006) Limited* [2020] eKLR:

“(viii) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.”

17. I find that the applicant has given a plausible and satisfactory explanation for the delay in filing the notice and record of appeal. In the circumstances of this case, it would neither be fair nor just to shut out the applicant from the seat of justice merely because of a confusion caused by his advocates. In the circumstances I allow this application and extend time for the applicant to file and serve the notice of appeal, memorandum of appeal and record of appeal within 14 days from the date hereof. The applicant shall pay costs to the respondent

DATED AND DELIVERED AND KISUMU THIS 10TH DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

