



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okogo v Omoroh & another (Civil Application E132 of 2021)  
[2022] KECA 110 (KLR) (11 February 2022) (Ruling)**

Neutral citation: [2022] KECA 110 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E132 OF 2021  
F TUIYOTT, JA  
FEBRUARY 11, 2022**

**BETWEEN**

**MARY ADHIAMBO OKOGO ..... APPLICANT**

**AND**

**FLORENCE ARACHI OMOROH ..... 1<sup>ST</sup> RESPONDENT**

**SALLY ANYANGO OTIENO ..... 2<sup>ND</sup> RESPONDENT**

*(An application for leave to serve a Notice of Appeal out of time against the decision of (A. C. M'rima, J) of 31st August, 2020 in Succession Cause No. 425 of 2015)*

**RULING**

1. Aggrieved by the decision of Hon. A. C. M'rima, J of 31<sup>st</sup> August, 2020 in Succession Cause No. 425 of 2015, the applicant's counsel filed a Notice of Appeal on 1<sup>st</sup> September, 2020 and contemporaneously applied for copies of the proceedings. Somehow, the applicant did not serve copies of the notice and letter upon counsel for the respondents as required by rules of this Court.
2. To make amends for this oversight, the applicant has filed a Notice of Motion dated 14<sup>th</sup> September, 2021 in which he seeks leave of this Court to serve the Notice of Appeal out of time.
3. In an affidavit sworn on 14<sup>th</sup> September 2021, counsel Japhet Osoro Kaosa who had the personal conduct of the High Court matter on behalf of the applicant, avers that he came to learn of the lapse while preparing the record of appeal. He explains that having taken the initial steps of filing the Notice of Appeal and requesting for proceedings, he asked his clerk to serve copies of them upon the advocate for the respondent. He further tells Court that the clerk has since left his firm and is not answering calls. Counsel pleads that the mistake made by the clerk should not be visited on his client.
4. The 1<sup>st</sup> respondent filed a response on her own behalf and on behalf of the 2<sup>nd</sup> respondent through an affidavit on 1<sup>st</sup> December, 2021. The Court is asked to note that the applicant has failed to comply



with rules 77(1) and 82 (1) of the *Court of Appeal Rules* (the rules) and suggests that the former rule is a mandatory.

5. She states that the firm of her advocates, Tom Mboya & Co. Advocates, are situated at Migori Township, Safaricom House, within the vicinity of the court where the Notice of Appeal was filed and that no explanation for the failure to serve the respondent herein has been given. Further that it has been over one year since the Notice of Appeal was filed.

6. Reacting to the plea the explanation that the mistake was of the clerk, the respondent states that it is the advocate and not the clerk who is the expert and person qualified to know the rules. The Court is asked not to allow the applicant to get away with his failure to comply with the rules.

7. The rule infringed by the applicant is rule 77 (1) which provides:

“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.”

8. Further, because there is sometimes delay in the superior courts availing copies of proceedings, an appellant who wishes to benefit from the exclusion of time required for preparation and delivery of a copy of proceedings (rule 82 (1)) must comply with rule (82) (2) and which reads:

“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.”

9. Yet because for one reason or another, parties fail to keep the timelines prescribed by the rules, the rules themselves in rule 4 given power to this Court to extend time in deserving cases. The power to extend time is granted to a single judge who exercises it on behalf of the court.

10. The power to extend time to file and serve a Notice of Appeal out of time is discretionary. Yet like all discretionary power it is one to be exercised judiciously and upon reason. In guiding that discretion, certain parameters have over time been set out by our Courts. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR stated:

“From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a 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 respondents 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.”

11. There will be occasion when a mistake of counsel will be excused so as to save a litigant from the consequence of such failure. One such occasion will be where it is demonstrated the party himself/herself was vigilant and did not share or contribute in the lapse of counsel. In this regard this Court has in *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR stated:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.

....

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance.

Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client.”

12. In the matter before court, counsel timeously filed the Notice of Appeal and bespoke proceedings. This was barely four days after the decision which aggrieves his client was handed down. Counsel for the applicant blames the failure to serve the notice and letter on a clerk who has since left his law firm. Whilst I agree with counsel for the respondent that, ordinarily, the responsibility should rest with counsel and not his clerk, in the nature of things advocates must delegate certain duties to other members of their staff. Members of staff will sometimes let down the principals. Such is life! However to his credit counsel for the applicant had, up to the point of failure to serve, and thereafter, in preparing the record of appeal, acted diligently. This tips things in favour of the applicant.
13. Yet I must consider whether the long delay prejudices the respondents. The interest of the respondents must never be ignored. In the response, the respondents do not say that the grant of the application will prejudice them in any way and the Court is therefore inclined to grant the plea for extension of time.
14. The Notice of motion dated 14<sup>th</sup> September, 2020 is hereby allowed. The Notice of Appeal and letter bespeaking a copy of proceedings shall be served upon counsel within (14) fourteen days of this Ruling



and further, the Record of Appeal shall be filed and served within 30 days of this Ruling. Costs shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

