



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omondi v Okoyo (Civil Application 178 of 2021)  
[2022] KECA 484 (KLR) (25 March 2022) (Ruling)**

Neutral citation: [2022] KECA 484 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 178 OF 2021  
M NGUGI, JA  
MARCH 25, 2022**

**BETWEEN**

**CHARLES O OMONDI ..... APPLICANT**

**AND**

**MAURICE NYANGINDE OKOYO ..... RESPONDENT**

*(Being an application for leave to file an appeal out of time from the judgment of the Environment and Land Court at Kisumu (M. A. Odeny J.) dated 5th May 2021 in Kisumu ELC Appeal No. 11 of 2019))*

**RULING**

1. In the application brought by Notice of Motion dated 21<sup>st</sup> December 2021 expressed to be brought under Rule 4, 5(2)(b) and 29 of the [Court of Appeal Rules](#), the applicant seeks the following orders:
  1. THAT the Honourable Court be pleased to certify this application urgent and hear it ex parte at the first instance for the purposes of granting prayer 2;
  2. THAT the Applicants/Appellants be granted leave to file the intended appeal herein out of time.
  3. THAT the Memorandum of Appeal dated 19<sup>th</sup> December, 2021 and annexed herein be deemed to be properly on record and be admitted for hearing.
  4. THAT the costs of and incidental to this Application be in the cause.
2. The application is based on the grounds set out on the face of the application and is supported by an affidavit sworn by the applicant, Charles O, Omondi on 23<sup>rd</sup> December 2021.
3. The grounds forming the basis of the application are that on 17<sup>th</sup> December, 2021 the applicant, who had lost contact with his previous advocate on record, discovered that the trial Court had delivered



judgment in the suit the subject of the intended appeal on 5<sup>th</sup> May 2021; that the applicant is a lay person and entirely relied on the information that he would occasionally get from his advocate regarding the status of the subject matter; that the effect of the judgment was that the trial court held that the applicant had not proved fraud against the respondent as regards the suit property, L.R No. Uholo/Ugunja/888.

4. The applicant contends that he was not aware of the date of delivery of the judgment by the trial court owing to lack of communication from his previous advocate on record. He had thus instructed his present Advocate on record to take up the matter. The new advocate had written to the Environment and Land Court in Kisumu requesting for typed and certified proceedings, orders and all such decrees emanating from the case.
5. The applicant further contends that due to the fact that the previous Advocate was not communicating with him, a Notice of Appeal was not filed in time. It is his contention that he has an arguable appeal with high chances of success. The ground of appeal cited is that the trial court erred in law by finding that the applicant had not demonstrated that the land was transferred to the respondent through fraud. It is also contended that the matter raises issues of law of great public interest which he should be allowed to canvass in the appeal without the appeal being rendered nugatory, or a mere academic exercise, and that the present application has been brought with reasonable promptitude and without unnecessary delay.
6. In his affidavit sworn in support of the application, the applicant avers that he was aware that the judgment in this matter was delivered on the 5<sup>th</sup> May 2021 in favour of the proposed respondent. That once judgment was delivered, he had tried to reach his Advocate then on record in order to know the status of his case but he could not be reached as he was not communicating with the applicant. He only became aware that the judgment was delivered when he was served with an order emanating from the lower court for his eviction from the suit property.
7. His current Advocate had moved with speed to salvage his appeal by filing the current application seeking to file an appeal out of time. He annexes a Memorandum of Appeal and avers that his appeal has high chances of success since it raises triable issues. The delay in filing his appeal was caused by his previous Advocates and he asks this Court to find that mistakes and actions of counsel should not be visited upon him as he is an innocent litigant.
8. The respondent did not file a response to the application.
9. The application before me is expressed to be brought under Rule 4, 5(2)(b) and 29 of the Court of Appeal Rules. Rule 5(2)(b) comes into play when there is a valid Notice of Appeal before this Court. Rule 29 deals with this Court's power, on an appeal, to re-appraise evidence and to take additional evidence. These two Rules are therefore not applicable to the application.
10. The applicant seeks extension of time to file a Notice of Appeal and Record of Appeal out of time. This Court is empowered to grant such extension under Rule 4 of the Court of Appeal Rules which provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”



11. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

12. It is conceded by the applicant that he is late in filing his Notice of Appeal and his Record of Appeal. The judgment that he seeks to appeal against was delivered on 5<sup>th</sup> May 2021. As provided under Rule 75(2) of the Court of Appeal Rules, the Notice of Appeal should have been filed within 14 days of the 5<sup>th</sup> of May 2021, that is by the 19<sup>th</sup> of May 2021. It was not.
13. The first factor that the court is required to consider in an application under Rule 4 is the length of the delay. The present application was filed on 23<sup>rd</sup> December 2021. There was therefore a delay of some seven (7) months before the present application was filed. The reason that the applicant gives for the delay is that his previous advocate did not communicate to him about the date for delivery of the judgment. He avers at paragraphs 3 and 4 of his affidavit in support of the application as follows:

“3. THAT once judgment had been entered I tried reaching my Advocate who was on record for me at the time to know the status of the case but he could not be reached. He was basically not communicating with me.

4. THAT I was only aware of the judgment was delivered once I was served with an order emanating from the lower court to be evicted from the suit property.”

14. These two paragraphs, in my view, contain some contradictions that suggest that the applicant was not candid with the court in his averments. ‘Once judgment was delivered’ suggests that the applicant was aware at the time of delivery of the judgment, on 5<sup>th</sup> May 2021, that the judgment had been delivered. He asserts at paragraph 4, however, that he only learnt that it had been delivered when he was served with an eviction notice from the Magistrate’s Court. He does not indicate when the said notice was served on him, nor does he annex a copy thereof. In my view, the applicant has not given a reason for the seven-month delay that would justify the exercise of discretion under Rule 4 in his favour.
15. The third factor to consider in a Rule 4 application is, ‘possibly’, the chances of success of the appeal. The applicant has not annexed a copy of the decision that he seeks to appeal against. His sole ground of appeal as set out in the Draft Memorandum of Appeal annexed to his affidavit is that the Learned Judge erred in law by finding that he had not demonstrated that the suit property was transferred to the respondent through fraud. I observe that the appeal to this Court in relation to the suit property is a second appeal, the matter having emanated from a Magistrate’s Court. That being the case, the jurisdiction of this Court would be confined to consideration of matters of law. The ground of appeal identified by the applicant would require an examination of matters of fact that were presented before the trial court. That being the case, the possibility of the applicant succeeding on appeal is doubtful.
16. Finally, this Court should consider the prejudice to be suffered by the respondent should the applicant be granted extension of time to file his Notice and Record of Appeal out of time. The applicant argues that the only prejudice that the respondent would suffer is ‘slight delay in finalizing the matter.’ As



observed earlier, this is a second appeal from a 2019 appeal in the Environment and Land Court. This indicates that the respondent has been awaiting finalisation of the matter before the ELC for at least the last two years. In the absence of information regarding the matter before the trial court, it is not possible to tell how long the matter was before the Magistrate's Court. Such delay, however, cannot be other than prejudicial to the respondent.

17. In the circumstances, and taking into account my findings with respect to the other factors that a court should consider, I find the present application to be without merit, and it is hereby dismissed.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF MARCH, 2022.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

