



**Othina v Othina (Miscellaneous Application E155 of 2021)
[2022] KECA 474 (KLR) (11 March 2022) (Ruling)**

Neutral citation: [2022] KECA 474 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
MISCELLANEOUS APPLICATION E155 OF 2021**

**F TUIYOTT, JA
MARCH 11, 2022**

BETWEEN

EDWARD OUMA OTHINA APPLICANT

AND

ANDREW OYADO OTHINA RESPONDENT

(An application for extension of time to file and serve record of appeal from the judgment & decision of (Ong’ondo, J) delivered on 26th June, 2019 in MIGORI ELC. NO. 310 OF 2018)

RULING

1. Edward Ouma Othina, the applicant, cited various provisions of the Civil Procedure Rules and Act, and Rules 4 and 42 of the Court of Appeal Rules in a notice of motion dated 16th May 2021 seeking enlargement of time to file an appeal out of time.
2. In any affidavit sworn in support of the Motion, the applicant gives a history of the delay and why he posits his application to be deserving.
3. On 26th June 2019, Hon. Judge G.M.A. Ong’ondo delivered judgment in ELC Case No. 310 of 2018 at Migori in favour of the respondent. The trial court is said to have granted him a permanent injunction in respect to land parcel described as Kawere/Konyanya/Kaveding/1429. Costs as well were awarded to the respondent. Aggrieved by that decision, the applicant’s advocate filed a notice of appeal on 9th July 2019. About twenty (20) months later, to the date of the motion, the record of appeal has not been filed. The applicant offers the following explanation.
4. First, that the delay in filing the record was occasioned by illness on his part which caused him not to sufficiently instruct his advocates on time. Further, that he could still not file the record of appeal in time given that proceedings were only ready for collection on 21st December 2020. The applicant does not however give any evidence that he bespoke copies of the proceedings for purposes of appeal



- or that they were ready for collection at the date he alleges. As will be apparent shortly this may not be without significance.
5. A final reason is that he was affected by the effects of the covid-19 pandemic and could not raise the advocate fees and filing fees on time to enable them file the record of appeal. He says he has now raised the fees and wishes to pursue his Appeal.
 6. This Court is also told that that intended appeal is highly merited with high chances of success.
 7. As at the date of hearing this application, no response to the application had been filed.
 8. Rule 4 grants power to the Court to enlarge time limited by the Rules of the Court or by any decision of the Court or of a superior court. It is a discretionary power to be exercised judiciously. To guide that discretion, the Court considers, inter alia, the length of delay, the reason for delay, the extent of prejudice, if any, grant of the order may cause the respondent, and, possibly, the chances of success of the intended appeal. See *Fakir Mohammed vs Joseph Mugambi & 2 others*[2005] eKLR. On occasion the Judge will consider whether there are exceptional circumstances that warrant extension notwithstanding inordinate delay.
 9. Having filed the notice of appeal timeously, the applicant would have sixty days to institute his appeal by lodging a memorandum of appeal, record of appeal, paying the prescribed fee and security for costs of the appeal (Rule 82(1)).If, however, the applicant had within thirty (30) days of the date of the decision, in writing, a copy served upon the respondent, applied for a copy of the proceedings in the superior court, then the time for preparation and delivery of the proceedings would be excluded from the computation of the time (Rules 82(1) and (2)).
 10. In this matter the applicant states that the proceedings in the ELC were only ready for collection on 21st December 2020 but does not state that he complied with the provisions of Rule 82(1) and (2) as regards bespeaking proceedings. Although there has been no response by the respondent and so what the applicant says has not been controverted, it was still incumbent upon the applicant to back up the essentials of his application with sufficient material. The applicant neither stated that he called for the proceedings in writing nor furnished a copy of that letter, if he did. For that reason, the court will proceed on the basis that the proviso to Rule 82(1), and Rule 82(2) were not complied with and that Applicant is not entitled to the exclusion of time granted under Rule 82(1). For this reason, the delay in instituting the appeal is 20 months, certainly a lengthy delay. Whether the delay can be excused depends on the explanation made.
 11. The applicant attributed the delay to two reasons. One is his illness. Again the applicant does not give details of his illness nor any proof of it. The other is that is that he was adversely affected by the effects of the covid-19 pandemic and could not raise the advocate's fees and pay court fees and security of costs on time. As a continuing feature of the applicant's affidavit, it is thin on detail. How exactly the pandemic affected the applicant's fortunes is not elaborated.
 12. Owing to the dearth of proof and detail, I find myself unable to accept the explanation by the applicant and have to reach a decision that a twenty (20) months delay, not properly explained, is inordinate.
 13. Something else. Even if needed to, I was unable to assess the viability of the intended appeal because other than merely stating (and rehashing it in submissions) that the intended application is highly merited, no arguments were put forward as to why it would be so. I was further handicapped as no draft memorandum of appeal, no proceedings or a copy of judgment was placed before me.
 15. The motion of 16th May 2021 is dismissed but with no order as to costs as the respondent did not participate in this single Judge proceedings.



DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH 2022.

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

