



**Obarasa & 2 others v Etyang & 2 others (Civil Application
139 of 2021) [2022] KECA 592 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 592 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 139 OF 2021
F TUIYOTT, JA
APRIL 28, 2022**

BETWEEN

**MICHAEL OKEMER OBARASA 1ST APPLICANT
PETER OMUKAGA OCHOM 2ND APPLICANT
FREDRICK M. OKEMER 3RD APPLICANT**

AND

**CLEMENT ETYANG 1ST RESPONDENT
LEONARD WAWIRE PAUL 2ND RESPONDENT
PASCAL AMALYA ODENYO 3RD RESPONDENT**

*(An appeal from the judgment (A. K. Kaniaru, J) delivered
on 28th September, 2015 in Civil Appeal No. 48 of 2015)*

RULING

- [1] There is before me a Notice of Motion dated 23rd July, 2021 in which the applicants seek leave of this Court to file an appeal out of time. The judgment sought to be appealed against is the decision of Kaniaru, J. delivered on 28th September, 2015 in Busia ELC No. 48 of 2015 (O.S).
- [2] In support of the application is an affidavit of Michael Okemer Obarasa (the 1st Applicant) sworn on 23rd July, 2021 on his own behalf and on behalf of the other applicants. In it he explains that although the judgment was read in the presence of his advocate, the advocate failed to inform him about it in time. He pleads an innocent litigant who is unable to interpret the law. He avers that his intended appeal raises triable issues and displays a copy of a draft Memorandum of Appeal. Last, he states that he could not be supplied with proceedings within time as he was informed by the first appeal court that the court file could not be traced.



- [3] The respondents did not file a response to the application.
- [4] In their short submissions, the applicants rehash the grounds raised in the application and argue, further, that there is a constitutional imperative that each party deserves to be given an opportunity to be heard.
- [5] The power to extend time granted to this Court by Rule 4 of the Court of Appeal Rules is discretionary. A discretion to be exercised judiciously and to guide that discretion, the court considers inter alia, the length of delay, the explanation for delay, prejudice that the respondent may suffer if the application is granted and, possibly, the viability of the intended appeal (See Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR).
- [6] The application dated July 23, 2021 is brought 5 years, 9 months after the date of delivery of the judgment and is an awfully long delay. Unless there is a very good explanation for such delay, the application should be dismissed without much ado.
- [7] The substantial explanation is that the applicants advocate did not inform them of the judgment. Blame is placed on the doorsteps of the advocates. Yet, even if I was to accept what there was blemish on the advocates, I would think the applicants to be extremely indolent for failing to follow up on their own case for such a long period of time. A party who shows such disinterest in his litigation is unlikely to draw any sympathy from the Court. If such a party's advocate is to blame, the party too must share in it and eventually bear the consequences of inaction.
- [8] An attempt to find further excuse in the supposed inability of the ELC court registry to trace the court file fares no better. There is no evidence that the file could not be traced or of the applicants following up the matter.
- [9] I cannot find any reason to excuse this inordinate delay and I must, as I hereby do, dismiss the Notice of Motion of July 23, 2021. But as there was no response to it, I make no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

