



**Anyiko v Obeti & another (Civil Application E041 of 2022)
[2022] KECA 676 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 676 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E041 OF 2022**

**M NGUGI, JA
JULY 8, 2022**

BETWEEN

RICHARD OCHIENG ANYIKO APPLICANT

AND

KENNEDY OYUGI OBETI 1ST RESPONDENT

CAROLINE ATIENO 2ND RESPONDENT

(Being an application for leave to file and serve notice of appeal and record of appeal out of time, against the whole Ruling and orders of the High Court of Kenya at Homa Bay (Kiarie, J.) dated 9th November, 2021 in HCCA No. 81 of 2019)

RULING

1. The application the subject of this ruling is expressed to be brought under Article 159(2) (d) of the Constitution, section 3A and 3B of the Appellate Jurisdiction Act, and Rules 4 and 12 of the Court of Appeal Rules, 2010.
2. Dated 14th March 2022, the application seeks leave to file and serve a notice of appeal and record of appeal out of time against the whole of the ruling and orders of Hon. Kiarie, J dated 9th November, 2021 in Homa Bay Civil Appeal No. 81 of 2019.
3. The reasons advanced for the failure to lodge the notice and record of appeal in time are set out on the face of the application and the affidavit in support sworn by Counsel for the applicant, Ezekiel Oduk. These are that the first appellate court had informed the parties in open court on 13th October, 2021 that the ruling in the appeal would be delivered on 28th October, 2021. Counsel for the applicant was present in court to take the ruling but the Judge was not present. The ruling was delivered on 9th November, 2021 but Counsel for the applicant was not present as he was not aware that it would be delivered on that date. He had also not received a notice informing him of the delivery date. He only



learnt of the delivery of the ruling long after while inquiring about its status in the Registry following receipt of a notice of taxation scheduled for 2nd February, 2022 from Counsel for the respondent.

4. The applicant avers that the period of and reasons for the delay in filing the notice and record of appeal is excusable as the delay is not inordinate, and that he has an arguable appeal with overwhelming chances of success. A draft memorandum of appeal is annexed to the application.
5. There is no response to the application from the respondent.
6. I have considered the application and the reasons advanced for the delay. I note that the ruling in the matter was delivered on 9th November, 2021. It had been scheduled for delivery on 28th October, 2021. The applicant's Advocate avers, and this has not been controverted, no affidavit in response having been filed by the respondent, that the ruling was re-scheduled to 9th November 2021, but no notice was given to him. He therefore learnt of the delivery of the ruling after he received a notice for a taxation scheduled for 2nd February, 2022. The applicant's Counsel does not indicate precisely when he learnt that the ruling was delivered, though it must have been prior to 2nd February, 2022.
7. In the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* 1999(2) EA 231 the Court held that in considering an application under Rule 4 of the *Court of Appeal Rules*, the Court should take into account the length of the delay, the reasons for the delay, (possibly the chances of success of the intended appeal, and the prejudice to be suffered by the respondent if the application is allowed.
8. In this case, the notice of appeal should have been filed by the 16th of November, 2021 and the record of appeal filed 60 days thereafter. The present application was filed on 14th March, 2022. Taking into account the period between 21st December and 13th January 2022 when time did not run, the record of appeal should have been filed by 7th March 2022, and there was therefore a delay of just about 7 days.
9. Taking the above matters into consideration, I am satisfied that the application is merited, and it is hereby allowed. The applicant is granted leave to file a notice and record of appeal out of time. The said notice shall be filed and served within 7 days hereof and the record of appeal within 45 days thereafter.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

