



REPUBLIC OF KENYA



KENYA LAW
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**Ekesa v Ekakoro (Civil Application E071 of 2022)
[2022] KECA 1131 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1131 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E071 OF 2022
F TUIYOTT, JA
OCTOBER 21, 2022**

BETWEEN

JOHN ONYA EKESA APPLICANT

AND

GAD EJAPU EKAKORO RESPONDENT

(Being an application for extension of time to file an appeal out of time from the judgment of the High Court of Busia (A. Omollo, J) delivered on 10th November 2021 in BUSIA ELC CASE NO. 55 OF 2018)

RULING

1. Before me is a Notice of Motion dated 24th May, 2022 brought under the provisions of rule 4 of the rules of this Court. In it, the applicant seeks leave of this Court to file an appeal out of time against the decision of A. Omollo, J. delivered on 10th November, 2022 in Busia ELC Case No. 55 of 2018.
2. In support of the application, the applicant swore an affidavit on 24th May, 2022 where he deposes that he filed a notice of appeal immediately on 17th November 2021 after judgment was delivered and applied for copies of the judgment and proceedings on the same date. Proceedings are ready and a certificate of delay was issued on 23rd February, 2022 and so 60 days prescribed for filing an appeal expired in April. He explains that he could not file the appeal on time as he could not get the exhibits that were used during the hearing. He deposes that his former advocate on record who handled the matter during trial did not give him the complete file and for that reason was unable to file the record of appeal without the exhibits. He also adds that on visiting the court registry, the exhibits were missing from the court file.
3. He filed a supplementary affidavit sworn on 27th May, 2022 wherein he attaches the judgment of the trial court.



4. The respondent filed grounds of opposition dated 5th July, 2022. It is contended that the firm of J.V. Juma & Company Advocates is not properly on record pursuant to order 9 rule 5 of the Civil Procedure Rules as leave was not sought to change advocates; no tenable reasons have been advanced for the late filing of the appeal, proceedings having been requested for in November 2021; no attempt has been made to seek extension of time in the court of first instance; and the judgment and decree has been executed to the fullest and no more prejudice can be occasioned to the applicant.
5. The discretion granted to this Court by Rule 4 of the Court of Appeal Rules when considering an application for extension of time must be exercised judiciously. The party seeking extension of time must have a good explanation for the delay, demonstrate that the delay is not inordinate and that the respondent will not suffer prejudice if extension is granted. And possibly, that the intended appeal has good prospects of success. See Fakir Mohamed -Vs- Joseph Mugambi & 2 others [2005] eKLR.
6. The respondent elected to respond to the current application by way of grounds of opposition and not by a replying affidavit and this has a bearing on the outcome as will be apparent presently. The contents of the affidavit filed in support of the application are not controverted and as I have no reason to disbelieve them, then I hold them to represent a true account of events and facts as deposed.
7. And so I deal with a preliminary issue raised by the respondent. It is contended that the firm of J.V Juma & Company advocates who filed the application on behalf of the applicant are not on record. This contention, raised in the grounds of opposition, is really a matter of fact that should have been deposed in an affidavit. Since the contention is not admitted, I am unable to find in favour of the respondent that the firm is not properly on record.
8. To the substantive matter. The filing of an appeal is provided for under rule 82 of the 2010 rules (now rule 84):-

82. Institution of appeals

- (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
 - (a) a memorandum of appeal, in quadruplicate;
 - (b) the record of appeal, in quadruplicate;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) 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.
- (3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.



outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

9. As the applicant bespoke proceedings pursuant to the proviso to subrule 1, then he would benefit from the freeze placed on the time needed for preparation and delivery of proceedings in computing the time within which the appeal ought to be instituted. The evidence is that the certificate of delay was issued on 23rd February, 2022 and so the appeal ought to be instituted by 25th April, 2022. The reason given for failing to do so within the time prescribed is that the file given by his previous advocates to his current advocates did not have exhibits (presumably copies) which were also missing from the court file. This reason has not been debunked by evidence to the contrary and seems to me to be plausible. Further, when I consider that this application was filed about 30 days after the deadline then the delay in seeking the intervention of this Court is not inordinate. Another reason that draws me towards granting the extension is because I am not told that to grant it will prejudice the respondent in any way. In reaching this decision I find the submission made by the respondent's counsel that the application is undeserving because the applicant has not filed a memorandum of appeal rather unhelpful as rule 82 envisages that one of the documents to be lodged in instituting an appeal is a memorandum of appeal. That could not be filed before the applicant sought and obtained the leave that is the subject of the application now before Court.
10. Ultimately the Notice of Motion dated 24th May 2022 is for allowing and is hereby allowed, costs shall be in the appeal. The appeal shall be instituted and served within 30 days of this Ruling.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR.

