



REPUBLIC OF KENYA



KENYA LAW
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**Ojwang v Ghelani & 5 others (Civil Application E069 of 2022)
[2022] KECA 1096 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1096 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E069 OF 2022
F TUIYOTT, JA
OCTOBER 7, 2022**

BETWEEN

JACOB NYAKWA OJWANG APPLICANT

AND

NATHWALAL NARSHIDAS GHELANI 1ST RESPONDENT

JOSHUA OMARI T/A SEDIME AGENCIES 2ND RESPONDENT

SAMUEL OGWENO OKETCH 3RD RESPONDENT

MATHEWS OWINYO ODERA 4TH RESPONDENT

JOSHUA ONGWEN WAGUDE 5TH RESPONDENT

DISTRICT LAND REGISTRAR, KISUMU 6TH RESPONDENT

(Being an application for extension of time to lodge and serve Notice of Appeal and Memorandum of Appeal from the judgment of the Environment & Land Court of Kenya at Kisumu (A. O. Ombwayo, J) dated 7th December, 2021 in Kisumu HC ELC Case No. 232 of 2013)

RULING

1. The applicant herein being dissatisfied with the decision dated December 7, 2021 of the Environment and Land Court (ELC) in Kisumu filed a notice of appeal dated 17th December, 2021 and lodged on December 20, 2021 under rule 75 of the [Court of Appeal Rules, 2010](#) (now rule 77 of the [Court of Appeal Rules, 2022](#)) at the ELC at Kisumu.
2. The applicant did not take any further steps towards instituting the appeal and now moves this Court through a Notice of Motion dated May 16, 2022 for grant of extension of time to serve the notice of appeal and to file a memorandum of appeal against the said judgment. Further that the memorandum



of appeal annexed to that application be admitted and be deemed to be properly on record and to have been so filed within the stipulated time upon payment of the requisite filing fees.

3. In the affidavit sworn on May 16, 2022 by the applicant, he explains that his previous advocate on record, Mr. Kimanga, who had the conduct of the matter fell ill and died. He deposes that the notice of appeal ought to have been served upon the respondents within 7 days but was not and he attributes this failure to serve on his former advocates. He notes however that the typed proceedings were obtained on February 23, 2022 and the judgment on April 5, 2022. This would be after March 20, 2022 when the appeal ought to have been instituted.
4. The 1st, 2nd, 5th and 6th respondents have not put in any response to the application. The 3rd and 4th respondents on the other hand filed a letter dated July 4, 2022 in which their advocates explain that the application was not served upon them and they only became aware of it on July 2, 2022 when the applicant's written submissions were served upon them. They were yet to file any response to the application or submissions at the time of writing this decision.
5. The notice of appeal ought to be served on persons affected and the relevant provision is rule 77(1) (now rule 79(1)) of the rules which reads:

77. Service of notice of appeal on persons affected

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.

6. The applicant concedes that this provision was not complied with by his previous advocate. In submissions, he attributes this to the confusion in the offices of the advocates following the sickness and later demise of the late Mr. Kimanga.
7. Similarly, the applicant has breached the period within which the appeal ought to be instituted. Rule 82 (now rule 84) makes provision for institution of appeals and reads: -

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.
8. The applicant depones that his previous advocate requested for the certified proceedings *vide* a letter dated December 20, 2021 but the same were not furnished until February 23, 2022. But as the letter bespeaking proceedings was not served on the respondents, then applicant would have been required to institute the appeal within sixty days of the lodging of the notice of appeal. As the notice of appeal was lodged on December 20, 2021, the appeal ought to have been instituted on or before March 14, 2022 (this period has been reckoned by excluding the Christmas recess as required under rule 3). That date to the date of the filing of the current application is about 62 days. This delay is not so inordinate. Secondly, the reason given for the delay is plausible. It was because of the illness and eventual death of his advocate and perhaps an understandable inaction of the firm he left behind. At any rate, by failing to respond to the application, the respondents have not demonstrated they will suffer any prejudice if the application were to be granted. In allowing this application, as I shall presently will do, I believe that I have been faithful to the considerations that guide my unfettered discretion in matters of this nature (see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. Nai 251 of 1997 (unreported)).
1. Ultimately, I allow the application of May 16, 2022. The applicant is granted seven (7) days to serve the notice of appeal filed on December 20, 2021 and fourteen (14) days from the date of service thereof to file and serve the record of appeal. Costs of this application shall be in the appeal.

DATED AND DELIVERED IN KISUMU THIS 7TH 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

