



**Akoth (on behalf of Franciscan Sisters of Saint Joseph (Asumbi) now Suing through next friend Sister Mary Goretty Achieng) v Tom K’opere trading as T.O. K’opere & Co. Advocates & another (Civil Application E093 of 2022) [2022] KECA 1413 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1413 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E093 OF 2022  
F TUIYOTT, JA  
DECEMBER 16, 2022**

**BETWEEN**

**SISTER MARY DOMINIC SAVIO AKOTH (ON BEHALF OF FRANCISCAN SISTERS OF SAINT JOSEPH (ASUMBI) NOW SUING THROUGH NEXT FRIEND SISTER MARY GORETTY ACHIENG) ..... APPLICANT**

**AND**

**TOM K’OPERE TRADING AS T.O. K’OPERE & CO.  
ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**DOROTHY ANNE ADHIAMBO WERE, SARAH CAROLINE AKINYI  
OMANYA ,RUTH HELLEN OMANYA & JANET AWUOR OMANYA (SUED AS  
ADMINISTRATORS OF THE ESTATE OF RICHARD OMANYA ADONGO-  
DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to lodge a notice of appeal from the Judgment of the Environment and Land Court of Kenya at Kisumu (Ombwayo, J) Dated 6th May, 2022. in KSM. ELC NO. 64 of 2019)*

**RULING**

1. I have before me an application dated July 10, 2022 seeking an order for enlargement of time within which the applicant may lodge a notice of appeal against the judgment of Ombwayo, J delivered on May 6, 2022 in Kisumu ELC Case No 64 of 2019. Although sister Mary Dominic Savio Akoth on behalf of Franciscan Sisters of St Joseph (Asumbi) (FSJ) suing through next of friend sister Mary Goretty Achieng, the applicant, cites section 3A and 3B of the [Appellate Jurisdiction Act](#), rule 1 (2) and rule 5 (2) of the [Court of Appeal Rules 2010](#) and article 159 (2) of the [Constitution](#), the power to enlarge time of the nature sought is anchored specifically in rule 4 of the Rules of this court.



2. There is a dispute between the applicant and the respondents over land known and described as LR No West Kasipul/Kodera Karaboch/599 that was the subject of the suit before the ELC. Before that court, the applicant was represented by M/s Omollo & Omollo Advocate LLP. Sister Achieng who swore an affidavit on behalf of the FSJ deposes that towards the end of June 2022, Sister Salome Otieno and herself, at his invitation, visited Joseph Mboga the area Chief of Kodera Karaboch location. He gave them a copy of the judgment in the ELC and informed them that he had been instructed by the 2<sup>nd</sup> respondents to request FSJ to move out of the suit land.
3. Having read and fairly understood the judgment, the deponent immediately rang and sent texts to advocate Omollo who she used to deal with, but without success. She then notified Sister Mary Julita of the judgment and when Sister Julita physically visited the office of the advocates, she found it locked. A further visit yielded some results. She found one Lilac Omollo who informed her that Mr Omollo had been undergoing treatment for depression and had since April, 2022 not been in a good state of mind to return to his legal practice. She further informed Sister Julita that many clients had withdrawn instructions and had appointed other advocates.
4. Prior to that, in the month of March, 2022, the deponent was told by counsel Omollo that he would notify her of the delivery of the judgment and that her attendance was not necessary. The current advocate for the applicant has perused the ELC file and it has emerged that the applicant was not represented in the ELC on May 6, 2022, the date of the delivery of the judgment.
5. That is the explanation for the delay in filing the notice of appeal which ought to have been lodged on or before May 20, 2022.
6. In a further affidavit sworn on September 13, 2022, prompted by assertions in the replying affidavit of Janet Awuor Omanywa sworn on August 26, 2022, Sister Achieng deposes that before the ELC, the proceedings were taken out against sister Akoth on behalf of FSJ but as sister Akoth is in poor health, she has stood in her place. Sister Achieng asserts that she does so in her capacity as a trustee of FSJ.
7. The application is resisted through the replying affidavit of Janet Omanywa. She doubts that sister Achieng is a trustee of FSJ and challenges her to provide proof. She states that sister Achieng has brought the application without authority.
8. She deposes that although judgment in the ELC was reserved for March 24, 2022, it was not delivered then. The judge informed the parties, through counsel, that judgment was not ready and would be delivered in April before Easter, on a date to be advised. On May 6, 2022, the respondents received an email from counsel informing them that judgment had been delivered and a copy was forwarded. She states that counsel informed her that the deputy registrar of the ELC had, by email, forwarded a copy of the judgement to all parties including the applicants' counsel. She thinks that the applicant is untruthful when she says that FSJ was never informed of what was going on in such a serious matter.
9. On other matters, Ms Omanywa deposes that their counsel wrote to the applicant on June 24, 2022 asking it to vacate the property. The letter was emailed on June 24, 2022 and delivered by courier on June 30, 2022. The court is told that sister Achieng cleverly omits the exact date when she was apparently called by the chief to give the impression that the only information she received regarding the judgement was through the office of the chief.
10. The deponent makes reference to a letter dated June 23, 2022 written by the applicant and which was sent to them on June 27, 2022. In paragraph 19 of the affidavit the court is asked to infer the following:



- a. The letter is dated June 23, 2022, yet the applicants have stated that they knew about the judgment for the first time when they were contacted by the area chief towards the end of June on a date that they have not disclosed.
  - b. The letter is dated June 23, 2022, a day before the applicants received our advocates' letter by email (a fact which they have withheld from the court). I verily believe that the letter was in fact a reaction to our advocates' letter aforesaid, but was backdated to create the impression that our advocate's letter had and has not been received.
  - c. The letter talks about a directive by the chief that the applicants will be evicted from the land. As the author of the letter rightly observes, the judgment of the court did not order that the applicants be evicted. Rather, it is our advocate's letter dated June 24, 2022 ('JAO 7') that threatened the applicants with a move to evict them. The applicants were clearly making reference to our counsel's letter which they first received on 24<sup>th</sup> June.
  - d. The suit property and the applicant's office is in Homa Bay County while the advocate who wrote the letter is based in Kisii. The process of obtaining the judgment, going through it, going to Kisii to instruct the advocate to write the letter on 23<sup>rd</sup> June could only mean that the applicants had the judgment several before and therefore that the allegation that the applicants received a copy of the judgment from the chief is false. It is instructive that the applicants have refused to say the exact date when the chief contacted Sister Salome Otieno and do not even say how he got her number.
  - e. The phone records produced by the applicants show that they were already in communication with M/s Omollo & Omollo Advocates even before M/s Nyamurongi & Co Advocates wrote the letter. They don't explain how they got the judgment.
  - f. The wording of the letter shows that the applicants were making reference to a judgment they already knew about. The letter makes no reference to the fact that the applicants received a copy of the judgment from the chief.
  - g. The only evidence on record as to when the applicants first learnt that Mr Omollo had been unwell is the text message at Page 75 of the application sent to Julita Mary on July 5, 2022. Yet the letter dated June 23, 2022 is not even copied to M/s Omollo & Omollo Advocates yet they were the advocates on record for them in the matter in which the subject judgment was issued. If Mr Omollo was unwell as claimed, then the decision by the applicants to go to a different lawyer and not to involve him in the communication confirms that the applicants knew well before mid-June 2022 that he was unwell.
  - h. There is nothing in the letter that suggests that a copy of the judgment was given to the applicants by the chief.
11. Sister Achieng, as earlier alluded swore an affidavit on September 13, 2022 in response to issues raised in the replying affidavit of Miss Omonya. I will from time to time make reference to that supplementary affidavit.
  12. I have read and understood the submissions filed by the parties.
  13. It is common ground that anyone desirous of challenging the judgment of the ELC delivered on May 6, 2022 needed to have filed the notice of appeal within 14 days thereof (rule 75 of the 2010 Rules, (now rule 77)) and the deadline was May 20, 2022. The applicant is late and implores the discretion of this



court to enlarge time. That discretion, though extensive, is to be guided by well-established principles restated in *Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR* being;

' The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors.'

14. But I start by dealing with a preliminary matter. The proceedings before the ELC were commenced by Tom O K'opere by way of originating summons. In those proceedings the 1<sup>st</sup> respondent is named as sister Dominic Savio Akoth for and on behalf of Franciscan Sister of Saint Joseph (Asumbi) Registered Trustees. The application before me is said to be brought by sister Mary Dominic Savio Akoth on behalf of Franciscan Sisters of St Joseph (Asumbi) now suing through next friend sister Mary Goretty Achieng. It is explained by the applicant, and proof is furnished, that sister Akoth is suffering poor health and that sister Achieng, who is a trustee of FSJ is now her next of friend. Attached to the supplementary affidavit of sister Achieng is proof that she was appointed trustee on May 2, 2018.
15. Counsel for the respondents argues that the FSJ is a body corporate and that before the ELC, sister Akoth brought the suit not in person but in her capacity as a trustee. It is submitted that sister Achieng cannot therefore simply step in on behalf of Sister Akoth as though the proceedings was a matter personal to sister Akoth.
16. It seems to me that the objection by the respondents is based on a wrong premise. Looking at some of the documents filed in the ELC, it is clear that the current applicant was sued as a defendant before the ELC. proceedings were brought against FSJ. The 1<sup>st</sup> defendant is named as sister Dominic Savio Akoth for and on behalf of FSJ. The argument by the respondent that FSJ is a body corporate and should be the proper party to file this application is defeated by the manner in which proceedings were taken out by the plaintiff in the ELC, not against FSJ as a body corporate but against sister Akoth for and on behalf of FSJ. The problem began with the manner in which FSJ was sued. The suit was brought against sister Akoth because she was a trustee of FSJ which was really the substantive party. There can be no good reason to now begrudge sister Achieng, who is a trustee, for bringing the application on behalf of FSJ as sister Akoth is unwell. I refuse to uphold the objection.
17. The applicant contends that it was not informed of the judgment by the erstwhile advocates as the principal to that firm, Mr Omollo was unwell and it first learnt of the judgment when sister Achieng was told of it by chief Joseph Mboga who also informed her that FSJ was required to move out of the suit land. It is said that FSJ got this information towards the end of June 2022. The respondents on the other hand doubt the candour of this contention and state that FSJ would have known of judgment by at least June 24, 2022 when its advocates asked it to vacate.
18. An issue that immediately arises is when FSJ exactly first learnt of the judgment. Although in the supporting affidavit of Sister Achieng, she talks about the end of June 2022 without given a specific date, some other information is suggestive of the date. In the supplementary affidavit of sister Achieng, she categorically deposes that FSJ got wind of the judgement on June 22, 2022. She further states that on the same day she sent Kshs 500 through mpesa to the chief to enable him photocopy the judgment. Although she refers to an attached copy of the mpesa transaction message, there is no such attachment to her affidavit. Yet I have to find that what she deposes is believable because attached to



her supplementary affidavit is a copy of two short messages (sms) sent from her phone to the advocate of FSJ on 22<sup>nd</sup> June in which she states:

' Hi, we are told there is a court order to evict us'

Then in apparent desperation asks;

' Please help us know what to do.'

19. From this evidence I believe sister Achieng when she states that she first got to know of the judgment on June 22, 2022 and not on June 24, 2022 as suggested by counsel for the respondents.
20. None of the parties attended the ELC for the delivery of the judgment. The judgment was transmitted through electronic mail on May 6, 2022 by the deputy registrar of the ELC. One of the email address to which the mail was sent is info@omolloadvocate.com. This would be the email address of the past advocates of the applicant. Of note is that the email is not addressed to the applicant itself.
21. FSJ contends that its then advocates had been non-communicative for some time only for FSJ to later learn that he had been unwell from since April, 2022. Attached to the supporting affidavit of Sister Achieng is a copy of an sms sent on July 4, 2022 from advocate Omollo to sister Julita in which he states:

' Hi sr. I have been hospitalized at Mater Hospital since 27<sup>th</sup> and I was discharge today. Feeling far much better. Gdnt.'

22. Although this message is of July 4, 2022, it does corroborate the evidence of sister Achieng that information received from one Lilac Omollo, who she found in the office of the advocate after FSJ learnt of the judgement, was that advocate Omollo had been sick for some time. In reaching this conclusion i have reflected on the argument raised by the respondents that a medical report dated July 12, 2022 from Equity Afia, a medical facility at Kisumu, demonstrates that dispositions of sister Achieng are false. The form states that one Arthur Omondi Omollo was presented to the facility with a history of low moods, social seclusion, decreased need for sleep and tendencies of sadness and anger outbursts on April 2022. It further states that he was currently, the date of the report, under treatment and observation from home.

The report, however, does not mention his admission in Mater Hospital. Yet I observe that the sms from advocate Omollo reveals that he was discharged from Mater Hospital on the date of the sms viz July 4, 2022 and that he had been hospitalized at there since the 27<sup>th</sup> although the month is not stated. It is therefore possible that he attended Equity Afia on April 22, 2022 before his admission in Mater and further he visited Equity Afia for treatment and observation as an outpatient after his discharge from Mater on July 4, 2022. In a word, there is no inconsistency between the contents of the sms by advocate Omollo and the medical report.

23. In a sum there is a plausible explanation for the delay. Having learnt of the judgment on June 22, 2022, FSJ filed the present application on July 10, 2022. Although it could have acted faster, action was taken about 18 days later. This cannot be said to be unreasonable delay given that FSJ had to engage a new firm of advocates. In addition, the lateness from the time the notice of appeal ought to have been filed to the date of the application is about 40 days. This is not inordinate delay and is at any rate accounted for by a credible explanation. Further, the court has keenly read the lengthy replying affidavit filed in opposition to the application. It raises many issues but does not reveal any prejudice that the respondents may suffer if the enlargement sought is granted.



24. In the end, the discretion of the court leans in favour of the applicant. The notice of motion dated July 10, 2022 is hereby allowed. Costs shall abide the outcome of the appeal. The notice of appeal shall be filed and served within 14 days hereof and thereafter, and within 60 days thereof, the record of appeal shall be filed and served.

**DATED AND DELIVERED AT KISUMU THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

**F TUIYOTT**

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**JUDGE OF APPEAL**

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

*SIGNED*

**DEPUTY REGISTRAR**

