



REPUBLIC OF KENYA



**Ouma & 2 others v Magany & another (Civil Application  
E092 of 2022) [2022] KECA 1362 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1362 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E092 OF 2022  
F TUIYOTT, JA  
DECEMBER 2, 2022**

**BETWEEN**

**MICHAEL ABONGO OUMA ..... 1<sup>ST</sup> APPLICANT  
ISAYA JUMA MWARE ..... 2<sup>ND</sup> APPLICANT  
MARTIN JOHN OKECH ..... 3<sup>RD</sup> APPLICANT**

**AND**

**SERAFINA OKUTA MAGANY ..... 1<sup>ST</sup> RESPONDENT  
ANDREW ONYANGO MAGANY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file an appeal against the  
Judgment of the Environment and Land Court of Kenya at Homa Bay (G.M.A.  
Ong'ondo, J.) Dated 25th January, 2022 in ELC Court Appeal No. 22 of 2021)*

**RULING**

1. For one reason or the other, there could be a delay by a trial court in preparing and delivering of a copy of proceedings and judgment to a party who is desirous of preferring an appeal against the judgment to the Court of Appeal. The delay can cause an intended appellant to breach the timeline prescribed for instituting an appeal.
2. Such delay will be beyond the control of the intended appellant and so the objective of proviso to Rule 82 (1) of the *Court of Appeal Rules, 2010* (now Rule 84 (1)) is to grant respite to such an intended appellant. It 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.

3. Michael Abongo Ouma, Isaya Juma Mware and Martin John Okech (jointly the applicants) are dissatisfied with the judgment of Ong’ondo, J delivered on January 25, 2022 in ELC Appeal No. 22 of 2021 *Serfina Okuta Magany & another –Vs. Michael Abongo Ouma & 5 others*. Through their advocates, M/s Mbugua Mureithi & Co, they filed a notice of appeal dated February 3, 2022 and lodged in the ELC registry a day after, on February 4, 2022, within time (See Rule 75 of the 2010 Rules (now Rule 77)).
4. In a letter dated February 8, 2022 the said advocates wrote to the Deputy Registrar of the ELC bespeaking a certified copy of the proceedings and judgment. Again within the time prescribed by the Rules of this Court. By some omission on the part of the advocates, a copy of the letter was not served upon the respondent. See Rule 82 (2) (now Rule 84(2) which reads:
  1. 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.
5. The reason for the lapse is explained in the affidavit of Victor Olewe, an advocate for the appellants, sworn on July 15, 2022. After delivery of the judgment, the applicant filed an application dated February 10, 2020 for stay of execution before the ELC Court at Homa Bay. To the application (I suppose the affidavit in support), was attached copies of the notice of appeal and the letter bespeaking proceedings. The lapse in serving the letter independent of the application is said to be an oversight by the advocate. Proceedings were typed and were ready for delivery to the applicants on March 1, 2022. Obtaining a certified copy of the judgment took much longer and was only available on June 14, 2022. A certificate of delay dated June 21, 2022 issued by the Deputy Registrar sets out the date of June 14, 2022 as being the date when proceedings and “all necessary documents” (presumably the certified copy of the judgment) were ready for delivery to the current applicants.
6. The application and affidavit in support lacks clarity but I understand the applicant to be saying that as things stand, they are not entitled to rely on the proviso to Sub- Rule 1 of Rule 82 (now Rule 84) because they did not properly serve the respondents with a copy of the letter bespeaking proceedings as envisaged in sub-rule 2.
7. There is no response to the motion before Court and the matters deponed thereto are uncontroverted.
8. I have read the submissions by the applicants dated September 9, 2022. The motion before Court was filed on July 15, 2022, about a month after proceedings and judgment were ready for delivery to the applicants. This period is not inordinate. The failure to serve a copy of the letter bespeaking proceedings is blamed on an oversight of the advocate for the applicants who deposes to his omission. I think the explanation is plausible and there has been a prompt attempt by the applicants to right the wrong. In addition, as I am not told that to grant the application will prejudice the respondents, then I



am inclined to allow the application and trust that I have exercised my discretion within the parameters set out in the various decisions of this Court (see for example *Fakir Mohamed Joseph Mugambi & 2 others* [2005] eKLR).

- 9 The notice of motion dated July 15, 2022 is hereby allowed. The applicants shall within 14 days hereof institute and serve the appeal upon the respondents. Costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Kisumu this 2<sup>nd</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.**

