



County Government of Siaya v Oloo & another (Civil Application E093 of 2021) [2021] KECA 71 (KLR) (8 October 2021) (Ruling)

Neutral citation: [2021] KECA 71 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E093 OF 2021
RN NAMBUYE, JA
OCTOBER 8, 2021**

BETWEEN

COUNTY GOVERNMENT OF SIAYA APPLICANT

AND

EVERLYNE MANDE OLOO 1ST RESPONDENT

EDWIN ODHIAMBO SIALA 2ND RESPONDENT

(An Application for leave for extension of time to Lodge Record of Appeal out of time against the Judgment of the Environment and Land Court (A. O. Ombwayo, J.) dated 30th January, 2020 in Kisumu ELC No. 281 of 2014)

RULING

- 1 Before me is a Notice of Motion dated 7th May, 2021 under, Sections 3A of the [Civil Procedure Act](#) and Rule 4 and 81(1) of the *Court of Appeal Rules* . The Notice of Motion substantively seeks leave of the court to lodge the record of appeal out of time pursuant to Rule 4 of the Court of Appeal Rules against the whole judgment of A. O. Ombwayo, J. delivered on 30th January, 2020. It is supported by grounds on its body and a supporting affidavit sworn by Leonard Otieno together with annexures thereto. It has been opposed by the respondents written submissions dated 21st July, 2021.
- 2 It was canvassed virtually vide the Go-To-Meeting platform due to the ongoing Covid-19 pandemic challenges through written submissions and legal authorities in the absence of counsel for the respective parties and without oral highlighting.
- 3 In summary the applicant’s averments and submissions are inter alia that it was aggrieved with the judgment of the trial Court and instructed the firm of M/s S. O Madialo & Co. Advocates under whose instructions Leonard O. Otieno has deposed the supporting affidavit to the application under consideration to lodge an appeal against the said judgment, pursuant to which instructions the said firm of advocates filed a notice of appeal dated 4th February, 2020, and caused it to be served on the



- respondents 17th February, 2020. A letter bespeaking proceedings was written on 4th August, 2020 and received at the registry on 12th August, 2020. Proceedings were supplied on 19th March, 2021, together with a certificate of delay.
- 4 Counsel was however unable to compile and serve the record of appeal in time due to the outbreak of the Covid-19 pandemic akin to an Act of God, beyond his control. It is his position that the intended appeal is not frivolous, as it involves demolition of market structures which were expensively put up by the applicant for use by the public. That the default in timeously filing the record of appeal was occasioned by the scaling down of Government services due to Covid-19 pandemic which led to the closure of courts.
 - 5 Counsel relies on Civil Application No. Nai 256 of 2001; *Nuru Awadh Bawazir vs Christopher Stephen Akilano Akiwumi & Anor (unreported)* and Civil Application No. Nai 270 of 2001(149/2001 UR; *Lt Colonel Joseph Mweteri Igweta vs Mukira M'Ethare & Anor (unreported)*) both on the principles that guide the court on the exercise of its mandate under Rule 4 of the Court of Appeal Rules.
 - 6 In rebuttal, the respondents filed written submissions. In these, they contend that indeed Rule 82(1) of the Court of Appeal Rules required the applicant to file its record of appeal within sixty (60) days of the lodging of the notice of appeal unless proceedings were applied for and the letter bespeaking proceedings filed and served within the timelines set therein which according to them, the applicant complied with. That the record is explicit that the applicant was accorded a certificate of delay and certified copies of proceedings on 19th March 2021. According to them, the above two processes capacitated the applicant to file its record of appeal by 19th May, 2021, which opportunity the applicant squandered. Instead of filing the record of appeal, they prematurely filed the application dated 14th April, 2021 seeking the same relief. The respondents accordingly alerted them that the said application was prematurely filed, subsequently withdrawn by their letter dated 18th May, 2021. Instead of filing the record of appeal as advised, they filed the application under consideration on 7th May, 2021 also prematurely as time allowed by the certificate of delay for filing the record of appeal entitled them to file the record of appeal on or before 19th May, 2021.
 - 7 That the applicants only have themselves to blame and should not therefore be indulged by the court. The respondents further argue that the fact that the substratum of the appeal is public property is not sufficient basis for granting the relief sought and urged for the application be dismissed.
 - 8 Relying on the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, on the guidelines for exercise of the court's mandate in extension of time within which to comply with a court process, they submit that the applicant has failed to meet the threshold set by the Supreme Court in the above case and therefore prays for the application to be dismissed with costs to them.
 - 9 My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the Court of Appeal Rules, which provides as follows:
 - “ 4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
 - 10 The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations in case law both binding and persuasive. I take it from the position taken by the Supreme Court crystalizing the threshold on extension of time within which to



comply with a court process (M. K. Ibrahim & S.C. Wanjala SCJJ.) in the case *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* (supra) in which these were crystallized as follows:-

- “(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

- 11 From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
- 12 I have given due consideration of the record in light of the applicants sole pleading, rival submissions of the respective parties herein, and principles that guide the court in the exercise of jurisdiction under Rule 4 of the CAR. Only one issue falls for determination namely whether the applicant has satisfied the prerequisites for granting relief under Rule 4 of the CAR.
- 13 On the period of delay in seeking the Courts intervention, the parameter I find appropriate to apply in determining as to whether the applicant has satisfied this prerequisite is that set out in the case of *George Mwendu Muthoni vs Mama Day Nursery and Primary School*, Nyeri CA No. 4 of 2014, (UR), in which extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months.
- 14 Rule 75 of the CAR is the substantive rule that makes provision for the filing of a Notice of Appeal, while Rule 82 of the Court of Appeal Rules is the substantive rule that provides for the mandatory requirement that a certified copy of the proceedings be applied for within thirty (30) days of the delivery of the decision appealed against, while the record of appeal is required to be filed within sixty (60) days from the date of the filing of the notice of appeal, unless there is demonstration that the circumstances under consideration in an application of this nature fall within the proviso to the said Rule 82 which provides for exclusion from computation of the sixty days for filing of the record of appeal, time taken by the registry for preparation and supply of a certified copy of the proceedings.
- 15 As summarized in the respondents’ submissions, judgment in Kisumu ELC No. 281 of 2014 was delivered on 30th January, 2020 in favour of the respondents. The applicant being dissatisfied, lodged the notice of appeal on 4th February, 2020 and requested for typed proceedings on the same date. The proceedings were not ready for collection until 19th March, 2021 when the applicant was notified of



their readiness and issued with a certificate of delay. It therefore follows that pursuant to Rule 82(1) of the Court of Appeal Rules, the applicant ought to have filed the record of appeal on or before 19th May, 2021. Instead of doing so, prematurely filed the application under consideration.

- 16 The sequence of events outlined above leaves no doubt in my mind that failure to file the record of appeal on 19th May, 2021 was occasioned by applicant's advocates inadvertence who even failed to heed the respondents warning that the application was premature.
- 17 The position in law with regard to circumstances under which the court may either pin or decline to pin responsibility for an advocates mistake or inadvertence or a client have been crystallized by case law enunciated by the court. I take it from *Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd* [1987] eKLR, among numerous others, the Court variously declined to visit wrongs of advocates against clients where like in the instant application there was sufficient demonstration that noncompliance with any prerequisites provided for in the applicable rules was due to the advocate's fault.
18. In light of the above and in the circumstances displayed above, I find it just and equitable not to pin responsibility for applicant's advocates inadvertence on their client and use it as basis for declining to exercise my discretion in their favour. It will be too highly punitive in my opinion. However, before I make the final order, I am enjoined in law to consider any prejudice the respondent may suffer if the relief were granted. None has been cited by the respondent in their submissions.
19. In the result, I find merit in the applicant's application. It is accordingly allowed and I proceed to make orders as follows:
 1. Since the record of appeal is said to be ready, the applicant has thirty days from the date of the delivery of the ruling to file and serve the record of appeal.
 2. Costs of the application to abide the outcome of the appeal.

DATED and DELIVERED at NAIROBI this 8th of October, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

Signed

DEPUTY REGISTRAR

