



REPUBLIC OF KENYA



KENYA LAW
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**Ochung & 3 others v Ochung & 3 others (Civil Application
E078 of 2022) [2022] KECA 1246 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1246 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E078 OF 2022
F TUIYOTT, JA
NOVEMBER 4, 2022**

BETWEEN

**MAURICE OTIENO OCHUNG 1ST APPLICANT
MARAGARET OGUTU OCHUNG 2ND APPLICANT
WILFRED ODHIAMBO OCHUNG 3RD APPLICANT
GEORGE OWINO OCHUNG 4TH APPLICANT**

AND

**TERRY MAUREEN OCHUNG 1ST RESPONDENT
GEORGE FRANCE OCHUNG 2ND RESPONDENT
PERPETUA AMONDI OCHUNG 3RD RESPONDENT
CATHERINE OCHUNG 4TH RESPONDENT**

*(Being an Application for leave to file an appeal out of time, from
the Ruling of the High Court of Kenya at Kisumu (F.A. Ochieng,
J.) dated 9th July, 2019 in HC. Succession Cause No. 654 of 2015)*

RULING

1. In the notice of motion dated June 3, 2022, this court is asked to grant leave to the applicants to file the intended appeal out of time and to bring in new evidence in support of their appeal, specifically to produce their respective certificates of birth during the hearing of the intended appeal. The application is said to be brought under rules 4 and 29 of the [Court of Appeal Rules 2010](#). Rule 29 is now rule 31 in the [2022 Rules](#). The decision that is the subject of this application is of FA Ochieng, J delivered on July 9, 2019 in Kisumu High Court Succession Cause No 654 of 2015.



2. To be noted this early is that an application for leave to adduce further evidence is not a matter to be dealt with by a single judge and I decline the invitation to hear or determine that limb of the application.
3. Wilfred Odhiambo Ochung (the 3rd applicant) swore an affidavit on June 3, 2022 in support of the motion and on behalf of all the applicants. The ruling herein was delivered on July 9, 2019. A notice of appeal against the decision was lodged on July 17, 2019 (and not July 15, 2021 as erroneously deposed). By a letter written a day earlier, the advocates then acting for the applicants wrote to court below bespeaking certified copies of proceedings and judgment. It is deposed that the proceedings and judgment were eventually supplied on February 25, 2020.
4. The court is told that this was the time of the Covid 19 pandemic in which courts were closed in accordance with directives of the National Government. Further, that it was also during this sad and difficult time that the 1st applicant passed on from the effects of the pandemic and as a consequence, commencement of the appeal was delayed. The 3rd applicant further states that by the time they were ready to take up the appeal, they had lost contact with their then advocate and they could not follow up with filing the memorandum and record of appeal. The court is asked to spare the applicants from mistake of the advocate.
5. The application is opposed through a replying affidavit of Terry Maureen Ochung Awuor on July 5, 2022. It is deposed that the notice of appeal was filed 2 years after delivery of the ruling, a delay which is inordinate. The respondents contend that the applicants have failed to provide any substantive proof of their reason for the delay in filing the appeal.
6. Although the applicants mistakenly stated that the notice of appeal herein was lodged on July 15, 2021, the copy of the notice attached to the affidavit shows that it was lodged in the High Court of Kenya Kisumu Registry on July 17, 2019. The notice of appeal was therefore lodged on time in accordance with rule 75 (now rule 77) of the *Court of Appeal Rules*.
7. What was not done in time was the institution of the appeal. Rule 82 (now rule 84) on institution of appeals 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. As the applicants sought copies of proceedings in accordance with the proviso to subrule (1), and subrule 2, they would, as matter of law, be entitled to the respite granted by the rules for exclusion of the period required for the preparation and delivery of a copy of the proceedings in the computation of time of when the appeal needed to be instituted. However, the applicants did not show this court the certificate of delay contemplated by subrule 1 and no explanation was given as to why such certificate was not prepared by the Registrar. Instead, the applicants purport to provide evidence of the delay by making reference to the stamp of the Deputy Registrar of the superior court below dated February 25, 2020 certifying a copy of the judgment as a true copy of the original. That certificate is not the certificate of the period required for preparation and delivery of the proceedings that is envisaged by the rule. For that reason, the applicants cannot benefit from the suspension of that period and the time for instituting the appeal has to be computed from the date when the notice of appeal was lodged, being July 17, 2019.
9. The appeal therefore ought to have been instituted by September 17, 2019. The consequence is that the present application is brought about 30 months late. No doubt an inordinate delay. I am not persuaded that this delay can be attributed to the challenges associated with the Covid 19 pandemic as it was not demonstrated that the court registry was closed and not accessible for filing. At any rate, if it is true that the proceedings were supplied on February 25, 2020, still, the delay would be in excess of 24 months. No explanation has been given as to why the applicants' advocates would not have brought this application earlier. Further, the attempt by the applicants to blame their advocates as being unavailable is not plausible as the applicants have not demonstrated any effort they made to contact them.
10. Simply, considered within the parameters which guide the discretion granted to this court by rule 4 for extending time (see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997), the application falls short of merit and is for disallowing.
11. The notice of motion dated June 3, 2022 is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

