



Ouya (Suing as the Personal Representative of the Estate of Ouya Anguka) & 4 others v Pioneer General Assurance Co. Ltd & 2 others (Civil Application E098 of 2023) [2023] KECA 1369 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KECA 1369 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E098 OF 2023
HA OMONDI, JA
NOVEMBER 17, 2023**

BETWEEN

JOHN AMBILI OUYA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF OUYA ANGUKA) 1ST APPLICANT
PETER NGESO PETE (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDEREA NYAUNDI OGENDO) 2ND APPLICANT
PETRO PETER ONGUKA 3RD APPLICANT
WASHINGTON OKECH 4TH APPLICANT
JOSEPH ODHAIMBO OMEDO (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JULIUS OMEDO OTIENO) 5TH APPLICANT

AND

PIONEER GENERAL ASSURANCE CO. LTD 1ST RESPONDENT
THE REGISTRAR OF LANDS 2ND RESPONDENT
KISUMU NYANDO MWALIMU SACCO 3RD RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal from the decision of the Environment and Land Court at Kisumu (Odeny, J.) dated 1st November in Kisumu ELC No. 865 of 2015)



RULING

1. The application dated 2nd August 2023 brought pursuant to Rule 4 [Court of Appeal Rules, 2010](#), seeks extension of time within which to file appeal out of time, against the judgment of Odeny, J, delivered on 1st November 2023. The application is supported by the affidavit of even date, sworn by David Otieno.
2. The applicant had filed a suit against the respondents jointly and severally, in Kisumu ELC No. 865 of 2015 seeking a declaration that the registration of the 1st respondent as the proprietor of the suit property; and the subsequent transfer to the 3rd respondent was fraudulent and void; a permanent injunction to restrain the 1st and 3rd respondents from dealing adversely with the land; and an order directing the 2nd respondent to cancel the initial proprietorship registration of the 1st respondent, as well as the subsequent registration of the 3rd respondent. Judgment was entered on 1st November 2023 wherein the applicant's suit was dismissed with no orders as to costs.
3. Aggrieved by the outcome, the applicants instructed their advocate to file an appeal; and in preparation, the advocate filed and served the Notice of Appeal and letter requesting proceedings both dated 13th November 2019. The certified copies of proceedings were received on 1st December 2020 and a certificate of delay dated 16th December 2020 issued by the Deputy Registrar of the court. Apart from that, in the course of preparing the record of appeal, the applicant's counsel found out that a key piece of evidence - namely, the parcel title for Title No. Kisumu/Konya/2238 which had been produced at the trial, did not form part of the trial court's records. The applicants' counsel routinely requested for copies of documents in the said parcel file to be availed vide several letters to the Land Registrar produced in the affidavit of support as DO-6 (a-c); and eventually on 27th July 2023 after several follow ups, the court forwarded the exhibits.
4. The applicants explain that as a result there was delay in filing the appeal within the 60 days prescribed, which delay has not been deliberate as the applicants are eager to prosecute the intended appeal, and should not be denied the opportunity to ventilate their grievance through no fault of their own. Further, that the respondent will not suffer any prejudice as they have been aware of the steps taken to ensure the missing documents are availed to complete the court record as the letters were copied to the respondent's advocates.
5. In opposing the application vide a replying affidavit sworn by Geoffrey O. Yogo, the 1st respondent describes the application as an afterthought which is unmerited, as the applicants have not explained why they could not just file the record of appeal with whatever documents they had, then seek leave to file a supplementary record to include the missing documents. Citing the decision in [Sokoro Savings and Credit Co-operative Society Ltd vs. Mwamburi](#) [2023] KECA 381 KLR, where the prayer for extension of time was declined on grounds that there had been inordinate delay, the respondents contend that, bearing in mind that an appeal should be lodged within 60 (sixty) days of the decision appealed against, yet the applicants had close to 4 years within which to file the appeal, but opted not to utilize the time diligently, then the only rational conclusion is that there has been inordinate delay. The respondents urge this Court to pay fidelity to the equitable maxim that equity aids the vigilant, not the indolent, and decline to exercise discretion in favour of the applicant.
6. Has the applicant met the prerequisites for granting relief under Rule 4 of the [Court of Appeal Rules](#)? Rule 4 of the [Court of Appeal Rules](#) gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso vs. Rose Wangari Mwangi* Civil Application No. Nai. 255 of 1997 (unreported) held that the discretion of a single



Judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others (2013) eKLR.

7. Indeed, M’Inoti, J, had this to say concerning Rule 4 in Imperial Bank (IR) & Anor vs. Alnashir Papat and Others [2018] eKLR:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favour. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”

8. Discretion also depends on circumstances of each case as per Mongira & Another vs. Makori & Another [2005] eKLR. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of Nicholas Kiptoo Korir Arap Salat vs. IEBC [2014] eKLR sets down these principles as follows: -

- i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
- iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
- v. Whether there will be any prejudice suffered by the respondent if extension is granted.
- vi. Whether the application has been brought without undue delay.
- vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of Julius Kamau Kithaka (*supra*) is whether *prima facie* the intended Appeal/Appeal has chances of success or is a mere frivolity.

9. In the instant case, the applicant’s advocate has, in the supporting affidavit explained the delay in serving the record of appeal. I note that the Notice of Appeal and the letter bespeaking proceedings were filed timeously. The respondent’s only argument is that the applicant ought to have filed what was available then later on seek for leave to file a supplementary, yet the respondents have not approached the court to have the appeal struck out for want of filing the record of appeal within the prescribed time.

10. It is noted that the applicant is now in possession of the said missing documents and can file the record as soon the orders sought are granted. I find that the applicant has met and satisfied the principles set out for exercising discretion in his favour, as the delay in filing and serving the record of appeal has been explained satisfactorily. and grant the extension the delay in filing and serving the Record of Appeal has been satisfactorily. Consequently, the applicant is hereby granted leave to file and serve the record of appeal within 14 days from the date of the delivery of this ruling. The costs of this application shall abide the final outcome of the appeal.



DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

