



**Mwamba & 6 others v Makwolo & 3 others (Civil Application
E079 of 2024) [2024] KECA 1579 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1579 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E079 OF 2024
HM OKWENGU, JA
NOVEMBER 8, 2024
[IN CHAMBERS]**

BETWEEN

TOM MOMANYI MWAMBA APPLICANT

AND

SAMWEL BENJAMIN AOSA 1ST APPELLANT

MOGAKA AOSA 2ND APPELLANT

JACKSON M MAKWORA 3RD APPELLANT

STEPHENE NE AOSA 4TH APPELLANT

MOKAYA OBAGA 5TH APPELLANT

GEKONGE OBAGA 6TH APPELLANT

AND

JAMES NYACHWAYA MAKWOLO & 3 OTHERS RESPONDENT

*(Being an Application under Rule 4 of the Court of Appeal Rules 2010, Section
1A, 3A & 63(e) of the Civil Procedure Act, Article 159 Constitution, 2010,
and all other enabling provisions of the law seeking to have time extended)*

RULING

1. By a Notice of Motion dated 25th June, 2024, the applicants, Tom Momanyi Mwamba, Samwel Benjamin Aosa, Mogaka Aosa, Jackson M. Makwora, Stephene Ne Aosa, Mokaya Obaga and Gekonge Obaga have moved this Court, seeking orders that the Court do extend time, to enable them file and serve the record of appeal out of time, on such conditions that the Court may deem fit to grant.



2. The application is anchored on grounds stated on the face of the motion, and an affidavit sworn by Samwel Benjamin Aosa. In brief, the applicants filed a notice of appeal on 24th May, 2023, which notice of appeal was duly served. The applicants applied for copies of proceedings on 23rd May, 2023, and paid for the same on 23rd June, 2023. Subsequently, they were issued with a certificate of delay on 4th June, 2024, in which the Deputy Registrar certified that the dates between 16th November, 2023, and 17th April, 2024, were required for the preparation of the proceedings and should be discounted in the computation of the time for filing of the appeal.
3. From the memorandum of appeal and the notice of appeal, which are both attached to the applicants' notice of motion, the applicants are aggrieved by the judgment of the High Court in Kisii Civil Appeal No. 119 of 2019, delivered on 4th May, 2023. Samwel Benjamin Aosa swears that the delay in filing the record of appeal was occasioned by delay in obtaining copies of the proceedings which were only supplied on the 17th April, 2024.
4. The applicants have not availed a copy of the ruling subject of the intended appeal, but from the memorandum of appeal, it appears that in the ruling, the High Court dismissed the applicants' motion to set aside the *ex parte* judgment entered by the Magistrate's court. The applicants faulted the learned Judge of the High Court for upholding the ruling of the trial magistrate (subordinate court), that service was proper, when it is clear that the process server did not indicate the name of the person who pointed out the applicants at the time and place of service.
5. The applicants are also aggrieved that the learned Judge dismissed their draft statement of defence, and did not consider the prejudice that they were likely to suffer by being denied an opportunity of being heard.
6. The respondents have opposed the application through a replying affidavit sworn by James Nyachwaya Makwolo (Makwolo), who is one of the respondents. In the affidavit Makwolo contends that the applicants' motion is incurably defective due to the titles given to the parties; he also contends that the applicants have not given any explanation for the failure to file the record of appeal between 16th June, 2024, and 25th June, 2024.
7. Although the applicants cited several provisions, the application being one seeking extension of time, falls squarely within the provisions of Rule 4 of the *Court of Appeal Rules*, which read together with Rule 55(1) of the *Court of Appeal Rules*, 2022, gives me discretion as a single Judge to extend time for the doing of any act authorized or required by the rules.
8. As stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral Boundaries Commission & 7 Others (IEBC)*, the discretion to extend time is:
 - “ 15. ... a very powerful tool which ought to be exercised with abundant caution, care and fairness; it ought to be exercised judiciously and not whimsically, to ensure that the principles enshrined in the *constitution* were realized.
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 - 17(1) Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court.
 - 17(2) A party who sought for extension of time had the burden of laying a basis to the satisfaction of the court.”



9. In this application, both parties have been very casual in the manner in which the application has been presented and responded to. For instance, the applicants have not given the Court enough information for the Court to appreciate the reasons for the failure to file the record of appeal within time, and the prejudice if any, that the applicants are like to suffer.
10. In addition, although it is alleged that the delay in filing the record of appeal is due to the failure to obtain proceedings in time, the letter seeking proceedings was written on 23rd June, 2023, while the ruling was delivered on 4th May, 2023. The applicants have not given any explanation as to why it took about fifty (50) days to apply for proceedings.
11. Section 84(1) of the *Court of Appeal Rules* provides that in computing time within which the appeal is to be instituted, the time required for the applicant to be supplied with a copy of the proceedings can only be excluded where the request for proceedings was made within thirty days from the date of the decision sought to be appealed against. To this extent, the applicants cannot rely on the certificate of delay to have time extended as they applied for the proceedings outside the required time.
12. Further, the letter seeking the typed proceedings was not copied to the respondents. This contravenes Section 84(2) which precludes the applicants from enjoying the benefits of the proviso to section 84(1) if the application for copies of proceedings was not copied to the respondent.
13. The certificate of delay relied upon by the applicants indicates that the period between 16th November, 2023 to 17th April, 2024, ought to be discounted in the computation of time, as it was the time taken to prepare and supply the certified copies of the proceedings and that the proceedings were certified and issued to the respondent/applicant on 17th April, 2024, and yet the same certificate states that it was prepared and was ready for collection on 4th June, 2024. The certificate though signed by the Deputy Registrar is suspect, as the Registrar could not have required about forty-five days after the proceedings were ready, to prepare the certificate of delay and issue it to the applicants.
14. Finally, the applicants have not given any explanation as to why it took more than twenty days after receiving the certificate of delay to file the application, assuming they were indeed issued with the certificate of delay on 4th June, 2024.
15. The upshot of the above is that the applicants have failed to discharge their obligation of laying the basis for the exercise of this Court's discretion as they have failed to demonstrate that they are deserving of the exercise of such discretion. Consequently, the application is dismissed.

I make no orders as to costs.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

