



Okimaru & 4 others v Walime (As a Legal representative of the Estate of David Wanjala Welime (Deceased) & 2 others (Civil Application E079 of 2025) [2025] KECA 2060 (KLR) (1 December 2025) (Ruling)

Neutral citation: [2025] KECA 2060 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E079 OF 2025
LK KIMARU, JA
DECEMBER 1, 2025**

BETWEEN

**GEORGE OKIMARU 1ST APPLICANT
WILLYSHARE IRARU 2ND APPLICANT
ELLY EPALA 3RD APPLICANT
JULIUS NYONGESA WANYONYI 4TH APPLICANT
GEOFFREY IRARU JUMA 5TH APPLICANT**

AND

**NICHOLAS SITATI WALIME (AS A LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID WANJALA WELIME (DECEASED)) 1ST RESPONDENT
WALTER ETYANG 2ND RESPONDENT
COSMAS IRARU 3RD RESPONDENT**

(Being an application for extension of time to file the record of appeal out of time from the Judgment of the Environment and Land Court of Kenya at Bungoma (E. Cheronu, J) Dated 27th February, 2025 in ELC No. E018 of 2024)

RULING

1. The applicants moved the Court by notice of motion pursuant to Rule 4 of the Court of Appeals Rules seeking to be granted extension of time to file the record of appeal out of time. The applicants state that, being aggrieved by the Ruling delivered by E. Cheronu J on 27th February, 2025, they lodged a notice of appeal on 28th February, 2025. The applicants, however, did not write the letter bespeaking the typed and certified copies of the proceedings to the Superior Court as provided under the proviso of Rule



84(1) of the Court of Appeal Rules. By the time they obtained the typed copies of the proceedings, thirty (30) days had elapsed from the time they were supposed to file the record of appeal.

2. The applicants plead with the Court that they have a good appeal which is likely to succeed. They are apprehensive that if they are not given a chance to ventilate the appeal before this Court, they will be evicted from the suit parcel of land and consequently defeat the intended appeal. The application is supported by the annexed affidavit of Omagwa Angima, the applicants' advocate and the supplementary affidavit of George Okimaru, one of the applicants.
3. The application is opposed. Nicholas Sitati Welime, swore a replying affidavit in opposition to the application. The respondent was of the view that the delay of four months in the circumstances of this application was inordinate. The respondent was not convinced by the reasons given by the applicants for the delay in filing the record of appeal in time. The respondent reiterated that in the circumstances of the application, the delay was inexcusable as it was evident to the respondent that the applicant was not deserving of the exercise of discretion in their favour by this Court. In the premises therefore, the respondent urged the Court to dismiss the application.
4. This Court has considered the application, the replying affidavit and the written submissions filed by the parties to this application. The application calls for exercise of judicial discretion by this Court under Rule 4 of the Court of Appeal Rules. In *Paul Wanjohi Mathene v. Duncan Gichare Mathenge* [2013] eKLR, this Court stated:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, not on whim, sympathy or caprice. I take note that in exercising (discretion) consideration of the factors stated in the previous decisions of this Court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
5. In the present application, it was clear to the Court that the applicants gave satisfactory explanation for the delay. The applicants lodged the notice of appeal in time. Their advocate, due to an oversight, (which he admits to be a honest mistake) did not write the letter bespeaking the certified typed copies of the proceedings to the Superior Court when he lodged the notice of appeal. If he had done so, he would have benefited from the filing of certificate of delay by the Superior Court. As it were, by the time he obtained the proceedings from the Superior Court, thirty (30) days had elapsed.
6. Although the respondent has a point when he states that the period of delay of four months is inexcusable, this Court has considered the totality of the facts of this application, including the fact that the dispute relates to occupation of land, and formed the view that the applicants should be given a chance to ventilate their appeal before this Court. Any prejudice that the respondent will suffer will be compensated by an award of costs.
7. In the premises therefore, the application has merit. The applicants are hereby granted leave to file the record of appeal out of time. The record of appeal shall be filed and served within thirty (30) days of today's date. The respondent shall have the costs of the application.

DATED AND DELIVERED AT KISUMU THIS 1ST DAY OF DECEMBER, 2025.

L. KIMARU

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JUDGE OF APPEAL



I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR.

