

**IN THE COURT OF APPEAL
AT KISUMU**

CORAM: KIAGE, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. E046 OF 2022

BETWEEN

JOHN OLOO ODENYAPPELLANT/APPLICANT

AND

WILLIAM MASARA OOKORESPONDENT

*(An application for extension of time to file and serve the Record and
Memorandum of Appeal against the Ruling of the High Court of
Kenya at Kakamega (W. Musyoka, J) dated 22nd May, 2020*

in

Succession Cause No. 341 of 2001)

RULING

The applicant, John Oloo Odeny, filed a Notice of Motion dated
4th April 2022 seeking the following orders, in the main;

- 1. THAT the Applicant be given leave to file its Record of Appeal out of time.***
- 2. THAT in the event that leave is granted and time enlarged as prayed hereinabove, then the Record of Appeal filed on 5th April 2022, be deemed to be properly filed and served on the respondents in compliance with the rules of this Honourable Court.***

The application is based on grounds on the face of it and is supported by an affidavit deposed to by the applicant. The applicant swore that he is the administrator of the estate of the late **William Odeny Masara** (deceased) and the intended appellant herein. By a judgment dated 22nd May 2020 in **Succession Cause No. 341 of 2001**, the High Court allowed the objector's application dated 23rd April 2015. The ruling in the matter was delivered on 22nd May 2020 in his absence but he was able to file a notice of appeal and request for typed proceedings. He also applied for stay of execution of the impugned ruling. The applicant alleged that he could not prepare the record of appeal in good time as the file was pending ruling in the judge's chamber and as such, he could not access some crucial documents.

Further, the applicant deposed that he was hospitalized in the months of February and March 2022 having contracted the Covid-19 virus and that due to his advanced age the virus took a toll on him and he could not perform his duties as usual. He contended that he is unemployed without any source of steady income and so it was not easy for him to secure immediate funds to enable him to prepare and file the record of appeal in good time. Moreover, he asserted, the

appeal has high chances of success as the High Court had previously granted orders for revocation of the grant issued but again confirmed the said grant without conducting another confirmation hearing. There is no response on record for the respondent.

I note that the application is expressed as made under **Rule 86** of the **Court of Appeal Rules, 2010**, yet the relevant **Rule** for such an application is **Rule 4** of the **Court of Appeal Rules, 2010**, now **2022**.

Enlargement of time lies in my discretion to be exercised judicially in accordance with sound principle, not out of whim, caprice or sympathy. It is also an equitable relief which attaches relevance to the general conduct of a pleader including their candour or lack of it. See **JOSEPH KABERIA ARIMBA SPEAKER COUNTY ASSEMBLY OF MERU & 3 OTHERS Vs. DOUGLAS BUNDI KIRIMI [2020] eKLR**. More importantly, my consideration is to be guided by the laid down parameters as espoused in many cases, including the oft-cited case of **LEO SILA MUTISO -VS- ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231** as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

The applicant claims that he delayed in lodging his memorandum and record of appeal for reasons that, he could not access some crucial documents from the court file because the file was pending a ruling in the judge’s chamber; he was hospitalized in the months of February and March of 2020 having contracted the Covid-19 virus, and that he is unemployed hence he could not get immediate funds to enable him prepare to file the record of appeal in good time.

I do not find the reasons proffered by the applicant plausible and satisfactory. **Rule 90** of the **Court of Appeal Rules, 2022 (formerly Rule 88)** allows an appellant to lodge a supplementary record of appeal where he may have omitted a critical document from his original record. Therefore, the argument that the applicant could not access some key documents which were in the court file in

the judge's chambers, is not well grounded. The alleged hospitalization of the applicant in the months of February and March 2022 due to the Covid-19 pandemic is also not a tenable reason for the delay. The impugned ruling was issued on 22nd May 2020, and the applicant lodged the notice of appeal soon thereafter on 4th June 2020. The applicant has not given a reasonable explanation as to why he failed to lodge the record of appeal between June 2020 to February 2022 when he apparently fell ill, a period of about one and a half years later. I find the delay to be inordinate. I am therefore not persuaded by the reasons submitted.

In the result, I decline to grant the prayer to extend time. I accordingly dismiss the application in its entirety, with costs.

Dated and delivered at Kisumu this 12th day of May, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR