



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Manyonge (Suing as the administrator of the Estate of Achi Wepukhulu (Deceased) v Pwoka (Environment and Land Miscellaneous Application E006 of 2023) [2023] KEELC 19264 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19264 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023**  
**EC CHERONO, J**  
**JULY 28, 2023**

**BETWEEN**

**ATHUMANI KHISA MANYONGE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ACHI WEPUKHULU (DECEASED) ..... APPLICANT**

**AND**

**ESTHER NASIMIYU PWOKA ..... RESPONDENT**

*(Being an application for leave to appeal out time the Ruling of the Hon. CAS Mutai (SPM) in Bungoma CMCC 395 of 2007 Athumani Khisa Manyonge v Esther Nasimiyu as delivered on the 4th of February, 2022.)*

**RULING**

1. The Applicant has moved this Court vide a Notice of Motion brought under certificate of urgency dated March 6, 2023 seeking the following orders;
  - a. That this Honourable Court be pleased to extend time within which the Applicant can appeal against the Ruling of the Hon. CAS Mutai (SPM) in Bungoma CMCC 395 of 2007 Athumani Khisa Manyonge v Esther Nasimiyu as delivered on the 4<sup>th</sup> of February, 2022 in which the Honourable Magistrate declined to review his orders dated the 18<sup>th</sup> of May, 2021 that dismissed the Applicant's suit before the lower court for want of prosecution.
  - b. That upon the extension of time, this Honourable Court be pleased to admit the Applicant's Memorandum of Appeal dated March 6, 2023 as having been duly filed upon payment of the requisite fees.
  - c. That the costs of this application be provided for.



2. The application is based on grounds apparent on the face of the said application and affidavit of the applicant sworn on even date.
3. The Respondent did not file response to the said application.

### **Applicant's Summary Of Facts**

4. The Applicant in his supporting affidavit deposed that after the trial Magistrate declined to review his orders dismissing the former suit for want of prosecution on February 4, 2022, he was aggrieved by the same and proceeded to instruct the firm of M/s Omagwa Angima & Company Advocates to urgently take over the matter and file an appeal against the Ruling of the lower court. He annexed a copy of the consent order dated 28<sup>th</sup> day of February, 2022.
5. The Applicant further stated that the said Firm of Omagwa Angima & Company Advocates prepared a draft Memorandum of Appeal which they shared with him and even informed him that that they had filed the same. However, when he was not receiving prompt and/or proper communication from his advocates in regard to the status of his suit, he instructed present Firm of Bryan Khaemba, Kamau Kamau & Advocates to take over the matter and conduct due investigations and correctly inform him of the status of the matter and the subsequent steps that needed to be taken
6. He deposed that upon performance of the aforesaid due diligence, he discovered that his immediate former advocates had never filed the Memorandum of Appeal as they had informed him.
7. In conclusion, the applicant avers that the failure to file the intended appeal was purely the mistake of his previous advocates and which mistake he urged this Honourable Court not to visit upon an innocent client.

### **Applicant's Written Submissions**

8. The Applicant through the firm of M/S Michael Were and Associates Advocates submitted that under Section 79G of the *Civil Procedure Act* and Section 16A of the *Environment and land Court Act*, this Court has wide and unfettered jurisdiction in considering an application for extension of time and the court may in circumstances that it deems just and fit, admit and hear an appeal out of time.
9. He submitted that the only issue for determination in the present application is whether the application is merited. In his attempt to answer the question, the learned Counsel looked at the length of the delay and submitted that there is no period of delay that is set down in statute and as such, any length of delay can still be excused if sufficient cause has been set forth. He referred to the case of *Juma Nyateko v Fredrick Omondi Okech*[2021] eKLR, *Visbva Stone Suppliers Company v RSR Stone Limited*[2006] eKLR.
10. The second issue raised by the learned counsel is the reasons for the delay which he contends that the applicant has laid down a detailed chronology of events that led to the delay in him preferring an appeal and filing the present application. He submitted that the delay is largely based on the mistake, actions and/or inactions of his agents whom he entrusted to represent him and urged not to vit the mistake of counsel upon an innocent client. He cited the case of; *Sultan Hasham Lalji v Diamond Hasham Alji & 2 Others*[2019] eKLR, *Belinda Murai & Others v Amos Wainaina*(1978)EAR278, *Philiph Chemwolo & Another v Augustine Kubende*[1986] eKLR, *Jaldesa Tuke Dabelo v IEBC & Another*[2015] eKLR, *Owino Ger v Marmanet ForestCo-operative Credit Society Limited*[1987] eKLR, *Lee G. Muthoga v Habib Zurich Finance (K) Limited & Another* Civil Application No Nai236 of 2009 and *Catherine Njuguini Kenya & 2 others v Commercial Bank of Africa Limited*, Civil Application No 366 of 2009.



11. As to whether the respondent will suffer prejudice, the learned counsel submitted in the negative arguing that and averred that any prejudice can be compensated by way of damages.
12. Lastly, the learned Counsel submitted the applicant has an arguable and not a frivolous appeal and cited the case of *Ngei v Kibe & Another* Civil Application No E359 of 2021 92021) eKLR

### **Legal Analysis And Decision**

13. I have considered the Notice of Motion application dated March 6, 2023, the supporting affidavit and the submissions by M/s Michael Were & Associates. I have also considered the applicable law.
14. The main issue for determination in the present application is whether this Court should exercise its inherent powers in granting the orders sought. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*(2014) eKLR, the Supreme Court of Kenya outlined the guiding principles in applications for extension of time as follows;  
“i) Extension of time is not a right of 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 for extension of time has the burden of laying a basis to the satisfaction of the court;  
iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;  
iv) Whether there is a 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 respondents if the extension is granted;  
vi) Whether the application has been brought without undue delay; and  
vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
15. The applicant in his affidavit in support of this application deposed that after the impugned Ruling was delivered by the trial Magistrate on February 4, 2022, he instructed his hitherto advocates to urgently take over the matter and file an Appeal. The applicant further stated that his former Advocates prepared a draft Memorandum of Appeal which they shared with him and even informed him that they had filed the same. The Applicant further stated that when he was not receiving prompt and/or proper communication from his Advocates in regard to the status of his suit, he instructed the present firm of Bryan Khaemba, Kamau Kamau & Company Advocates and that the the failure to file the intended Appeal in time was purely the mistake of his previous Advocates which mistakes should not be visited upon an innocent client.
16. Applying the guiding principles set out by the Supreme Court in the *Nicholas Kiptoo Arap Korir Salat* case (*supra*), the explanation given by the applicant for the delay in filing appeal within the stipulated period is that he had given instructions to his former Advocates but failed to execute the same. The applicant has not annexed a letter instructing his former advocates to prefer an Appeal or receipt indicating that he paid the said Advocates to lodge an appeal on his behalf. If indeed the applicant instructed his hitherto advocates to prefer an appeal against the said order and paid legal fees to the said



Advocates, the applicant has not made any complaint either to the Law Society of Kenya against the alleged Law Firm or even to the Police.

17. It is my view that like all professional practitioners, acts of commissions or omissions by Advocates in the course of their professional duties as principal agents must be seen as commissions and omissions by their clients. An Advocate who is instructed by his client is the principle agent and are joint at the hip with the client. In the case of *Omwoyo v African Highlands & Produce Co. Ltd.* (2002)1KLR, Ringera J held;

“Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions just like other professionals do in their fields of endeavour. The plaintiff should not be made to shoulder the negligence of the defendant’s advocates. This is a proper case where the defendant’s remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.”

18. Again in the case of *Savings and Loans Limited v Susan Wanjiru Muritu* (Nairobi) Milimani HCCC No 397 of 2002 where Kimaru J stated;

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such Advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, She would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

19. I agree with the two decisions which are applicable to the circumstances of the present application. The applicant in this case stated he instructed his former Advocates to prefer an appeal but failed to check whether the appeal was filed within the statutory period. I agree with the Kimaru J in the case of *Savings and Loans Ltd (supra)* that cases belong to litigants and not Advocates and that they have a duty to check their progress constantly.
20. It is also important to note that the impugned Ruling by the trial Magistrate was delivered on February 4, 2022 and this application was filed in court on March 7, 2023. It took the applicant more than twelve (12) months which period in my view is inordinate and no sufficient explanation has been given for the delay.
21. For all the aforementioned reasons, I find the application dated 6<sup>th</sup> February and filed in Court on March 7, 2023 lacking merit and the same is hereby dismissed with costs.

Orders accordingly.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS  
28<sup>TH</sup> JULY, 2023**



**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

- 1. Applicant/Advocate-absent**
- 2. Respondent/Advocate-absent**
- 3. M/S Joy C/A-present**

