



**Khang'ati (Suing as the Personal Representative of the Estate of the Late David  
Khang'ati Peter Wafula) v Wanyonyi (Environment and Land Miscellaneous  
Application E011 of 2024) [2025] KEELC 458 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 458 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2024**  
**EC CHERONO, J**  
**FEBRUARY 6, 2025**

**BETWEEN**

**MONICAH OMUKOKO KHANG'ATI ..... APPLICANT**  
**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE**  
**LATE DAVID KHANG'ATI PETER WAFULA**

**AND**

**VINCENT WANYONYI ..... RESPONDENT**

**RULING**

1. This Ruling is in relation to the application dated 27/06/2024 which seeks the following orders;
  - a. Spent
  - b. That the honourable court be pleased to grant leave and extend time within which the applicant should file her appeal out of time
  - c. That costs of this application be in the cause.
2. The application is based on twelve (12) grounds shown on the face of the application supported by the affidavit of Monicah Omuoko sworn on 27/06/2024.
3. It is the Applicant's case that an interlocutory judgment was entered against the Respondent in Bungoma CMC ELC No.7 of 2019 and later set aside for inter-parte hearing. That before the matter could be heard, the Respondent filed an application dated 08/01/2024 which led to the Ruling delivered on 14/02/2024 allowing the said application in its entirety. That she instructed her advocate to appeal against the ruling and an appeal was lodged vide Bungoma HCCA No. E025 of 2024. That the Respondent herein immediately set into motion the execution process to recover the decretal award of Kshs. 510,000/=. That she successfully applied for stay in the subordinate court which was granted



on condition that the Kshs.510,000/= be deposited within 30 days in a joint interest earning account in the name of the counsels. That her appeal and application for stay before the High Court was struck out for want of jurisdiction. As a result, the delay in filing an appeal before this court was unintentional, unforeseeable and not inordinate. It was argued that the intended appeal is arguable with a high chance of success, that she is willing to pay the security of Kshs.510,000 and that the application has been made in good faith and without undue delay and that it would be in the interest of justice if the same was allowed.

4. In opposition thereto, the Respondent filed a replying affidavit sworn on 05/10/2024 where he deposed that the subject of this application is a ruling delivered on 14/02/2024. That the Applicant chose to file an appeal before the High Court which was struck out for want of jurisdiction and that he incurred advocates fees of Kshs.100,000/= and he stands to be prejudiced if another appeal is filed. That the Applicant is not worthy of the equitable orders sought.
5. In further support of the application, the Applicant filed submissions dated 29/11/2024 where she reiterated the contents of the supporting affidavit. Reliance was placed in the case of Major Joseph Mwateri Igweta vs. Mukira M. Esthare & Another Civil Application NO. Nai 8 of 2000. She also urged the court to consider the provisions of Article 159 of *the Constitution*, 2010.
6. The respondent on his part filed submissions dated 05/12/2024. He submitted that the Applicant has not demonstrated sufficient reasons for the grant of the orders sought. That no explanation was offered as to why the appeal was filed in the wrong forum. Reliance was placed in the case of Gachungu vs. Karanga & 3 Others (Civil Application No. 208 of 2020 KECA 1411 (KLR), Nicholas Kiptoo Arap Salat vs. The IEBC & 7 Others (2014)eKLR. It was argued that the appeal has been overtaken by events since the decretal amount has been forwarded to the Respondent thus this application is an academic exercise. He cited the case of Ngetich vs. Metto ( Misc Application No. E046 of 2021(2022) KEELC 14758 (KLR) 10 No.22.

#### **Analysis and determination.**

7. Section 79G of the *Civil Procedure Act* is the operative law in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

8. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion. Some of the factors that guide Courts in exercising the discretion whether to extend time to file an appeal out of time were discussed by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd [2003] eKLR*. They include the following:
  - i) The period of delay;
  - ii) The reason for the delay;
  - iii) The arguability of the appeal;
  - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;



- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.
9. The impugned Ruling was delivered on 14/02/2024 while the present application was filed on 27/06/2024 which is about 3 months and 2 weeks after the lapse of the 30 days period allowed to file an appeal. The Applicant has argued that this delay is due to her advocate inadvertently lodging the appeal before the High Court as opposed to this court which is clothed with jurisdiction. Although this fact was mentioned and both parties acknowledged it, the Applicant failed to specify when the appeal was filed before the High Court or when the High Court struck it out. Providing this information would have allowed this court to assess whether the Applicant and her advocate had been negligent in adhering to procedural rules by assessing the time lapse in the above-mentioned actions of error.
10. It is my considered view that the counsel in conduct of this matter was indolent on how she handled the instructions to appeal. Although the Respondent maintained that no sufficient reason was given for the lateness, in *Belinda Mural & 9 Others Vs Amos Wainaina* [1978] eKLR, the Court of Appeal – Law JA, citing other cases such as *Shah H. Bharmal & Brothers Vs Kumar* [1961] EA 679 where it was held that:
- “Mistakes of a legal adviser may however amount to ‘sufficient cause under the East African Rule.’”
11. I am also guided by the pronouncements of the Court of Appeal in the case of *Edith Gichungu Koine Vs Stephen Njagi Thoithi* [2014] eKLR where it was held that:
- “It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice.....”
12. The Court of Appeal further observed that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. As can be seen from the application, the Applicant argues that she was not given a chance to be heard in the application. It follows therefore that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
13. Further and although the Respondent’s argument that he stands to be prejudiced if another appeal is allowed having paid Kshs.100,000/= as advocates fees for the appeal wrongly filed in the High Court, it is my opinion that that costs can be recovered and it is upon the Respondent to lodge the necessary pleadings. Therefore, I find that no actual prejudice has been demonstrated.
14. The Respondent also argues that the application has been overtaken by events since the decretal sum has been forwarded to him by the Applicant. It is noteworthy that the Applicant in her supporting affidavit states that
- “...although I am paying the decretal sum in compliance with the court orders in the subordinate court I am still aggrieved by the subordinate courts decision...”



This alleged fact has not been controverted by the Applicant although I note that the same was raised in the Respondent's submissions. Further, I note that it has been pleaded that the subordinate court had ordered for the decretal sum to be deposited in a joint interest earning account of the advocates. It is therefore unclear to this court whether this money has been paid and for what purpose.

15. Having considered all facts as pleaded and in reference to the applicable law and authorities on the issue of delay I am satisfied that though the delay in this instance is inordinate, sufficient explanation has been given. This is not to say that this court would condone or forgive inordinate delays but that it must do whatever is necessary to rectify mistakes where it serves the interests of justice.
16. Ultimately and for the reasons given, the application dated 27/06/2024 is merited and the same is allowed as follows;
  - a. The memorandum of appeal annexed to the supporting affidavit to be filed within 7 days from the date hereof.
  - b. The Applicant shall file her record of appeal within 30 days of this ruling and ensure the prosecution of the appeal within 1 year.
  - c. Costs of the application shall be borne in the appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

M/S Chungu for the Applicant.

M/S Wanyama for the Respondent.

Bett C/A.

