



REPUBLIC OF KENYA



**KENYA LAW**  
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**Opiyo v Omollo (Environment and Land Appeal E003 of 2024)  
[2024] KEELC 13590 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13590 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E003 OF 2024  
AY KOROSS, J  
DECEMBER 5, 2024**

**BETWEEN**

**SARAH WANDERE OPIYO ..... APPLICANT**

**AND**

**WILLIAM OCHIENG OMOLLO ..... RESPONDENT**

**RULING**

1. By a notice an undated notice of motion that was filed by the applicant on 28/02/2024, she sought the following reliefs: -
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That the Hon. Court does grant leave for the appellant's advocate to come on record for her.
  - e. That the Hon. Court does grant leave for the applicant to file a notice and memorandum of appeal out of time.
  - f. The appellant's annexed notice and memorandum of appeal be deemed as properly filed.
  - g. The Hon. Court be pleased to issue an order of a stay of execution of the judgment delivered on 26/07/2023 pending a hearing and determination of the appeal.
  - h. Costs of the motion be provided for.
2. The motion was supported by several grounds on the face thereof together with the applicant's affidavit deposed on 20/11/2023.



3. Materially in both, the applicant stated that the applicant's then advocate did not timeously get a copy of the judgment and the current advocate could only get a copy upon coming on record; she was old and sickly; her current counsel only received instructions to come record after time to appeal had lapsed; the appeal had chances of success; if execution proceeds she will suffer substantial loss and the appeal rendered nugatory and she was willing to furnish security.
4. Despite giving the respondent time to file his response, he did not comply, and on the date of hearing of the motion on 1/10/2024, the applicant's counsel Ms. Kokeyo urged this court to allow the motion as prayed.
5. Having carefully given thought to the motion, its grounds, affidavit, and Ms. Kokeyo's submission, the issues that arise for resolution and which shall be addressed consecutively are: -
  - a. Whether it was necessary for the law firm of Ms. Juliet Kokeyo & Co. Advocates to seek leave to come on record for the applicant.
  - b. Whether an extension of time should be granted.
  - c. Whether orders of stay of execution should be granted.
  - d. What orders should this court issue including an order as to costs?
6. All these issues shall be considered in a seriatim manner.
  - a. Whether it was necessary for the law firm of Ms. Juliet Kokeyo & Co. Advocates to seek leave to come on record for the applicant.**
7. Order 9 Rules 9 and 10 of the Civil Procedure Rules provide that post-judgment, any change of advocate has to be carried out with leave of the court.
8. In my considered view and as has been held in various court decisions, the intent of Order 9 Rules 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court to hear and determine the matter, I would not have hesitated to uphold that once judgment has been rendered, leave has to be sought from the trial court.
9. However, the scenario is different in the instant case, this court is sitting as an appellate court. In my view, Order 9 Rules 9 and 10 of the Civil Procedure Rules do not apply in instances of an appeal because the then applicant's counsel's instructions in the lower court were exhausted after the suit concluded.
10. At an appellate stage, the applicant had a right to representation of her choice. I am persuaded by the case of Tobias M. Wafubwa v Ben Butali [2017] eKLR which held thus;

“Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”
11. The law firm of Ms. Juliet Kokeyo & Co. Advocates is properly on record and it did not need to seek leave at this stage. This prayer by the applicant is misplaced.



**b. Whether an extension of time should be granted.**

12. Section 79G of the *Civil Procedure Act* provides that appeals originating from the lower court should be filed before this court within 30 days from the date of the decree or order appealed against.

13. However, in occasions of delay, parties can by Section 95 of the *Civil Procedure Act*, move this court to exercise its judicious discretion based on good and sufficient grounds and the court may extend the time as it deems fit even if the time originally fixed has expired. Section 79G of the *Civil Procedure Act* states;

“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.”

While Section 95 of the *Civil Procedure Act* provides as follows: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

14. The principles that guide this court when faced with a prayer for an extension of time have been dealt with in a line of court decisions notably the recent decision of the Supreme Court of Kenya of *Non- Governmental Organizations Coordination Board v EG & 5 others (Petition (Application) 16 of 2019) [2023] KESC 78 (KLR) (22 September 2023) (Ruling)* which summarized the non-exhaustive principles thus: -

“The guiding principles in considering an application for extension of time were:

- a. 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;
- b. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
- c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
- d. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. whether there would be any prejudice suffered by the respondents if the extension was granted;
- f. whether the application had been brought without undue delay; and
- g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



15. In rendering this decision, the apex court cited with approval several authorities including the well-cited decision of Leo Sila Mutiso V. Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) which stated: -

“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.”

16. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its judicious discretion which is anchored on reason, material, and evidence placed before it. Since the circumstances of each case are unique as even a singular day could be tantamount to delay, each case has to be considered on its set of conditions.
17. In addition, this court must also consider its principal objective of facilitating the just, expeditious, proportionate, and accessible resolution of disputes as provided for in Section 3 of the *Environment and Land Court Act*.
18. On the principle of delay, the impugned decision was rendered on 26/07/2023 and the instant motion was filed on 28/02/2024- a period of 7 months which this court considers to be inordinate.
19. Though the applicant advanced convincing reasons which were that she was unwell and she had not obtained proceedings on time, these reasons are not convincing as evidenced by her annexures and lower court records.
20. From the records, although she is aged 85 years, she was discharged from the hospital on 31/7/2023 which was before the effluxion of time and no explanation has been given as to why she did not file the appeal shortly after being discharged from the hospital.
21. In addition, from the lower court record, Ms. Kokeyo had as of 23/08/2023 received instructions from the applicant. This is evident by the counsel’s letter to the trial court which she filed on 24/08/2023. In it, counsel was seeking copies of the proceedings and judgment.
22. This letter was made before the expiry of time and there is no evidence counsel ever paid for them. Proceedings were ready as of 18/9/2023 and if at all it impeded the filing of an appeal, it was expected that it would have been filed shortly after certification of the proceedings. But that was not so.
23. In my humble view, her reasons for the delay were a smoke screen and an afterthought which this court will not allow. I must mention, that notwithstanding this court is a superior court and disparate from the other Court of Appeal, a notice of appeal is not required.
24. The burden was upon the applicant to demonstrate by way of evidence, plausible and satisfactory reasons for the delay, and in the absence of a cogent explanation, I must conclude, find, and hold the applicant has not met the ingredients to warrant enlarging the time for her to file an appeal out of time.
25. This finding renders the determination of issue (c) unnecessary. It is trite law costs follow the event and since the respondent did not file any documents, there shall be no orders as to costs. This court hereby issues the following disposal orders: -
- a. The undated notice of motion filed on 28/02/2024 is hereby dismissed.



- b. There are no orders as to costs.
  - c. This file is hereby effectively marked as closed.
- It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**5/12/2024**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Miss Kokeyo for the applicant

N/A for the respondent

Court assistant: Ishmael Orwa

