



REPUBLIC OF KENYA



**KENYA LAW**  
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**Adana v Ogora (Civil Appeal E006 of 2021)  
[2025] KEHC 1462 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1462 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E006 OF 2021  
DKN MAGARE, J  
FEBRUARY 12, 2025**

**BETWEEN**

**MBIPUI JULIUS ADANA ..... APPELLANT**

**AND**

**AVENUS OGORA ..... RESPONDENT**

**RULING**

1. This is a ruling over 2 applications, one dated 7.1.2025 by the Appellant and another dated 25.5.2022 by the Respondent.
2. In the application dated 7.1.2025, the Appellant seeks leave of this court to appeal against the judgment of the subordinate court in Kisii CMCC No. 695 of 2018. The Appellant already filed the appeal and seeks to validate it as it was filed out of time.
3. The Applicant states that the judgment of the lower court was given on 9.10.2020. Filing at that time was via email, which had been introduced owing to the commencement of paperless filings in the wake of the Covid-19 pandemic that hit the world that year. The Appellant sent an email dated 30.10.2020 forwarding the Memorandum of Appeal to the court for filing.
4. It was further deposed that there were subsequent reminders to the court to act on the Memorandum of Appeal by assessing payable court fees to enable the Appellant to pay. Still, no feedback was forthcoming until 29.1.2021, when the court notified the Appellant's advocate to pay the assessed court fees for filing the memorandum of appeal dated 29.10.2020.
5. It was thus deposed that the delay of 81 days was explained as not inordinate, and the appeal raised triable issues so that locking out the Appellant from the right of appeal would be more prejudicial than admitting the appeal out of time.



6. The Respondent filed the application dated 22.5.2022 and seeks to strike out the appeal for being filed out of time. The Appellant responded that the application was filed long after directions were taken for the appeal hearing and was, as such, an afterthought.
7. The Appellant filed submissions dated 7.1.2025. It was submitted that the Appellant had satisfied the grounds upon which to extend the time for filing the appeal by validating the already filed appeal. They relied on *Ogao v Masosori* [2024] eKLR.
8. The Appellant also relied on *Edith Gichugu Koine vs Stephen Njagi Thoithi* [2014] eKLR to submit that there was no prejudice demonstrated to be suffered by the Respondent if the appeal was admitted out of time.
9. I have not seen the Respondent's submissions.

### **Analysis**

10. The court will first establish whether the Appellant has satisfied the conditions based on which to enlarge time for appeal. The second issue is whether to strike out the Appeal.
11. In considering the issue of timely filing of the appeal which is germane to this case, this court is guided that discretion to extend time is unfettered. There is no limit to the number of factors the Court would consider so long as they are relevant. These factors include but are not limited to the period of delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, or whether the matter raises issues of public importance. All are relevant but not exhaustive factors. Waki, JA (as he then was) in *Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company* Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

12. The Appellant laid down reasons for the delay in the Application and the Supporting Affidavit filed by the Appellant. No serious objection is filed concerning the cause of the delay. The Appellant's reasons are plausible. There are annexure emails sending the memorandum of appeal to the court registry for filing as early as 30.10.2020. There were several reminders to the court registry for action



in filing the memorandum of appeal dated 29.10.2020. No contrary information was filed on behalf of the Respondent. The extension of time for appeal is undoubtedly an exercise of discretion. In the Supreme Court's Decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR it was held as doth:-

- “(1) 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.
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

13. There must be some material before the Court to enable its discretion to be so exercised. In the case of Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR Odunga J. observed that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.”

14. In this matter, the Judgment appealed from was delivered on 9.10.2020. The appeal to this Court should have been filed by 9.11.2020. This Memorandum of Appeal was filed on 29.1.2021, 81 days after the last date of due filing. The Appellant was under a duty to show the reasons for the delay. However short or long, the period of delay must be explained. In Alfred Iduvagwa Savatia v Nandi Tea Estate & another [2018] eKLR J. Mohammed JA cited Aganyanya, JA in *Monica Malel & Another v R, Eldoret Civil Application No. Nai 246 of 2008* where the learned Judge stated;-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show .... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

15. Section 79(g) of the Civil Procedure Act provides that appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree. It states as follows:

“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.



16. On one hand, this court has no jurisdiction to extend time without a valid reason. On the other hand, the court should exercise discretion where there is a valid reason and explanation for the delay. The Applicant has explained the delay. The court registry delayed assessing the memorandum of appeal for court fees and payment before filing. The memorandum was sent to the court registry for assessment within time. The inefficiencies in assessing cannot be visited upon the Applicant. The emails were a precursor to the current filing system, which is real-time.
17. This court is hinged on dispensing justice to both parties, and all indications support it. Both parties can present their cases instead of extinguishing the appeal. In *Harris Horn Senior, Harris Horn Junior v Vijay Morjaria Nyeri* Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:
- (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”
18. I find that the evidence presented by the Appellant in the supporting affidavit justifies the delay of 81 days in filing the appeal. In our court system, delay is usually documented. Without documentation, it never happened. Again, there is no basis for alleging that the intended appeal is arguable.
19. The application dated 7.1.2025 is consequently merited. On the other hand, the application dated 22.5.2022 has been overtaken by the following order. It is consequently dismissed.

#### **Determination**

20. The upshot of the foregoing is as follows:
- i. The Application dated 22<sup>nd</sup> May 2022 lacks merit and is dismissed.
  - ii. The Application dated 1<sup>st</sup> January 2025 is merited and is allowed. The appeal herein is admitted out of time and deemed as filed within time.
  - iii. Each party to bear its own costs for both applications.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF FEBRUARY, 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Odero for the Appellant

No appearance for the Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**

