



**Achieng v Attorney General (Miscellaneous Civil Application  
E004 of 2024) [2025] KEHC 1674 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1674 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
MISCELLANEOUS CIVIL APPLICATION E004 OF 2024**

**DK KEMEL, J  
FEBRUARY 7, 2025**

**BETWEEN**

**LILIAN ANYANGO ACHIENG ..... APPLICANT**

**AND**

**THE HONOURABLE ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

1. The Applicant herein Lilian Anyango Achieng has moved this court vide her application dated 26<sup>th</sup> February, 2024 seeking the following orders: -
  - i. Spent.
  - ii. That the court be pleased to grant the Applicant/Proposed Appellant leave to appeal against the judgment and decree of the subordinate court dated and delivered on 5<sup>th</sup> December, 2023 in Siaya PMCC 29 of 2020, out of time.
  - iii. Upon granting leave to appeal against the judgment and decree of subordinate court dated and delivered on 5<sup>th</sup> December, 2023, the draft memorandum of appeal be deemed as duly filed and valid.
  - iv. The cost of this application abide the outcome of the intended appeal.
2. The application was supported by the grounds on the face of it and by the supporting affidavit of the Applicant sworn on even date. The Applicant's gravamen is inter alia; that the judgment was delivered on 5<sup>th</sup> December, 2023 in which the Applicant's suit was dismissed and which judgment the applicant was dissatisfied with and wishes to challenge and which appeal could not be lodged without leave of the court as the prescribed period of 30 days from 5<sup>th</sup> December, 2023 had lapsed; that even though the court delivered the judgment in the presence of the Applicant's advocate, the Applicant was not aware of the judgment as her advocate was unable to reach her and communicate and get further instructions



on the same as she had travelled to her rural home for December holidays and was unreachable; that by the time the advocate on record could obtain sufficient instructions from the proposed appellant, the time allowed to file an appeal had lapsed; that this application has been made without delay; that the appeal is arguable and is not frivolous as can be discerned from the draft memorandum of appeal; that it will be both just and equitable in the interest of justice to grant the orders sought.

3. The application was opposed by the Respondent who raised several grounds of objection inter alia; that the delay to lodge appeal was deliberate and inordinate; that the Applicant moved to court after about 83 days after the judgement was delivered; that the applicant has shown lack of diligence and thus inexcusable; that the applicant is guilty of violation of section 79G of the *Civil Procedure Act*; that the applicant has not met the threshold of “good and sufficient cause.”
4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. The Applicant submitted that she relies on her own supporting affidavit sworn on the 26<sup>th</sup> February 2024 and adopts the contents therein in its entirety. The gist of the application is that judgment having been delivered herein, the Defendant/Applicant intends to file an appeal therefrom; she further stands to suffer substantial and irreparable loss and damage unless this application is allowed; that her appeal will be rendered nugatory and an exercise in futility; that she has a good and arguable appeal which has high chances of success and that the application is timely made and without any unnecessary delay. It is her case that the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs of this application if allowed; that the Honourable court will note that the Respondent has not filed a replying affidavit opposing her application which clearly states that the applicant’s application is not opposed and that the same should be allowed as prayed; that going by the fact that there already exists an intended appeal herein, she wishes to rely on the provisions of Section 79 G of the *Civil Procedure Act* which 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 she had good and sufficient cause for not filing the appeal in time.

The Applicant sought reliance in *Feroz Begum Qureshi And Another Vs. Magnbhai Patel And Others* [1964] EA 633, where it was held that there is no difference between the words “sufficient cause” and good cause”. Reliance was further sought in *Daphne Parry Vs. Murray Alexander Carson* [1963] EA 546 that

“though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time barred, even at the risk of injustice and hardship to the appellant. Further reliance was placed in the case of *Dilpack Kenya Limited v. William Muthama Kitonyi* [2018] EKLR 28 as well as *First*



American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani)  
HCCC NO. 2255 of 2000 [2002] 1 EA 65.

Whether or not to enlarge time in, the court set out the factors to be considered in deciding whether or not to grant such an application and these are the explanation of its delay; the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice ; whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

On the issue of merit of application to extend time, it was held in Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others [2014] EKLR: -

“.....it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise such discretion in favour of the applicant. “we derive the following as the underlying principles that a court should consider in exercising such discretion: - 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; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time, is a consideration to case to case basis; where there is a reasonable (cause) for the delay, the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent, if extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petition, public interest should be a consideration for extending time.

In Itute Ngui & Ano. Vs. Isumail Mwkavi Mwendwa Civil Application No. 166 of 1997, Omolo, JA held that

“Whereas advocate’s bona fide error is special reason for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence.”

It is therefore the Applicant’s submission that in the interest of justice and based on the reason given, that the application be allowed as prayed as the respondents will not suffer any irreparable loss that cannot be compensated by way of costs as explained in the submissions.

6. The Respondent raised two issues for determination namely: whether the purported appeal was filed out of time; whether the delay to appeal was deliberate or inordinate and finally whether the cause of delay was sufficient.



7. On whether the purported appeal was filed out of time, it was submitted that the purported appeal was filed irregularly as it was filed out of the prescribed time limits in contravention of the provisions of section 79G of the *Civil Procedure Act*, 2010 which provides 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 the computation of such period any time which the lower court may certify as having been requisite for 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 appeal satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

It was submitted that the section mandates that every appeal to the High Court shall be filed within 30 days from the date of the decree or order appealed against. The appeal was filed 83 days after the judgment was issued. It was therefore filed well beyond the time stipulated in the *Civil Procedure Act*.

8. On whether the delay to appeal was deliberate or inordinate, it was submitted that the delay was deliberate and inordinate since more than two months elapsed before the appellant filed the appeal. Reliance was placed in the case of *Mwangi S. Kimenyi V. Attorney General & Another* (2014) eKLR where the court stated as follows: -

There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.”

It was submitted that the Applicant filed the appeal 83 days after the judgment of the lower court had been rendered. The reason given for the delay by the Applicant was that she had travelled home for the December holidays and therefore her advocate could not reach her to get further instructions. They have provided no evidence to show any failed attempt at communication during that period. It was also submitted that the Applicant also failed to state or prove when the communication was successful and when the instructions were given. This demonstrates a lack of diligence on the part of the Applicant. It was submitted that the delay in this case, based on the circumstances and explanation given by the Applicant, was inordinate and therefore inexcusable.

9. On whether the cause for delay was sufficient, it was submitted that section 79G of the *Civil Procedure Act* allows for filing an appeal out of time only if the Appellant can demonstrate good and sufficient cause. The Applicant argues that by the time the advocate on record received adequate instructions from the proposed appellant, the deadline for filing an appeal had already passed. In *County Executive of Kisumu v. County Government of Kisumu & 8 others* (Civil Application 3 of 2016) [KLR] (12 April 2017) (Ruling) the court stated as follows;

It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.

10. I have given due consideration to the application and the rival submissions filed by learned counsels for the parties herein. It is not in dispute that the Applicant did not lodge her appeal within the stipulated period of thirty days upon the delivery of the judgement sought to be appealed against. It is also not in



dispute that section 79G of the Civil Procedure Act allows a party to lodge an appeal out of time if an applicant demonstrates good and sufficient cause as to why the appeal could not be filed in sufficient and good time. I find the only issue for determination is whether the application has merit.

11. The Applicant has stated that after her case was dismissed on 5<sup>th</sup> December 2023, she left for the festivities and that she was unable to contact her Advocate until the month of February 2024 after a period of 83 days. She averred that she has a good and arguable appeal as per the draft Memorandum of Appeal. She now pleads with this court to grant her a chance to challenge the judgement of the lower and that the Respondent will not suffer any prejudice save for an order for costs of the application. The Respondent has vehemently opposed the application arguing that the Applicant had slept on her rights and ought to suffer for the inordinate delay in lodging her appeal in time.
12. Indeed, the Applicant has delayed for a period of 83 days after the delivery of the judgement sought to be appealed against. I find the 83 days not to be too long a period to amount to an inordinate delay. In fact, it is less than three months. In my view, the said period cannot be said to be over the edge. The explanation given by the applicant appears plausible in my view and that the Respondent's discomfiture can comfortably be taken care of by an award of costs. It is also my view that each party should be given their day in court.
13. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR derived the following as the underlying principles that a Court should consider in the exercise of discretion in regard to extension of time:
  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 a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  5. Whether there will be prejudice suffered by the respondents if the extension is granted.
  6. Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be consideration for extending time."
14. Being guided by the foregoing authority as juxtaposed with the explanation rendered by the applicant as well as the contents of the draft Memorandum of Appeal, iam satisfied that the Applicant has made out a case for the grant of the order sought.
15. In the result, the applicant's application dated 26/2/2024 has merit. The same is allowed in terms of prayer No. 3 thereof. The Applicant is ordered to file and serve her Memorandum of Appeal within then (10) days from the date hereof. The costs of the application are awarded to the Respondent.

**DATED AND DELIVERED AT SIAYA THIS 7<sup>TH</sup> DAY OF FEBRUARY 2025**

**D.KEMEI**

**JUDGE**

In the presence of :



Oreda.....for Applicant

N/A.....for Respondent

Ogendo.....Court Assistant

