



Chepkemoi v Sangogo (Administrator of the Estate of the Late Taputany Kibeta) (Civil Miscellaneous E345 of 2024) [2025] KEHC 2102 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL MISCELLANEOUS E345 OF 2024
JM NANG'EA, J
FEBRUARY 5, 2025**

BETWEEN

SUSAN CHEPKEMOI SAIMUTEI APPLICANT

AND

JOEL KIPSANG SANGOGO (ADMINISTRATOR OF THE ESTATE OF THE LATE TAPUTANY KIBETA) RESPONDENT

RULING

1. The Applicant seeks the following orders;
 1. Spent
 2. That she be allowed to appeal judgment in Nakuru Chief Magistrate's Court's Civil Case No. 690 of 2009 out of time.
 3. That a Memorandum of Appeal exhibited in the application be deemed as duly filed.
 4. That the costs of the Application be in the cause.
2. That Applicant's advocate (Linet Ogega) swore an affidavit in support of the application. She avers that the impugned judgment of the lower court was delivered on 15/8/2024. The Applicant was dissatisfied with the judgment and instructed her advocates then on record to lodge an appeal but the advocates failed to act. Counsel therefore states that the failure to lodge appeal within the prescribed period was not intentional. Leave to file appeal out of time is thus sought so that the merits of the appeal are ventilated.
3. The Respondent opposes the application vide affidavit in reply he swore on 17th December, 2024. It is contended that there is no evidence of instructions of any advocate to file appeal against the lower court's decision. The court is further told that there is no evidence that the current advocates for the Applicant in fact received instructions to file the appeal. There are therefore no sufficient reasons,



- according to the Respondent, for the default to lodge appeal on time and I am urged to dismiss the application.
4. The Applicant's advocates submit that the court does exercise its discretion under the overriding objective principle to allow for a just, expeditious, proportionate and affordable resolution of the dispute as held by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others* [2015] eKLR. The court is urged to accord the applicant the right of hearing, the Applicant contending that her omission is curable under Article 159 of the *Constitution*.
 5. The Applicant further pleads that she should not be punished for the mistake of her advocates (see Case Law in *Hudson Kihanda vs Romagego Kenya Limited* [2010] eKLR cited by Counsel).
 6. The Respondent has not filed submissions.
 7. I have considered the rival affidavit evidence and the Applicant's submissions. The issue for determination is whether the Applicant is deserving of the exercise of the court's discretion to grant her leave to file appeal out of time. The Applicant delayed for about three (3) months to bring this application and blame her previous advocates for failure to carry out her instructions to appeal the trial court's decision.
 8. Section 79G of the *Civil Procedure Act* provides that an appeal to this court from a subordinate court "shall be filed within thirty days from the date of the decree or order appealed against." An appeal may, however, be admitted out of time where the Appellant satisfies the court that he/she "had good and sufficient cause for no filing the appeal on time.". The same principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR.
 9. In the Supreme Court's decision in *Nicholas Kiptoo Korir Arap Salat* supra, the apex court laid down the following principles to guide the court in exercise of its discretion in disposing of such an application;
 - a. Extension of time is not a right but an equitable remedy only available to a deserving party.
 - b. A party seeking extension of time has the burden of laying the basis to the satisfaction of the court.
 - c. The court's decision depends on the circumstances of each case.
 - d. Delay to lodge appeal out of time should be explained to the satisfaction of the court.
 - e. The question of any prejudice that may be suffered by the Respondent should be taken into account.
 - f. The court should also consider whether the application has been brought without undue delay.
 10. As already noted hereinabove, this application was filed about 3 months from the date of delivery of the impugned judgment. It is not shown when the applicant's former advocates were instructed to appeal or when the current advocates took over the case. The long delay to appeal occasions prejudice to the respondent who has a decree in his favour. Indeed the Applicant at paragraph 9 of her affidavit concedes that the delay to appeal is inordinate. The Applicant's conduct also militates against the provisions of Sections 1A and 1B of the *Civil Procedure Act* which require disputes to be resolved in a just expeditious, proportionate and affordable manner.
 11. The upshot is that the application is dismissed in its entirety with costs to the Respondent.

J. M. NANG'EA, JUDGE.



RULING DELIVERED THIS 5TH DAY OF FEBRUARY, 2025 IN THE PRESENCE OF:
ADVOCATE FOR APPLICANT, MS BOR
ADVOCATE FOR RESPONDENT, MS KIPROP FOR MS NDEDA
THE COURT ASSISTANT (JENIFFER)
J. M. NANG'EA, JUDGE.

