



**Onyango v Ogolla (Civil Miscellaneous Application
E013 of 2025) [2025] KEHC 9647 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL MISCELLANEOUS APPLICATION E013 OF 2025**

DK KEMEL, J

JULY 4, 2025

BETWEEN

JOSEPHINE ACHIENG ONYANGO APPLICANT

AND

VITALIS ASUGO OGOLLA RESPONDENT

RULING

1. The Applicant herein filed the present application dated 7/5/2025 seeking the following reliefs:
 1. Spent.
 2. Spent.
 3. That the Honourable court be pleased to grant leave to the Applicant to file a Memorandum of appeal out of time against the judgment of Honourable J.P Nandi delivered on the 16th September 2022.
 4. That upon grant of prayer 3 above, the memorandum of appeal annexed herewith be deemed as duly filed and served.
 5. That the Honourable court be pleased to grant stay of execution of the decree and /or judgment in Bondo PMCC, No. E009/2022 pending the hearing and final determination of the intended appeal to be filed in this court.
 6. That the costs of this application do abide the outcome of the appeal.
2. The application is supported by the grounds set out thereunder as well as the supporting affidavit of George O. Anyumba, learned counsel for the Applicant. The Applicant's gravamen is inter alia; that the judgment in Bondo PMCC N. E009/2022 was delivered on 16th September, 2022; that the Applicant intends to file a Memorandum of appeal out of time in this court with leave of the



Honourable court against the aforementioned judgment; that the Applicant being dissatisfied with the judgment in Bondo PMCC No. E009/2022 preferred an appeal against the said judgment vide a memorandum of appeal filed in the High Court of Kenya at Siaya on 13/10/2022; that the said appeal was allocated Number E048 of 2022; that the memorandum of appeal was served upon the counsels for the Respondent therein Ms Odongo Awino & Co. Advocates on 20/2/2023; that when the Applicant's counsel attended the High Court registry in Siaya for purposes of filing an application for stay of execution pending appeal he discovered that the said appeal did not exist in the Judiciary system; that the counsel for the Applicant is not in a position to explain what might have caused the confusion as the filing of the memorandum of appeal was done by an office clerk who has since left employment; that the mistakes of an Advocate cannot and should not be visited upon the Applicant who is an innocent litigant; that it is for reasons that were beyond the Applicant's and /or his advocate that the memorandum of appeal was not filed within time; that there is good and sufficient cause for not filing the memorandum of appeal in time; that the chances of the appeal succeeding are high; that the application has been filed in good time; that the court has the power to issue the orders sought; that the Respondent has commenced execution against the Applicant herein in Bondo PMCC No. E009/2022; that the mistakes of an advocate cannot and should not be visited upon the Applicant who is an innocent litigant; that there is good and sufficient cause for not filing the memorandum of appeal in time.

3. The application was vehemently opposed by the Respondent whose counsel Mr Gideon Odongo filed a replying affidavit dated 5/5/2025 wherein he averred inter alia; that the Judgment the Applicant seeks to appeal against was delivered way back on 16th September 2022; that the present application has been made after an inordinate and inexcusable delay of more than 2 ½ years and therefore the same is for dismissal as such passage of time even with the widest possible extension of the terms, cannot be termed as either reasonable and/or excusable delay or a technicality; that the present application was drawn and its invoice generated some 22 months before the date of its filing on 16/4/2025 and which is only further putting into doubt upon the Applicant's case more so given that no explanation has been preferred for the said delay; that in reply to paragraph 6 of the supporting affidavit, there has been no proof exhibited by the Applicant by way of receipt showing that filing of the attached memorandum of appeal was indeed made on 13/10/2022 as alleged and that such allegation remains unsubstantiated; that the High court Civil Registry stamp imprinted on the face of the annexed memorandum of appeal does not suffice as proof since nothing could be easier than to have the stamp backdated more so given the prevailing circumstances herein; that electronically generated receipts has been easier for the Applicant to exhibit to substantiate his allegation of having filed his appeal as of that date(13/10/2022); that in paragraph 7 of the supporting affidavit, the Applicant's claim that his appeal was allocated No. E048/2022 similarly falls by the wayside since a look at the Judiciary E-filing Kiosk, the parties in Siaya High Court Civil Appeal No. E048/2022 are Kenafic Industries Ltd Vs Lucia Akoth Omengo & Stephen Otieno Okinda; that the Applicant in filing the present application had a duty to give a good explanation for the inordinate delay; that the reason advanced herein is not a plausible and candid reason; that in reply to paragraph 8 of the supporting affidavit, service of the said memorandum of appeal upon them on 20/2/2023 some four months after the alleged date of its filing is irrelevant to the proceedings at hand as it does not in any way prove that the same was filed within time; that the Respondent will suffer great prejudice should the Applicant be allowed to appeal after the lapse of more than 30 months from date of judgment since such an eventuality will stop him from enjoying the fruits of his judgment; that the prolonged and unexplained delay of over 2 ½ years herein has been occasioned by the deliberate inaction, indolence and/or negligence on the part of the Applicant and thus the said delay is inexcusable; that the Applicant by filing an appeal out of time before seeking extension of time, and subsequently seeking leave of the court to extend time and recognize the appeal is tantamount to moving the court to remedy an illegality; that the Applicant in bringing forth his



application has relied on irrelevant provisions of the law and has altogether failed to rely on one of the specific provisions that must be relied on when making an application for leave to appeal out of time this being Section 79G of the *Civil Procedure Act*, this omission by the Applicant only serves to further render his application defective; that the present application is frivolous, vexatious and a clear abuse of the court process and that in the premises, the present application is for dismissal.

4. The application was canvassed by way of written submissions. The Applicant's submissions are undated while those of the Respondent are dated 4/6/2025.
5. The Applicant's submissions are a reiteration of the averments of the grounds in support of the application and the supporting affidavit of the Applicant's learned counsel. It was submitted that the application seeks extension of time for filing an appeal and that the Applicant has clearly stated the reasons that led to the delay in filing the intended appeal by annexing the relevant documents and that the said memorandum of appeal was stamped by the Registry and was also served upon the Respondent's counsel as indicated by the counsel receiving stamp on the face of the memorandum of appeal. The same states that this honorable court be pleased to grant stay of execution of the decree and/or judgment in Bondo PMCC No. E009/2022 pending the hearing of the application inter partes. That the Honourable court be pleased to grant leave to the Applicant to file a Memorandum of appeal out of time against the judgment of Honourable JP Nandi delivered on 16/9/2022. That upon prayer 3 above being granted the memorandum of appeal annexed herewith be deemed as duly filed and served. That the Honourable court be pleased to grant stay of execution of the decree and /or judgment in Bondo PMCC No. E009/2022 which was delivered on 16/9/2022. That the Applicant intends to file a memorandum of appeal out of time in this court with the leave of the Honourable court against the aforementioned judgment. That the Applicant being dissatisfied with the judgment of Honourable JP Nandi, he preferred an appeal against the said judgement vide a memorandum of appeal filed in the high court of Kenya at Siaya on 13/10/2022; that the said appeal was allocated No. E048/2022. That the memorandum of appeal was served upon the counsel for the Respondent therein Ms Odongo Awino & Co. Advocates on 20/2/2022. That the Applicant's counsel attended the High Court registry at Siaya for purposes of filing an application for stay of execution pending appeal and discovered that the said appeal did not exist in judiciary e-filing system. That the Applicant's counsel is not in a position to explain what might have caused the confusion as the filing of the memorandum of appeal was done by an office clerk who has since left employment and that the mistake of an advocate cannot and should not be visited upon the Applicant who is an innocent litigant. Further, that it is for reasons that were beyond the Applicant and/or his advocate that the memorandum of appeal was not filed within time. It was further submitted that there is good and sufficient cause for not filing the memorandum of appeal in time and that the chances of the appeal succeeding are high. Finally, it was submitted that the application has been filed in good faith and that the court has the power to issue the orders sought. Further, it was the Applicant's contention that she or her counsel cannot explain what became of the appeal which was allocated No. E048/2022, as they have not been able to get clarification from the court registry. It was submitted that the circumstances that led to the delay in filing the intended appeal were purely beyond the control of the Applicant and therefore totally excusable and that the Applicant prays that the application be allowed with costs to the Applicant.
6. The Respondent submitted that the Applicant filed an application dated 23/5/2023 principally seeking leave to file an appeal out of time as well as stay of execution pending hearing and determination of the intended appeal. That in opposing the said application, the Respondent relies on his replying affidavit dated 5/5/2025 as well as the written submissions that the judgment the Applicant seeks to appeal against having been delivered way back on 16/9/2022, the present application has been made after an inordinate and inexcusable delay of more than 2 ½ years and which delay the Applicant has failed to satisfactorily explain, and that the application before the court is dated 23/5/2023, as per the



invoice attached to the application, the invoice of this present application was issued on 24/5/2023. The fact that the present application was drawn and its invoice generated some 22 months before the date of its filing on 16/4/2025 is only further damning to the Applicant's case. Further, the Respondent relied on the following authorities;

i. Trusted Services Limited v. Sudi Salim Said & Salim Said (suing as the administrators Ad Litem of the Estate of Said Salim Said [2021] EKLK where Justice Njoki Mwangi observed;

31. It is this court's finding that the Applicant has not even in the least attempted to explain the three month's delay in the filing of the present application. In the said circumstances, this court concludes that the delay is inordinate, thus inexcusable.

In the case of Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others (supra) the Supreme Court held that:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably. He who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against the court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant.”

33. This court therefore finds that the Applicant is guilty of laches and that the unexplained three months is inordinate, thus inexcusable.

b) Joseph Odide Walome v David Mbadi Akello [2022] eKLR where Justice Aburili observed: -

26. Regarding the length of delay, it is evident from the pleading on record herein that the judgment that the Applicant is seeking to appeal against was delivered on 25/3/2021. The instant application was filed on 23/11/2021. This is a delay of 7 months and two days shy of eight months.

30 There is inordinate delay in this case which delay has not been explained. The attempted explanation is not truthful. The Applicant is therefore guilty of unexplained inordinate delay. I find the application for extension of time an afterthought and an attempt to frustrate the Respondent decree holder from enjoying his fruits of a lawful judgment. Justice cannot be served if the courts were to go forward one step and turn back ten steps in favour of an indolent litigant who does not want to settle decree.

7. It was further submitted that the allegation made by the Applicant that the memorandum of appeal was filed on 13/10/2022 and allocated No. E048/2022 falls by the wayside as the same has not been substantiated by way of receipt and/or any other evidence. That the Case No. E048/2022 from the Court Registry records as shown by Annexure GO2 in the Respondent's replying affidavit is in regard of other parties namely Kenafic Industries Ltd vs. Lucia Akoth Omengo and Stephen Otieno Okinda. That the service of the said memorandum of appeal upon the Respondent on 20/2/2023, some four months after the alleged date of its filing is irrelevant to the proceedings at hand as it does not in any way prove that the same was filed within time. That the Respondent will suffer great prejudice should the Applicant be allowed to appeal after the lapse of more than 30 months from date of judgment. More



so, in light of the fact that the Civil Procedure Act provides for timelines of only one month within which such documents ought to have been filed.

8. It was further submitted that the Applicant has relied on irrelevant provisions of the law and has altogether failed to rely on one of the specific provisions that must be relied on when making an application for leave to appeal out of time which is under Section 79G of the Civil Procedure Act and as such his application is only further defective and liable to be struck out. Reliance was placed in the Court of Appeal Decision in *Mariga & 2 others vs. Mariga & Another* (Civil Application E026/2023 [2024] KECA 470 (KLR) (26 April 2024) (Ruling) where Justice F. Ochieng observed as follows: -

“ 11. It is common ground that the application before me has been brought under the wrong provisions of the law. The Applicants pray for an order of extension of time to file an appeal out of time. To do so, the Applicants ought to have moved this court under Rule 4 of the Court of Appeal Rules, which provides that.....

15. The Supreme Court when faced with an instance where the Applicant filed an application under the wrong provisions of the law in the case of *Daniel Kimani Njihia v Francis Kimani & Another* [2015] eKLR, had this to say

“In the *Hermanus* case, this court had indicated how it should be moved, thus [paragraph 23] ...it is trite law that a court of law has to be moved under the correct provisions of the law.” Hence, without thus identifying the proper legal framework for the motion, an application is liable to be struck out.

16. Similarly, in the case of *Michael Mungai v Housing Finance Co. (K) Ltd and 5 Others* [2017] eKLR the court held thus;

“In the case of *Hermanus Phillipus Steyn v. Giovanni Gnnechi - Ruscone*, Supreme Court, Application No. 4 of 2012, this court was categorical that a court has to be moved under a specific provision of the law.

17. In this regard, the application is liable to be struck out having been hinged on the wrong provisions of the law.

18. In the result, I find that the application before me is fatally defective and incompetent. The application is therefore struck out with no orders as to costs.”

9. It was further submitted that filing an appeal out of time before seeking extension of time, and subsequently seeking leave of the court to extend time is tantamount to moving the court to remedy an illegality. Further, it was submitted that the correct route ought to seek leave and upon the said leave being granted, then file the Memorandum of appeal. Reliance was placed in the case of *Kabura & Another v Maina* (Civil Appeal E 172 of 2023 [2024] KEHC 10644 (KLR) (11 September 2024) (Judgment) wherein Rhoda Rutto J applied the binding authority of the Supreme Court arrived at in



the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2024] KEHC 10644 (KLR) (11 September 2024) (Judgment) as reproduced hereunder: -

“27. In the Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] Eklr. (Nicholas Salat Case) in addressing the issue of extension of time, the Supreme Court held:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such “an appeal, is tantamount to moving the court to remedy an illegality. This, the court cannot do. To file an appeal out of time and seek court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the document so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this court’s registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this court extending time), is expunged from court’s records.

28. Drawing guidance from the above holding and dictum of the Supreme Court, this court finds this appeal a nullity and of no legal consequence since it was filed without seeking leave to file it out of time.

29. In the circumstances therefore and guided by the Supreme Court decision having found that the appeal was filed out of time and without leave of court, I proceed to strike it out with no orders as to costs.”

The Respondent finally submitted that the application should be struck out.

10. I have considered the application and the rival affidavits as well as the submissions. It is not in dispute that the Applicant herein is aggrieved by the judgement of the lower court dated 16/9/2022 in Bondo SPMCC No. E009 of 2022. It is not in dispute that the Applicant subsequently purported to lodge an appeal wherein she was purportedly allocated a purported appeal number E48 of 2022 at Siaya High Court registry which was later established through the Judiciary E-filing system (CTS) to belong to another group of parties namely Kenafric Industries Ltd Vs. Lucia Akoth Omengo and Stephen Otieno Okinda. It is also not in dispute that the Applicant did not lodge her appeal within the stipulated period. The issue for determination is whether the Applicant’s application has merit.

11. Appeals lodged out of time is governed by the provisions of section 79G of the *Civil Procedure Act* 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.”

From the foregoing provision, the Applicant bore the responsibility of explaining to the court sufficiently why she was not able to file her appeal in time. The Applicant in her affidavit in support of the application has averred that she had lodged an appeal within time only that it turned out that the person who work for her Advocate’s law firm had made some mistakes and later left employment. She further implored this court not to punish her for the mistakes of her advocate and that this court should exercise discretion and allow her to lodge her appeal out of time in the interest of justice.

12. It is noted that the Applicant seeks to appeal against the judgment delivered way back on 16/9/2022 and that it is clear that the present application has been made more than 2 ½ years after the said judgment. This period appears in my view to be quite long and inordinate and which delay the Applicant has failed to satisfactorily explain. Even though the Applicant has indicated that she lodged the appeal on 13/10/2022, she confirms that the purported appeal No. E48/2022 belongs to other parties and that she has sought for an explanation from the High Court Civil Registry without success. It is also noted that the present application is dated 23/5/2023, as per the invoice attached to the application, the invoice of this present application was issued on 24/5/2023. There is no explanation by the Applicant why she had to wait until 16/4/2025 to file the said application one year later since it can be seen that the present application was drawn and its invoice generated some 22 months before the date of its filing on 16/4/2025 which clearly puts into doubt about the bonafides of the Applicant.
13. From the rival affidavits of the parties herein, it stands out that the Applicant is economical with the truth as to whether or not she had filed an appeal as claimed. It is instructive that following Covid-19 the Judiciary rolled out an E-filing system and virtual proceedings and that as from the year 2020 all suits were filed electronically. Hence, the Applicant like all other parties filing suits, was under obligation to file her appeal through the E-filing system. Already, it has transpired that the purported appeal number E48/2022 allegedly allocated to the Applicant actually belongs to other parties. That being the position, the Applicant was under obligation to avail evidence of electronic filing of her memorandum of appeal. She has failed to do so and therefore her claim that she had been allocated No. E48/2022 is false and must be rejected. If at all she had lodged such an appeal, the CTS system would corroborate the same. This is the Achilles Heel that the Applicant was required to surmount which she miserably failed to do so. It would appear to me that the Applicant must have used some uncanny means and roped the Registry Staff to allocate her a number which turned out to be false. She cannot now turn around and blame the Respondent who should be allowed to enjoy the fruits of the judgment. The Applicant is still under obligation to assist the court as to how she obtained an appeal number that belong another party and hopefully assist the supervisors of the court to curb any malpractice perpetrated in the registries.
14. The courts have in the past ruled that Applicants seeking for extension of time to lodge appeals out of time or other pleadings are strictly under obligation to give the court sufficient reasons why they were not able to file their pleadings in time. Further, the Applicants are under obligations to be honest, candid and truthful to the court which is expected to grant equitable relief. This is in tandem with the maxim of Equity that “he who comes to Equity must come with clean hands.”



15. In the case of *Trusted Services Limited v. Sudi Salim Said & Salim Said* (suing as the administrators Ad Litem of the Estate of Said Salim Said [2021] EKLR the court held:

“31. It is this court’s finding that the Applicant has not even in the least attempted to explain the three month’s delay in the filing of the present application. In the said circumstances, this court concludes that the delay is inordinate, thus inexcusable.”

16. In the case of *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others* (supra) the Supreme Court held that:

“Extension of time being a creature of equity, one can only enjoy if he acts equitably. He who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against the court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant.

33. This court therefore finds that the Applicant is guilty of laches and that the unexplained three months is inordinate, thus inexcusable.”

Also, in *Joseph Odide Walome v David Mbadi Akello* [2022] eKLR it was held: -

“26. Regarding the length of delay, it is evident from the pleading on record herein that the judgment that the Applicant is seeking to appeal against was delivered on 25/3/2021. The instant application was filed on 23/11/2021. This is a delay of 7 months and two days shy of eight months.

30 ... There is inordinate delay in this case which delay has not been explained. The attempted explanation is not truthful. The Applicant is therefore guilty of unexplained inordinate delay. I find the application for extension of time an afterthought and an attempt to frustrate the Respondent decree holder from enjoying his fruits of a lawful judgment. Justice cannot be served if the courts were to go forward one step and turn back ten steps in favour of an indolent litigant who does not want to settle decree.”

17. As noted above, the allegation made by the Applicant that the memorandum of appeal was filed on 13/10/2022 and allocated No. E048/2022 must be rejected as the same has not been substantiated by way of receipt and/or any other evidence. That the Case No. E048/2022 from the Court Registry records as shown by Annexure GO2 in the Respondent’s replying affidavit is in respect of other parties namely *Kenafric Industries Ltd vs. Lucia Akoth Omengo and Stephen Otieno Okinda*. Even though the Applicant claims that she served the purported memorandum of appeal upon the Respondent on 20/2/2023, the same was done some four months after the alleged date of its filing and it does not in any way prove that the same was filed within time. It is obvious that the Respondent will suffer great prejudice should the Applicant be allowed to appeal after the lapse of more than 30 months from date of judgment. More so, in light of the fact that the *Civil Procedure Act* provides for timelines of only one month within which such documents ought to have been filed. The Respondent being the decree holder is entitled to enjoy the fruit of the judgment and should not be prevented by an indolent Applicant.



18. It is also noted that the Applicant had purportedly filed an appeal even with knowledge that the same was out of time before seeking extension of time, and subsequently seeking leave of the court to extend time. This is tantamount to moving the court to remedy an illegality because the correct route was for the Applicant to seek leave and upon the said leave being granted, then file the Memorandum of appeal. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2024] KEHC 10644 (KLR) (11 September 2024) (Judgment) it was held:

“27. In the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. (Nicholas Salat Case) in addressing the issue of extension of time, the Supreme Court held:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such “an appeal, is tantamount to moving the court to remedy an illegality. This, the court cannot do. To file an appeal out of time and seek court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the document so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this court’s registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this court extending time), is expunged from court’s records.”

Flowing from the foregoing authority, the conduct of the Applicant in lodging an appeal out of time directly without seeking leave of the court must be deprecated. Such actions have clearly muddled her application for leave to lodge appeal out of time.

19. In view of the foregoing observations, it is my finding that the Applicant’s application dated 23/5/2023 and filed on 16/4/2025 is devoid of merit. The same is dismissed with costs to the Respondent. I further direct the Deputy Registrar of this court to initiate investigations as to how the Applicant herein was allocated an Appeal No. E48/2022 which incidentally belongs to other parties namely Kenafric Industries Ltd Vs. Lucia Akoth Omengo and Stephen Otieno Okinda.

DATED AND DELIVERED AT SIAYA THIS 4TH DAY OF JULY 2025.

D. KEMEI

JUDGE

In the presence of:

N/A Anyumbafor Applicant.

Odongofor Respondent.

Okumu.....Court Assistant

