



**Rukuma v Kinoti (Environment and Land Appeal E011 of 2023)
[2025] KEELC 87 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 87 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

**JO MBOYA, J
JANUARY 23, 2025**

BETWEEN

TIMOTHY MURITHI RUKUMA APPLICANT

AND

JAMES NKONGE KINOTI RESPONDENT

RULING

Introduction and Background

1. The Applicant herein has approached the court vide Notice of Motion Application dated 13th day of December 2024; and in respect of which the Applicant has sought for the following reliefs:
 - i.Spent
 - ii. That this Honourable court be pleased to issue a temporary stay of execution of its judgment dated 17.7.2024 and/or any consequent decree/orders issued pursuant to the said judgment pending the hearing and determination of this application.
 - iii. That this Honourable court be pleased to issue an order of inhibition inhibiting any dealings with land parcel number Nkuene /Ukuu/643 either by way of transfer, sale, lease, charge or otherwise pending the hearing and determination of this application.
 - iv. That the honourable court be pleased to grant leave to the applicant to file and serve a notice of appeal out of time and that the notice of appeal dated 7.10.2024 annexed hereto be deemed as duly filed.
 - v. That this honourable court be pleased to issue any further and/or suitable orders in the interest of justice.
 - vi. That the costs of this application be provided for.



2. The Application beforehand is anchored on various grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit of Timothy Murithi Rukuma [the Applicant] sworn on 13th day of December 2024; and to which the deponent has annexed various documents including a copy of the Notice of Appeal which was filed albeit out of time.
3. Upon being served with the instant application, the respondent filed a replying affidavit sworn on the 14th Day of January 2025; and in respect of which the Respondent has contended inter-alia that the application beforehand is an afterthought; and in any event, constitutes an abuse of the due process of the court. Besides, the Respondent has averred that the applicant herein did not take the requisite steps including seeking for the typed copies of the proceedings.
4. The application beforehand came up for hearing on the 16th Day of January 2025; whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of oral submissions. In this regard, the court adopted the agreement by the parties and thereafter proceeded to and entertained the application.

Parties Submissions:

Applicant's submissions

5. The Applicant herein adopted the grounds contained in the body of the Application. In addition, the Applicant also reiterated the averments contained in the body of the supporting affidavit and the various annexures attached thereto.
6. Other than the foregoing, learned counsel for the Applicants intimated to the court that same [Counsel] was desirous to withdraw prayers 2 and 3 of the application and thereafter, learned counsel posited that same shall canvass only prayer 4 of the application.
7. Furthermore, learned counsel for the Applicant proceeded to and highlighted three [3] salient issues for consideration and determination by the court. Firstly, learned counsel for the applicant has submitted that the applicant was previously represented by the firm of M/s Kiautha Arithi & Co. Advocates. In addition, it has been submitted that following the delivery of the judgment in respect of the appeal herein, the applicant instructed his Counsel on record [now previous Counsel] to file and lodge a Notice of Appeal.
8. Additionally, Learned counsel for the applicant has submitted that the applicant even proceeded to and paid his previous advocates the professional fees to facilitate the filing and service of the Notice of Appeal. To this end, learned counsel for the Applicant has referenced annexure TMR "1" attached to the supporting affidavit, which is a copy of the Receipt issued by the previous Counsel upon receipt of the payments by the Applicant herein.
9. Be that as it may, learned counsel for the applicant that despite being issued with requisite instructions and receiving the professional fees, the applicant's previous advocates failed and neglected to file the notice of appeal within the statutory timelines.
10. Secondly, learned counsel for the applicant has submitted that the applicant made several trips to the offices/chambers of his previous advocate with a view to ascertaining whether the notice of appeal had been filed and served. In this regard, learned counsel for the applicant has submitted that the applicant was duly informed that the notice of appeal had been filed.
11. Nevertheless, it has been submitted that when the Applicant sought to be availed a copy, same [Applicant] was refused a copy of the Notice of Appeal.



12. Arising from the refusal to avail a copy of the notice of appeal to the applicant, it has been submitted that the applicant was constrained to take up and indeed took up, the conduct of his own case and same {applicant} even filed an application for stay by himself.
13. However, it has been submitted that the application for stay which was filed by the applicant was dismissed by the Honourable Judge, namely, Honourable Justice Nzili, Judge; because there was no notice of appeal which had been duly filed. Thirdly learned counsel for the applicant has submitted that the application herein has demonstrated the diligence and reasonable steps that same {applicant} took in an endeavor to pursue his undoubted right of appeal.
14. Furthermore, it has been submitted that the applicant herein has never been indolent. On the contrary, it has been submitted that the applicant has shown that same has been keen to pursue his appeal to the Court of Appeal.
15. Arising from the foregoing, learned counsel for the Applicant has implored the court to invoke and adopt the provisions of sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; as well as Section 7 of the *Appellate Jurisdiction Act*, Chapter 9, Laws of Kenya; and thereafter allow the application in terms of prayer 4, which essentially seeks for the extension of time to file/ lodge the Notice of Appeal.

b. Respondents submissions:

16. The respondent herein relied on the contents of the replying affidavit sworn on the 14.1.2025 and thereafter highlighted three [3] salient issues for consideration by the court.
17. First and foremost, Learned counsel for the respondent has submitted that the applicaitbefore hand has been filed with unreasonable and inordinate delay which has neither been accounted for nor explained. In this regard, learned counsel for the respondent has submitted that the applicant is therefore not entitled to partake off and or benefit from the equitable discretion of the court.
18. Secondly, learned counsel for the respondent has submitted that the applicant herein did not even apply for the typed proceedings of the court. To the extent that the applicant did not apply for the typed proceedings of the court, it has been contended that the application before court constitutes an afterthought.
19. Thirdly learned counsel for the respondent has submitted that the applicant herein has had reasonable opportunity to pursue his appeal. However, it has been submitted that the applicant has been indolent and therefore should not be granted the leave/extension of time sought.
20. Finally, learned counsel for the respondent that the respondent shall be disposed to suffer a due prejudice if the application is allowed. In any event it has been contended that the respondent is equally entitled to the benefit underpinned by the provisions of Articles 27 & 28 of *the Constitution* 2010.
21. Premised on the following submissions, learned counsel for the respondent has invited the court to find and hold that the application beforehand constitutes an abuse of the due process of the court and thus same (application) ought to be dismissed with costs.

Issues For Determination:

22. Having reviewed the application beforehand; the response thereto and upon consideration of the oral submissions made on behalf of the respective parties the following issues crystallized and are thus worthy of determination:



- i. Whether the Applicant herein has established and demonstrated sufficient cause/ basis to warrant extension [enlargement] of time within which to file and serve a Notice of Appeal.
- ii. Whether the Respondent herein shall be disposed to suffer a due prejudice and or injustice, if the application is granted.

Analysis And Determination :

Issue No. 1 Whether the applicant herein has established and demonstrated a sufficient cause to warrant extension of times within which to file and serve a notice of appeal.

23. The Applicant herein was the respondent in the main appeal that was heard and disposed off vide judgment rendered on the 17.7.2024 and wherein the court find an error that the appeal was meritorious. Pursuant to the judgment under reference the appeal was allowed and the court decreed that the caution that had previously been lodged by the Applicant herein be discharged.
24. On the other hand, the court also proceeded to and awarded and to the Respondent the sum of Kshs.300,000/= only on account of general damages on the basis on illegal caution that had been lodged by the applicant.
25. It appears that the Applicant herein was not happy with the judgment. In this regard the applicant proceeded to and instructed his counsel on record {now previous counsel} to file/lodge a notice of appeal in accordance with the law. Furthermore, the applicant herein proceeded to and paid the professional fees to his advocate on record. See annexure TMR “1” attached to the supporting affidavit.
26. After paying the professional fees to facilitate the lodgment of the notice of appeal the applicant herein believed that his previous advocates had proceeded to and filed the notice of appeal. In any event the applicant has tabulated the steps and efforts made to ascertain whether the notice of appeal was timeously filed or otherwise.
27. In particular, the applicant herein has demonstrated that same visited the office/chambers of his previous advocate on various occasions. Furthermore, the applicant has intimated that the he {applicant} even requested to be availed a copy of the notice of appeal, if any that had been filed.
28. The averments contend and adverted to at the foot of the supporting affidavit by the applicant have not been impugned and or controverted. In any event, the averments at the foot of the supporting affidavit demonstrate blow by blow the efforts that were put in place by the applicant to pursue his undoubted right of appeal.
29. Nevertheless, it is evident that the applicants previous counsel was less than diligent in the discharge and execution of his professional duties. For good measure it was incumbent upon the advocate to file and lodge the notice of appeal within the statutory 14 days period. However, there is no gainsaying that the notice of appeal was not lodged in accordance with the law. Suffice to point out that because of the lethargic manner in which the previous counsel was acting, the applicant was constrained to and took up the conduct of the matter. In this respect the applicant proceeded to and filed an application for stay. However, because there was no valid notice of appeal filed the application was dismissed. Even though the respondent herein has contended that the application beforehand is an afterthought and constitutes an abuse of the due process of the court, there is no gainsaying that the totality of the evidence on record, demonstrates that the applicant has been keen to propagate his appeal. In any event, the applicant appears to have been let down by his previous counsel.



30. In my humble view, the averments contained at the foot of the supporting affidavit by the Applicant hereindemonstrates diligent efforts, steps and actions that were taken by the applicant to pursue his undoubted right of appeal. The actions reflect diligent steps and taken objectively it cannot be said that the applicant herein was indolent.
31. Additionally, I beg to underscore that the applicant herein has not only highlighted the length of delay but same as also gone forward and accounted for the delay. Furthermore, the reasons and explanations adverted to at the foot of the supporting affidavit, constitute plausible and cogent reasons, to warrant exercise of equitable discretion.
32. Pertinently, I hold the view that the applicant has laid before the court Bonafide reasons and as thus established sufficient cause to warrant the grant of the orders for extension of time.
33. To buttress the foregoing exposition of the law it is apposite to cite and reference the decision of the court of appeal in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), wherein the Court stated thus:

In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

34. The factors to be taken into account before granting an application for extension of time within which to undertake an act provided for under the law or pursuant to a court order have also been highlighted and elaborated by the supreme court of Kenya in a plethora of decisions.
35. In the case of Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 others (2014) eKLR, the Supreme Court of Kenya distilled various factors to be taken into account. For coherence, the court stated as hereunder:

From the above caselaw, 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 its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
36. Duly guided by the guidelines highlighted in the decisions supra and taking into account the obtaining circumstances I come to the conclusion that the applicant herein has established and demonstrated the existence of the sufficient cause to warrant the grant for extension of time.
37. As pertains to what constitutes sufficient cause, it is imperative to cite and reference the holding of the court of appeal in the case of: The Hon. *Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011*; wherein the Court of Appeal observed and stated as follows:
- “Sufficient cause or good cause in law means:-
- ‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See Black’s Law Dictionary, 9th Edition, page 251.
- Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

Issue No. 2 Whether the respondent herein shall be disposed to suffer a due prejudice and or injustice, if the application is granted.

38. Learned counsel for the respondent submitted that the dispute between the applicant and the respondent herein has been in court for more than 15 years. In this regard it was contended that the respondent has been denied and deprived of the rights to partake off and to enjoy the benefits flowing from ownership of the suit property.
39. Owing to the length of time that the matter has taken in the corridors of justice it was contended that the extension of time, in the manner sought by the applicant would gravely prejudice the respondent. In any event, it was contended that it behoove the court to bring the matter to an end.
40. The contention by the respondent and his learned counsel are valid. However, it is not lost on this court that every citizen of the republic of kenya is guaranteed a right of access to justice and a right to fair hearing in respect of every dispute.
41. Furthermore, the mere fact that a litigant or a litigants advocate committed a mistake and or blunder does not automatically deny or deprive the litigant of a right to pursue his/her claim before the court. In this regard the respondents right to have the suit heard and determined must be balanced as against the applicants undoubted right of appeal.



42. To my mind, the applicant herein is entitled to propagate and pursue his undoubted right of appeal and the court is enjoined to facilitate the enjoyment of such rights. For good measure the enjoyment of the right to appeal can only be undertaken where it is demonstrated that there exists overwhelming hindrance. However, in respect of the instant matter, the respondent has not demonstrated any such hindrance. At any rate I hold the view that the prejudice or injustice that the respondent is likely to suffer in respect of this matter is capable being atoned for and/or indemnified by an award of costs.
43. Finally, it suffices to remind myself of the dictum of Apallo J.A {as he then was} in the case of Philip Keiptoo Chemwolo vs Augustine Kubende (1986) eKLR; I think a distinguished equity judge has said:
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”
- I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree.
44. To my mind, the respondent has not demonstrated the nature of prejudice or injustice that same is bound to suffer. In any event, whatever prejudice that the respondent shall be exposed to can be atoned for by costs.

Final Disposition

45. Having considered the twin issues that were highlighted in the body of the ruling, it suffices to posit that the applicant has indeed provided plausible reasons to warrant the exercise of discretion in his favour.
46. In the circumstances the application dated 13.12.2024 be and is hereby allowed on the following terms:
- i. Leave be and is hereby granted to file and serve the requisite notice of appeal against the judgment and decree rendered on the 17.7.2024.
 - ii. The notice of appeal in terms of clause 1 hereof shall be filed and served within 14 days from the date hereof.
 - iii. The applicant shall pay costs of the application to the respondent.
 - iv. The costs in terms of clause iii and hereby assessed and certified in the sum of Kshs.15,000/=.
 - v. Any other prayer not expressly granted is hereby declined.
47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF JANUARY 2025

OGUTTU MBOYA

JUDGE.

In the presence of:

Mutuma – Court Assistant

Mr. Mwirigi for the Applicant



Mr. Mutunga for the Respondent

