



**Olwa v Osia & another (Miscellaneous Civil Application  
E010 of 2024) [2025] KEELC 4787 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4787 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
MISCELLANEOUS CIVIL APPLICATION E010 OF 2024**

**AE DENA, J**

**JUNE 26, 2025**

**BETWEEN**

**CALEB JUMA OLWA ..... APPLICANT**

**AND**

**JECKONIA ODUOR OSIA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN OCHIENG OGOLA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is the subject of the Notice of motion application dated 3/07/2024. The application seeks for leave to extend time for filing an appeal (out of time) against the judgement of the Principal Magistrates Court at Ukwala of Hon. Sarapai delivered in MCELC Case No. 28 of 2018 on 7/11/2023. That the Memorandum of Appeal be deemed as duly filed upon payment of the requisite fees and costs of the application be provided for.
2. The application is premised on the grounds on its face and the supporting affidavit of Dave Lung'aho Siganga counsel having the conduct of the matter on behalf of the applicant. It is deponed that the judgement above was delivered to the respondents suit on absolute proprietorship. That time to file the appeal expired on 7/12/2023 after the judgement was delivered by Hon. Sarapai on 7/11/2023. That the applicant was not given notice of the delivery of judgement and only became aware of the contents of the same on 26/6/2024 when counsel was able to access and peruse the physical copy and notified the applicant.
3. It is deponed that the applicant being dissatisfied with the judgement then gave instructions to appeal the judgement. That the delay in communication of the judgement to the applicant was due to inadvertence on the part of his counsels due to inability to access the court file. That the court has powers to enlarge time.



4. It is further deponed that the applicant has an arguable appeal with a great chance of success. A copy of the Memorandum of Appeal is annexed as DLS-2. That the delay is not inordinate or so great as to be inexcusable. The court is urged to allow the application in the interest of justice.
5. The respondent filed grounds of opposition dated 6/02/2025 as follows; -
  1. The inordinate delay in bringing the application for extension of time has not been explained satisfactorily
  2. The further delay in prosecuting the application for extension of time speaks to the applicant's lethargy
  3. The intended appeal has no chance of success and an order extending time for lodging an appeal will not serve any useful purpose.
6. On 10/2/2025 the court issued directions in the presence of counsels for both parties that the application be canvassed by way of written submissions.

### **Applicants Submissions**

7. The applicant's submissions are dated 12/02/2025. The applicant identified one issue for determination. Whether the Applicant has established sufficient cause to warrant granting of the orders sought.
8. It is submitted that neither the applicant nor his Advocates were aware that judgment had since been delivered by the trial court. That being an inadvertent omission the same ought not to be visited upon the client. Reliance was placed in the case of Phillip Chemwolo & Another -Vs- Augustine Kubede [1982-881 KLR 103 at 1040 where Apaloo J/A stated that 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 heard on merit. Article 50 (1) of *the Constitution* of Kenya, 2010 is also cited in this regard.
9. Further reference was made to the case of Martha Wangari Karua -VS- IEBC Nyeri Civil Appeal No.1 of 2017 where the court held that the Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.
10. The court was also referred to the provisions of section 79 of the *Civil Procedure Act* granting the court the powers for enlargement of time and provisions of section 42 of the Civil Procedure Rules 2010.

### **Respondents' Submissions**

11. The Respondents submissions are dated 4/2/2025. It is submitted there is no explanation as to why the Applicant or his advocate did not peruse the court file earlier than 26<sup>th</sup> June, 2024, yet the judgement was delivered on 7<sup>th</sup> November 2023.
12. That the Applicant has himself not sworn any affidavit to explain why he did not make any efforts to know the outcome of the case for the period between 7<sup>th</sup> November 2023 to 26<sup>th</sup> June 2024.
13. Reliance was placed in the case of Habo Agencies Limited —vs- Wilfred Odhiambo Musingo [2015] KECA 597 [KLR], where the court held that parties have a responsibility to show interest in and to follow up their case even when they are represented by counsel.
14. It was submitted that seven (7) months delay, which is not explained, is inordinate as reference is made to the case of Danson Muniu Njeru —vs William Kiptarbei Korir & 6 Others [2014] eKLR.



15. It is contended that even the delay in prosecuting the present application for extension of time, which was filed in July 2024 but was not prosecuted until 21<sup>st</sup> January, 2025 when the court gave directions in the absence of the Applicant and/or his advocates, confirms the Applicant's indolence or lack of interest in the matter. Lastly it is urged that whichever way one looks at the instant application, the same lacks merit and it should be dismissed with costs to the Respondent.

### **Analysis And Determination**

16. I have considered the application, the response thereto and the rival submissions of the parties. The main issue for determination is whether the applicant has met the threshold for grant of the orders for extension of time
17. The application is brought under the provisions of section 79G and 95 of the Civil Procedure Act and order 43 Rule 2 of the Civil Procedure Rules.
18. Section 79G of the Civil Procedure Act is on Time for filing appeals from subordinate court and 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 he had good and sufficient cause for not filing the appeal in time.
19. Arising from the above provisions the key test for the court to consider is whether the applicant had good and sufficient cause for not filing the appeal in time. The power to enlarge time under Section 79G herein is discretionary.
20. It is now established that discretion must be exercised judiciously. The Supreme court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No 16 of 2014 (2014) eKLR* had this to say;-
- The underlying principles a court should consider in exercise of such discretion should include: -
- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay.'
21. Starting with the requirement for time an appeal should be filed within 30 days of the judgement except where there is a certificate of delay to confirm that there was a delay in preparing and delivering the order. In the present case the delay is attributed to the late obtaining of a copy of the judgement. The



judgement of the trial court was delivered on 7<sup>th</sup> November 2023 and the present application was filed on 4/07/2024 resulting into a delay of 7 months.

22. Applying the law and precedent above my task is to interrogate the reason advanced for the said delay and see if the same would form sufficient or good reason to grant the extension. It is stated that the Applicant was not given notice of the delivery of judgement and only became aware of the contents of the same on 26/6/2024 when counsel was able to access and peruse the physical copy and notified the applicant.
23. Based on the above explanation it would appear to me that the applicant may have been appearing in person and was not notified of the date of the judgement. It could also mean the firm of Siganga herein was on record and they were also not notified as such. The applicant appellant did not swear an affidavit which may also have brought clarity. But counsel concedes to inadvertence on his part as he submits that the mistake of counsel should not be visited upon the client.
24. Having noted the above I think what is pertinent is the reason for the delay. It is deponed that the applicant became aware of the judgement on 26/6/2024 when counsel was able to access and peruse the physical copy and notified him. It is then that instructions were issued to counsel to appeal the decision. What ought to have been explained is what happened in the intervening period in terms of follow up and specifically after the hearing in the lower court was finalised to the time the discovery was made.
25. I have noted the submission that the Applicant's Advocates only became privy of the judgment entered when the Advocates perused the court file having waited on judgment notice since August 31, 2024 when the trial court directed that judgment was not ready and would be delivered on notice and having come up before for judgment on July 4, 2023 when the court was not sitting. This information is additional to what is deponed in the supporting affidavit. It is trite that submissions do not take the place of evidence see the Court of Appeal dictum in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR . I will therefore disregard this explanation.
26. Moreover, no single communication between the lawfirm of Siganga and the registry seeking information about the judgement or the file to access the same is adduced. There is also no communication from the client seeking progress of the case. What is lacking is the candid disclosure of really what transpired in the intervening period leading to the perusal of the court file.
27. For me there is no good or sufficient explanation that has been given for the delay in discovering there was judgement prompting the present application.
28. Moreover what I see is also indolence of the applicant. An indolent party must reckon with consequence of inaction see Muriti Kimonde versus Kenya Commercial Bank Ltd. (2006) Eklr. In Rukenya Buuri versus Marimi Minyora and 2 others (2018) Eklr the court held that a litigant must be diligent enough to follow up how his case is being handled by his advocate.
29. The upshot of the foregoing is that the application is dismissed. Parties to bear their own costs.

**DELIVERED AND DATED AT SIAYA THIS 26<sup>TH</sup> DAY OF JUNE 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**26/06/2025**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:



No appearance for the Applicant

Mr. Amuga for the Respondent

Court Assistant: Ishmael Orwa

