



**Lamayian & another v Chebet (Civil Application E193 of 2024)
[2025] KECA 1614 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1614 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E193 OF 2024
HA OMONDI, JA
OCTOBER 3, 2025**

BETWEEN

SAPEI NAREIYIO LAMAYIAN 1ST APPLICANT

NENGOE ENE MAIGUSIE 2ND APPLICANT

AND

EUNICE JEMTAI CHEBET RESPONDENT

(Being an application to extend time to serve the Notice of Appeal, to file the memorandum and Record of Appeal out of time against the Ruling of the High Court of Kenya at Kisii (R. E. Ougo, J.) dated 3rd December 2019 in Cause No. 94 of 2015)

RULING

1. Upon the death of Lemaiyan Naliki Maigusie, his two widows Sapei Narenyo Lemaiyan and Nengoe ene Maigusie, petitioned for and were issued with an amended grant of letters of administration of his estate, where they listed one property in Transmara/Olorien/24 and funds held in an account at Equity Bank, as the only assets. Later on Eunice Jemtai Chebet, sought revocation of the grant, lamenting that she was also a widow surviving the deceased, being the 3rd wife, yet she had been left out; and that some assets had not been disclosed. Consequently, by a ruling dated 3rd December 2019 (Ougo, J.), the confirmed grant was revoked and a fresh one issued to the three widows.
2. The two widows were aggrieved, and thus instructed their then counsel on record to lodge an appeal pointing out that vide a Notice of Appeal dated 16th June 2021, was filed and received at the court registry on 18th June 2021, on the same date of receipt, the applicants through their advocates on record M/s Ongegu & Associates, also requested for typed proceedings. Thereafter, they lost contact with their advocate; and despite numerous calls to follow up on the progress of the case, the advocate went mute despite numerous calls, prompting the applicants to proceed to the Kisii High court civil registry to establish the status of the case.



3. At the Civil registry, the applicants were informed that the file had been forwarded to the archives at Kisumu registry, prompting them to write a letter recalling for the file from Kisumu. Eventually, the file was availed in November; and upon perusal, the applicants noted that their advocate had neither filed the memorandum of appeal nor the record of appeal. The applicants acknowledge that the court had issued a letter to the former advocates to pick a copy of the typed proceedings on 31st January 2022 but the advocates never followed up on the same.
4. Eventually, the applicants decided to source for funds to appoint another advocate to seek leave and extension of time to file a record of appeal and memorandum of appeal out of time. It is their contention that failure to file the memorandum of appeal and record of appeal within time was not intentional but occasioned by over reliance on communication from their advocates which resulted in the oversight leading to lapse of time. The applicants are of the view that that non-compliance was due to a mistake on the part of their advocate and the same should not be visited upon them as they are innocent litigants who have been keen to prosecute the current appeal; The applicants are apprehensive that they stand to suffer substantial and irreparable loss and damages should the orders sought not be granted; and that they have a good arguable intended appeal which has high chances of success as per the attached draft memorandum of appeal.
5. In opposing the application, the respondent urges this Court to strike out the Notice of Appeal under Rule 86 of this Court's Rules since the applicants failed to comply with an essential step in the proceedings, namely failing to serve the notice of appeal and the record of appeal; and not serving her with the letter asking for typed proceedings yet she is directly affected by it; and her advocate's address of service was indicated in the alleged notice of appeal.
6. The respondent submits that the present application was filed after she had made an application for summons for confirmation of grant on the 22nd September, 2024; and this is a knee jerk reaction which this Court should not condone; that despite the ruling being delivered on the 18th December, 2019 – 5 years ago, she has been denied the opportunity to enjoy any fruits of the ruling, while the applicants are benefitting from the estate of the deceased to her detriment as well as the children she had with the deceased.
7. Are the applicant's innocent victims of Counsels mistake of Counsel? Has this application been made and without any unreasonable delay?
8. Rule 75(2) of the court of appeal rules stipulates that a Notice of Appeal should be lodged within fourteen days of the date of the impugned decision. If it is not done the Notice of Appeal is invalid and not properly on record. Recognizing this provision, the applicants urge this court to expand the time, on the basis that despite being desirous of pursuing an appeal, it is their advocate who let them down.
9. Rule 4 of the Court of Appeal Rules gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso v Rose Wangari Mwangi Civil Application No. Nai. 255/97* (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously an upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka v Waruguru Kithaki & 2 Others* (2013) eKLR. M'Inoti, JA had this to say concerning Rule 4 in *Imperial Bank (IR) & Anor v Alnashir Popat and Others* [2018] eKLR

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show,



the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”

10. As pointed out by the respondent, there is no evidence demonstrating that the previous advocate had been contacted, not a letter nor a text message on phone. In any event, the alleged mistake of counsel does not of itself cure a litigant’s own inaction, basically because it is a litigant’s case and not that of his counsel. The primary responsibility to act within the prescribed timelines under this Court’s Rules rests heavily on the litigant’s shoulders. Indeed, with regard to the responsibility of the litigant to follow up their case, Waki, J.A. had this to say in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

11. The period of delay is more than 5 (five) years since the ruling given on the 18th December, 2019, this is an inordinately long period and reeks of indolence on the applicant’s part. This period is undeserving of the exercise of the undoubted discretion that this court has under Rule 4 of the Rules of this Court. I find that the Applicant has failed to meet the threshold set out for this court to exercise its discretion in his favour and grant the extension. The application is thus without merit; and is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

