



**Juma v Khayundi (Civil Application E063 of 2025)
[2025] KECA 2012 (KLR) (18 November 2025) (Ruling)**

Neutral citation: [2025] KECA 2012 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E063 OF 2025
MS ASIKE-MAKHANDIA, JA
NOVEMBER 18, 2025**

BETWEEN

MARGARET OYIELA JUMA APPLICANT

AND

MOHAMMED OMOLLO KHAYUNDI RESPONDENT

(Being an application for Extension of time to file an appeal)

RULING

1. This application seeks extension of time for the filing of the record of appeal. The Environment and Land Court, “ELC”, dismissed the suit filed by Margaret Oyiela Juma, “the applicant”, on the grounds of res judicata. The applicant desires to appeal against that judgment and decree but can not do so as she is time barred by the rules of this court. The delay in filing the appeal was occasioned by the applicant’s previous advocate, who, despite lodging a Notice of Appeal in time, failed to take the necessary steps to file the record of appeal within the statutory period, hence this application.
2. The applicant was unaware of the failure by her counsel to file the Record of appeal until after the lapse of the prescribed period. Upon discovering the omission, the applicant promptly engaged the counsel now on record, who filed the present application without delay.
3. The application is opposed on grounds that it is misplaced, frivolous and without legal basis. That the application is brought under the wrong provisions of the law, being under the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act* and Orders 10 Rule 11 of the Civil Procedure Rules and Articles 25, 50 and 159 of *the Constitution* of Kenya. Finally, that the delay in bringing the application is inordinate.
4. The application was canvassed by way of written submissions only and without appearance of counsel or parties. Those submissions merely reiterate and expound on the grounds, affidavits in support and in opposition to the application and therefore I need not rehash them.



5. Much as the application appears to have been brought under the wrong provisions of the law, I do not think that the omission is fatal. A clear reading and appreciation of the application will leave one in no doubt at all that it is anchored on Rule 4 of this Court's Rules as it seeks extension of time. I will therefore treat it as such considering the edict of Article 159 of *the Constitution* of Kenya.
6. Rule 4 of the Court of Appeal Rules grants this Court discretion to extend time for filing an appeal: "The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."
7. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, outlined the considerations for extension of time thus:
 - a. 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;
 - 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 discretion to extend, is a consideration to be made on a case to 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.
8. In addition, this Court in the earlier case of *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, set out factors to be considered in granting such an application as follows:
 - a. The explanation if any for the delay;
 - b. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
 - c. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise or discretion in favour of the applicant.
9. In the present case, the applicant has alleged that the reason the record of appeal was not filed in time was due to indolence on the part of the previous counsel. The applicant claims that the previous counsel failed to update her on the progress of the appeal after the notice of appeal was filed.
10. When counsel is deemed negligent for failure to act on the instructions, courts have generally held that the error that caused the failure must be interrogated. In the case of *Itute Ingu and others v Isumael Mwakavi Mwendwa* [1994] eKLR, the court stated in similar circumstances, where an advocate's error served as the foundation for an application to file an appeal out of time thus:

"What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court's Rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such



a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.”

11. In this case, I am satisfied that the delay was not due to the applicant’s fault or indolence but resulted from the previous advocate’s failure to act. When the applicant discovered the omission by her previous counsel, she acted promptly demonstrating diligence and intent to pursue the appeal.
12. The role of a legal counsel necessitates an unwavering commitment to exercising diligence on behalf of the client. This duty requires the counsel to prioritize the client’s interests. The failure by the applicant’s former lawyers to inform her on the progress of her appeal, they erred on this particular duty, and it is trite that mistakes of counsel should not be visited on the applicant so as to prejudice her right to appeal.
13. I also do not think that the delay in filing the appeal is inordinate as to cause the applicant to be denied an opportunity of being heard on appeal. The respondent has not shown that the delay has caused him any prejudice in as far as the hearing and determination of the appeal is concerned. In my view, justice can still be done despite the delay. The respondent can be compensated by way of costs for any delay in any event.
14. The court in *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR, observed that:

“...it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the respondent will suffer if the applicant is granted extension of time.”
15. I therefore find that the applicant has met the threshold for me to exercise my unfettered discretion in her favour. The applicant has twenty-one (21) days from the date of this ruling to file and serve her record of appeal. Costs shall be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF NOVEMBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

