Ochola v Alando (Civil Appeal (Application) 221 of 2019)
[2025] KECA 1999 (KLR) (17 November 2025) (Ruling)

Neutral citation: [2025] KECA 1999 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL (APPLICATION) 221 OF 2019

MS ASIKE-MAKHANDIA, JA

NOVEMBER 17, 2025

BETWEEN

ENOCK OGWENO OCHOLA ..... APPLICANT

AND

KENNEDY OMONDI ALANDO ..... RESPONDENT

(Being an application for extension of time to serve the record of appeal)

RULING

1. Kennedy Omondi Alando, "the respondent", commenced Civil Proceedings in the Environment and Land Court at Migori against Enock Ogweno Ochola, "the applicant", touching on all that piece or parcel of land known as LR NO. EAST KASIPUL KOJWACH KAMIORO 433, "the suit Property". By the judgment rendered on 19th December 2018, the trial court found in favour of the respondent.

2. The applicant was aggrieved and or dissatisfied with the said judgment and decree. Consequently, he lodged the instant appeal on the 27th September 2019. However, it was not until 27th September 2024 that the record of appeal was eventually served on the respondent.

3. The respondent thereafter lodged an application to strike out the record of appeal for having been served late contrary to the law. It was indeed served after 5 years from the date of filing.

4. The application so mounted was heard and determined on the 7th July 2025 when the same was allowed by this Court. The applicant then filed the instant application in which he sought a plethora of prayers to wit; extension of time, review of the orders striking out the record of appeal, to treat the record of appeal on record as timeously filed, to give directions as to the disposal of the appeal and costs. When the application came before us for hearing on 6th October 2025 and upon engagement by court, parties agreed to abandon all the other prayers in the application save for the extension of time. Consequently, my determination in this ruling is strictly limited to the prayer for extension of time.

5. The grounds and affidavit in support of the application allege that the applicant was let down by his previous advocates who had all along led him to believe that they had processed the appeal as required and all that they were waiting for was a hearing date. Little did he know that the record of appeal had in fact not been served on the respondent as required by the rules of this court, hence the application. He also takes view that this application should be allowed so as to protect his constitutional right to fully exhaust the appellate process. That the appeal has high chances of success and that the respondent will suffer no prejudice if the application is granted. Finally, he decries the rules of procedure and strict timelines that stand in the way of substantive justice.

6. The application was opposed by the respondent through a replying affidavit sworn by the respondent in which he bemoans the delay he deems inordinate and failure to provide reasonable explanation. That he should be allowed to enjoy the fruits of his litigation. The applicant was merely an indolent litigant who should not be allowed by this Court to continue harassing him with unnecessary litigation. In the ultimate he claimed that the applicant had not met the legal threshold for the grant of extension of time and the application should therefore be dismissed with costs.

7. The application was canvassed by way of written submissions only and without appearance of counsel or the parties. Both parties reiterated their respective positions in their written submissions. I need not therefore rehash them.

8. I have carefully considered the application, the grounds, the affidavits in support of and in opposition to the application, the submissions by respective counsel and this is my take!

   The application is anchored on Article 159(2) of *akn ke act 2010 constitution the Constitution* of Kenya, Section 3A of the *akn ke act 1977 15 Appellate Jurisdiction Act*, Rules 4,37 and 44 of the Court of Appeal Rules and other enabling Provisions of Law and Rule 4 of the Court of Appeal Rules. Essentially this an application under the latter rule. This court and indeed the Supreme Court of Kenya has already laid down certain guiding principles regarding applications for the extension of time. For instance, in the case of Fahim Yasin Twaha V Timåmy Issa Abdalla & 2 Others [20151 eKLR, the Supreme Court stated that, '...as regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was held that:

   > '...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... we derive the following as the underlying principles that a court should consider in exercising 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 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. Where there is a reasonable course for delay, same should be expressed to the satisfaction of the court; 5. Whether there will be any prejudice suffered by the respondents if 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...''

9. The applicant seems to be blaming his erstwhile advocates for the failure to serve the record of appeal within the stipulated timelines of 7 days as prescribed in Rule 92 of the Court of Appeal Rules.

However, the applicant has not demonstrated that he made any attempts to follow up with his erstwhile advocates by way of correspondence. Nor has their previous advocates sworn an affidavit admitting that the mistake in effecting service of the record of appeal was solely of their making.

10. The applicant wants me to believe without any evidence that for five years since the lodging of the record of appeal, he had been following up on the status of the appeal. To my mind this was simply a case of a party going to slumber. Equity aids the vigilant and not the indolent hence the application is afterthought, lodged only after the respondent had successfully obtained orders of striking out the appeal. The inordinate delay and reasons thereof are inadequate in my view. In Bi-Mach Engineers Limited V James Kahoro Mwangi [20111 eKLR this Court held that: "The applicant had a duty to pursue his Advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile Advocates"

11. There is always a duty cast on the client to pursue his instructions that he has entrusted an advocate with. If the Advocates were simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. A party has a remedy against such an Advocate. Without explanation, there would be no basis for the exercise of any discretion. In Violet Wanjiru Kanyiri Vs Kuku Foods Limited [2022] eKLR, the court relied on the case of Alice Mumbi Nyanga V Danson Chege Nyanga & Another [2006] eKLR whereby the Court held that, '... A civil case once filed is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check the progress, He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court...'

12. In Muzaffer Musafee Essajee & Another V Anne Njeri Mwangi [20211 eKLR, this Court emphasized the need to comply with the timelines set in the rules for purposes of justice being served in a timely manner.

13. Applying the foregoing criteria, it is evident that the applicant never followed up his instructions to his Advocates timeously as expected. He was just contended with sitting back. I also note that the applicant has not attached draft memorandum of appeal to the application; it is thus not possible to prima facie determine the chances of the appeal succeeding. Similarly, the Applicant has not demonstrated that the respondent shall not be prejudiced if leave is granted.

14. On the other hand, the respondent is in occupation of the suit property and deserves to enjoy the fruits of his litigation which since the year 2019 has been denied due to the indolence by the applicant.

15. The applicant too has failed to lay a basis for the application of Section 3A of the *akn ke act 1977 15 Appellate Jurisdiction Act* and Article 159 of *akn ke act 2010 constitution the Constitution* of Kenya. Indeed, in the case of Kakuta Maimai Hamisi V Peris Pesi Tobiko & 2 Others [20131 eKLR, it was held that, '...we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by Parties or a court by pitching tent at Article 15 22 of *akn ke act 2010 constitution the Constitution*. We do not consider Article 15 22 2d to be a panacea, nay a general white wash, that cures and mends all ills, misdeeds and defaults of litigation...' Thus, Article 159 (2)

    (d) cannot aid the applicant.

16. In the ultimate, I am not satisfied that this application has met the threshold for me to exercise my unfettered discretion to extend time for the serving the record of appeal. The application is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 17 TH DAY OF NOVEMBER, 2025.

ASIKE-MAKHANDIA

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar