

**IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

(CORAM: OMONDI, JA, (IN

CHAMBERS)) CIVIL APPLICATION NO.

E008 OF 2025 BETWEEN

**CALLEN BWARI NYACHOGO 1ST
APPLICANT PETER ONGERA JAMES
2ND APPLICANT ERASTUS MASANYA JAMES..3RD
APPLICANT**

AND

**HOSEA NYANDIKA MOSAGWE *Suing as Legal administrator of the
Estate of Mosagwe Nyachogo*).....RESPONDENT**

*(An application for leave to serve the Notice of Appeal and
Record of Appeal out of time against the Judgment and
Decree of the Environment and Land Court at Nyamira (M.
Kamau, J.) dated 24th October 2023*

in

Case No. E004 of 2023)

***** RULING**

1. The Notice of Motion application supported by the affidavit of Jeremiah Onsare Soire is brought pursuant to rule 4 of the Court of Appeal Rules, seeking that leave be granted to the applicants herein, to serve the Notice and Record of Appeal out of time in respect of a decree/judgement arising from Nyamira

ELC No. E004 of 2023; and costs of the application be provided for.

2. The respondent herein had filed an appeal against the decision of the Magistrate's Court rendered on the 7th day of March 2023 vide Nyamira ELC Appeal No. E004 of 2023, where judgment was rendered on the 23rd day of October 2023 in favour of the respondent. The applicants herein felt aggrieved and proceeded to lodge a Notice of Appeal dated 3rd November 2023. However, despite lodging the Notice of Appeal within the prescribed statutory timelines, the applicants only effected service of the same upon the respondent's advocates on the 19th day of February 2024 when the record of appeal was served.
3. The Notice of Appeal ought to have been served within 7 days with effect from the date of lodging it, that is, on or before the 10th day of November 2023 in line with the provisions of rule 79(1) of the Court of Appeal Rules, 2022. For clarity, the respondent lodged an application seeking orders of striking out the entire record of appeal which application was disposed of by the withdrawal of the appeal by the applicants herein on

the 19th November 2024. The applicants have now lodged the instant application.

4. It is the applicant's contention that the Notice of Appeal was filed within time on 3rd November 2025, considering that the contested judgement was delivered on 24th October 2023 (the date is actually 23rd), however, the only lapse is that the counsel for the applicants did not serve the said Notice of Appeal in time; but proceeded to file the record of intended appeal which was registered as Civil Appeal No. E029 of 2024 at Kisumu and that the said appeal was struck out on 19th November 2024 due to lack of service of the notice of appeal.
5. The applicants explain that this application seeking to serve both the Notice of appeal and also record of appeal out of time, was made as soon as their counsel realized the defects and/or lapses, he took the necessary steps to withdraw the appeal and file this application without any delay and/or that it is one meant to pave way for the applicants herein to serve Notice of appeal and file their appeal and the dispute between them be resolved by this Court.
6. In opposing the application, the respondent by a replying

affidavit gives a background leading to the filing of the appeal,

pointing out that the applicants filed a Notice of Appeal and Letter Bespeaking Proceedings both dated 3rd November 2023; that upon procuring the Proceedings and Judgment, the Memorandum of Appeal and Record of Appeal at the Court Registry on the 7th day of February 2024. The respondent laments that despite lodging the Notice of Appeal within the prescribed statutory timelines, the applicants only effected service on the 19th day of February 2024 when the Record of Appeal was served; that the Notice of Appeal ought to have been served within 7 days with effect from the date of filing, that is, on or before the 10th day of November 2023 in line with the provisions of rule 79 (1) of the Court of Appeal Rules, 2022.

7. It is the applicant's contention that, as at March 2024 the applicants had been put on Notice vide the respondent's notice of motion application dated 15th March 2024 seeking inter-alia orders to strike out the record of appeal on account of failure to serve the notice of appeal and record of appeal within the statutory timelines, and that the applicants are indolent, guilty of laches, thus underserving of the equitable discretion of the Court.

8. The respondent also argues that, notwithstanding the withdrawal of the appeal, the applicants did not immediately approach the Court to seek orders of extension of time, but lodged the instant application dated 28th January 2025 in Court on the 31st day of January 2025, hence a demonstration of lack of due diligence in the process of lodging the instant application. In this regard reference is made to the holding in **Bi-Mach Engineers Limited vs. James Kahoro Mwangi [2011] eKLR** on exercising of court discretion, the Appellate 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. It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The Client has a remedy against such an Advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion...”

9. In urging this Court not to buy into the excuse regarding the mistake by counsel, reference is also made to the

case of

Kenya Commercial Bank Limited vs. Kenya Planters

Co- operative Union [2010] eKLR, where the Court held

that:

'...Similarly, it is utopian in my view for Counsel to broadly cite the 02 provision as if they also cover situations aimed at subverting the expeditious disposal of cases or appeals. In my opinion, the provision is not at a flash meant to cover mistakes or lapses of counsel or negligent acts, dilatory tactics or acts constituting abuse of the Court process; on the contrary in all these situations and many more (the list is not exhaustive) the Court shall continue to strike out applications under the 02 principle if t Advocates and their clients have a duty to assist the court in managing the cases. Thus, the furthering of the 02 principle by the courts is not likely to be helped or assisted where advocates or the parties in the applications fail to lay the basis for the application of the 02 principle or fail to comply with the rules practice directions or court orders. In the case of applications seeking the invocation of 02 principle a firm basis whether factual or legal must be laid and expressed in the application. In short, a party must explain why he thinks he is embraced by the 02 principle or why he thinks the court should apply it...

10. The respondent maintains the position that the applicants have not demonstrated that their application ought to be considered under the oxygen rule; that the advocate cannot use 'oversight' and/or mistake as an excuse for not complying with the rules of the court; and that this is just a

ploy for sympathy of the Court. It is reiterated that counsel had a duty to give a plausible reason as to why the Notice of Appeal

despite being lodged on time was served approximately two (2) months and a half while factoring the excluded days.

11. This Court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time for any step intended to be done within the period stipulated by the Rules in **Paul Wanjohi Mathane vs. Duncan Gichare Mathenge**

[2013] eKLR this Court held thus:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

12. In the present application, the applicants have given the reason for the delay in serving the Notice appeal in time. For clarity, the applicants have demonstrated, and the respondent acknowledges that same was lodged on time on the 3rd November 2023. That Notice ought to have been served on the respondent on or before the 10th November 2023. However, the respondent herein was served on the 19th February 2024 with the record of appeal vide Kisumu

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No. E029 of 2024, and upon perusing the record of appeal same came across the notice of appeal.

13. The respondent's argument is that despite the glaring error, the applicants never lodged an application then, to remedy the situation, instead, waited until the appeal was withdrawn on the 19th day of November 2024, and went to slumber again until 31st day of January 2025 when they filed the instant application. The respondent herein relies on the case of **Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others [2015] eKLR**, that it is incumbent upon the applicants to explain the reasons for delay and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

14. In **Leo Sila Mutiso vs. Hellen Wangari Mwangi [1999] 2 EA 231** which stated thus:

"...that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent."

15. Certainly, there is a procedural lapse in the manner this

court's discretion is sought, but that ought not to defeat the

substance of the applicants' desire. Should the applicants' who had clearly made their intention known, and who through their counsel had taken every step towards realizing their appeal, be blamed for the lapse by their counsel? In **Belinda Murai & 6 Others vs. Amos Wainaina [1978] KLR** Madan JA as he then was stated as follows:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate"

16. To err is human, and I don't think that a procedural lapse especially when every other step has been taken, should be used as a lance spear to send a party to the guillotine. Even though the advocate is an agent of his client, the same does not imply that the mistake of his advocate is binding to his client hence the need to have each case considered on its own facts. I am inclined to quote the sentiments in **Josphat Mabila Akoyo vs. George Mabele Sifuna &**

John

Odhiambo [2022] KEELC 1034 (KLR) where it was stated that:

“Each case has to be considered on its own facts. However, one thing that should not be lost sight of is that there has to be a clear distinction between a lawyer's mistake and a client's. Where there is an allegation of such on either or other, it must be brought out with precision that this or that was the Advocate's mistake or error, and he/she has actually owned to it or there is unmistakable demonstration of the same and that the client's hand was or was not in it.”

17. Indeed, in the case of **Phillip Chemwolo & another vs.**

Augustine Kubede [1982-88] KLR 103 at 1040 Apaloo

JA held 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”.

I need not say more, the applicant's advocate has owned up to his mistake herein and took steps to remedy, in my view two months after realizing the blunder cannot be considered as inordinate under the circumstances. The period of delay is not inordinate, the reason given is plausible; and no prejudice is occasioned to the respondent as he will have his day in court on appeal,

bearing in mind that he does not allude to any execution process having begun.

18. The application is merited and is allowed. The applicant is granted extension of time to lodge and serve the notice of appeal. The same shall be filed and served within fourteen (14) days of today's date. There shall be no orders as to costs.

Dated and delivered at Kisumu this 30th day of January, 2026.

H. A. OMONDI

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR