

**IN THE COURT OF
APPEAL AT KISUMU**

**(CORAM: OMONDI, JA (IN
CHAMBERS)) CIVIL APPLICATION**

NO. E121 OF 2025 BETWEEN

**VIOLET SHIVOGO ANDESO 1ST
APPLICANT DORKA AJWANG LIME
2ND APPLICANT**

*(Suing as legal representatives in the estate of **SAMSON NDUNDE
LIME - DECEASED***

AND

**MOHAMMED IDRIS 1ST
RESPONDENT
INIRIETA NALISI..... 2ND
RESPONDENT**

*(Being an application for extension of time within which to file
and serve Notice of Appeal against the ruling of the High Court
of Kenya at Kakamega (S. Chirchir, J.) dated 22nd May 2025*

in

HCCA No. 20 of 2022)

RULING

1. The respondents had filed an application in the High Court seeking review judgment on issue of special damages and in a decision granting their prayers, the learned Judge (Chirchir, J.) where "the trial court's award of special damages at the sum of Kshs.2,064,847/- was reduced by deducting thereof the sum of Kshs.1,724,347/- leaving a

net award of Kshs.340,500/- At the same time, the learned judge declined

the applicants' application dated 4th September 2023 which had also sought a review of the same judgment of on the issue of regarding tabulating the receipts produced as exhibits and so as to correct the sum awarded in the judgment.

2. The applicants being aggrieved with the findings in both applications wished to file an appeal, but the time within which to do so had lapsed. This is what has led to filing the Notice of Motion dated 8th August 2025 which seeks that the applicants be granted leave to file a Notice of Appeal out of time pursuant to a Ruling of the delivered on 22nd May 2025, Kakamega High Court Civil Appeal No. 20 of 2022 (Chirchir,J); that time be extended for filing the Memorandum of Appeal and record of appeal out of time by a further 21 days from the date of such order.
3. The applicant explains that after delivery of the ruling on 22nd May 2025 in the presence of both parties' counsel, the applicants' counsel was unable to contact them in time to obtain instructions on whether or not to file an appeal until the 14 days period had lapsed. By the time the instructions were given, and the Notice of Appeal finally filed on the 10th June 2025, 5 days had lapsed beyond the statutory 14

days period.

4. In opposing the application, the respondents through the replying affidavit dated 1st August 2025, sworn by Mohammed Idriss, the 1st respondent, describes the application as being devoid of merit, incompetent, irregular and an abuse of the due process of court; that the ruling by Chirchir, J, sought to be challenged was delivered as earlier scheduled on 22nd May, 2025 in the presence of the advocate for the applicants. The Court is urged to consider that the applicants, who are represented by counsel, were aware of the ruling on 22nd May, 2025 and ought to have filed a Notice of Appeal within 14 days; and there is no proper, plausible or excusable explanation for their failure to do.
5. The applicant's counsel attributes the delay in filing Notice of Appeal to lack of instructions from the applicants in time to lodge the appeal due to inability to communicate to the applicants via the only available phone number which was not going through. It is contended that the explanation given on behalf of the applicants is plausible contrary to the averments by the respondents; that the events that took place signal the fact that they were beyond the control of the applicants and should not be visited upon them. The

Court is urged to find

that the delay is therefore excusable and can be cured as per the reasons given above.

6. The applicants further submit that they have an arguable appeal with high chances of success and the same ought to be heard on merit as demonstrated in the draft Memorandum of Appeal; and the respondents do not stand to suffer any prejudice if the orders sought herein are granted.
7. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. Under Rule 77 of the Court of Appeal Rules, an intended appellant is required to lodge the Notice of Appeal, before or within fourteen (14) days of the decision, then within 7 days of lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal- this did not happen. The discretion that I am called to exercise in the determination of this application is unfettered and is provided under Rule 4 of the Court of Appeal Rules which provides as follows:

The court may, on such terms as it thinks 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.

8. The above cited rule does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The oft cited case of **Leo Sila Mutiso vs. Hellen Wangari Mwangi [1999] 2 EA 231** laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 if the application is granted.”

9. Some of the considerations that a court will take into account include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of

appeal, the need to protect a party's

opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

10. How long was the delay in this instance? 5 (Five days).

What was the reason? From the explanation by the applicant’s counsel, there was a challenge in reaching the applicant; and by the time they connected, time had lapsed. Certainly, there is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. For instance, in **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR**, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

11. Undoubtedly the notice of appeal ought to have been lodged within 14 days of the delivery of the decision which it seeks to appeal against and served within 7(seven) days after lodging,

that did not happen, not because counsel was unaware of the outcome, nay he was present, but unable to communicate with the applicant; and get instructions on whether to contest the decision or let it be. In my considered view, that is not tantamount to delaying tactics with an intention to scuttle fruits of the outcome.

12. 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.

13. 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 27th day of March, 2026.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is

*a true copy of the
original.*

Signed

DEPUTY REGISTRAR