



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Rahuodho v Akoo (Civil Application E181 of 2024)
[2025] KECA 328 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 328 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E181 OF 2024
LA ACHODE, JA
FEBRUARY 21, 2025**

BETWEEN

FRANCIS OKELLO RAHUODHO APPELLANT

AND

Jael Apondi Akoo RESPONDENT

(Being an appeal from the judgment of the High Court, Family Civil Appeal at Siaya (Ogembo J) dated 23rd May, 2024 in Civil Appeal No. E006 of 2022)

RULING

1. By this Notice of Motion dated 19th November 2024 and brought under rule 4 and 41(1) of the Court of Appeal Rules 2022 the applicant seeks leave to file a Memorandum and Record of Appeal out of time, in respect of the judgment dated 23rd May, 2024, delivered in Siaya Family Civil Appeal No. E006 of 2022 and that the cost of the application be provided for.
2. The grounds are stated on the face thereof: that the delay is not inordinate and was caused by a mistake of the counsel; that judgment was delivered on 23rd May 2024 and Notice of Appeal filed on 17th June, 2024; that the delay is not malicious, deliberate or reckless and that the intended appeal has very high chance of success, as per the record of appeal.
3. The applicant swore an affidavit dated 19th November 2024 in support of the application and averred that he differed with his advocate Mr. Agina of M/s Agina & Agina Advocates and decided to act in person, only to learn that all this time, his counsel had been sick and under treatment and that is why the instructions he was giving to his office were not carried out timeously. The applicant then retained M/s Ben Aduol Nyanga and Co. Advocates, who came on record and filed the Notice of Appeal and wrote follow up letters to the Deputy Registrar, Siaya High court, requesting for copies of judgment and proceedings.



4. The applicant filed submissions through M/s Ben Aduol Nyanga and Co. Advocates, and urged that this court has the discretion under rule 4 of the Court of Appeal Rules 2022 to grant the prayers for extension of time. They relied on the case of Leo Sila Mutiso vs Rose Hellen Wangare Mwangi Civil App. No. Nai. 255 of 1997 (ur) as cited in the case of *Lufthansa Services and Europa Africa GMBH and Another vs LSG Sky Chefs (K) Ltd, Civil Application No. 274 of 2016*.
5. Secondly, that the delay from 23rd May 2024 when judgment was delivered, to 17th June, 2024 when the Notice of Appeal was filed, is not inordinate, and is excusable on account of his counsel being ill and under treatment. He states that the intended appeal has high chances of success for reasons that the respondent is not related to the family and has no locus standi to contest the estate of William Opondo.
6. Counsel submitted further that it has been demonstrated that there exists at least an issue upon which this Court ought to pronounce itself, as envisaged in Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union, Civil Application Nai. No. 72 of 2001. Further, that one arguable point will suffice as stated in Kenya Railways Corporation vs Edermann Properties Limited, Civil Appeal No. NAI 176 of 2012 and Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 others, Civil Appeal No. NAI 256 of 2013.
7. The respondent did not file a replying affidavit. However, M/s Ochanyo B. Onyango Advocates filed submissions dated 4th February 2025 on her behalf urging that the application is misconceived, vexatious, an afterthought and an abuse of the court process. That the application is brought contrary to Order 43 of the Civil Procedure rules, as the applicant was obligated to seek and obtain leave to appeal against the order from the court that made that order.
8. Counsel submits that the applicant has no good and sufficient cause/ground for not filing the appeal within the time provided under Section 79(g) of the *Civil Procedure Act*. That he is solely laying blame on his advocate yet the case belongs to the litigant and not the advocate. Counsel cited the case of Rajesh Rughani vs Fifty Investment Ltd. & Another [2015] eKLR to urge that it is not enough to simply blame the advocate on record for failure to inform, as if there is no duty on the client to pursue her matter.
9. Counsel also relied on the decision in Bains Construction Co. Ltd vs John Mzare Ogowo [2011] eKLR, to assert that it is to some extent true to say, mistakes of counsel should not be visited upon a party, but it is equally true when counsel as agent is vested with authority to perform some duties and does not perform it, the principal must bear the consequences.
10. Counsel contended that the delay of six (6) months and thirteen (13) days from the date of judgment to the date of the instant application is inordinate and this application amounts to a fishing expedition. That the Court should not be summoned to come to the aid of the indolent upon whom equity frowns. On this they relied on the cases of Hadkinson vs Hadkinson [1952] 2All ER. 567, Jackline Wanjira Njeru vs Equity Bank (Kenya) Ltd & Another [2020] eKLR and Ratnam vs Cumarasamy [1964] 3 all e r 933.
11. The Court of Appeal jurisdiction under rule 4 of the Court of Appeal Rules, 2022 is premised on principles upon which the Court exercises the discretion in an application of this nature. The principles were stated in Leo Sila mutiso (Supra) 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”.

12. In the case before me the actual length of the delay is from 23rd May 2024 when judgment was delivered, to 17th June, 2024 when the Notice of Appeal was filed. The actual delay is therefore, about 10 days and it is this application which came six months later. The delay is therefore, found not to be inordinate. The delay is attributed to illness on the part of the applicant’s counsel and has therefore been sufficiently explained.

13. On the Possibility of the intended appeal to succeed the Court expressed itself in *Machira t/a Machira & Company Advocates V Mwangi & Anor* (2002) thus:

“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious consideration”.

14. The applicant herein stated that the intended appeal has high chances of success for reasons that the respondent is not related to the family and has no locus standi to contest the estate of William Ogolla Opondo. That the deceased had no wife and did not know the respondent, whose national identity card indicates that she hails from Yala sub division North Gem location and not from Simenya where the deceased hailed from. It is my view that this is not an idle point and should be given a chance for ventilation on appeal.

15. On the question of prejudice to be suffered I weighed the right of the applicant to pursue the intended appeal, which is pegged on the need to do justice to the parties and boost the confidence of the public in the justice system, against that of the respondent to have finality and conclusiveness to litigation, so that she can enjoy the fruits of a judgment that was rendered in her favour. It is my considered view that the respondent will not suffer prejudice since it is in the interest of justice that justice be done to the parties and that there be finality and conclusiveness to the dispute.

16. Consequently, the application dated 22nd November, 2024 succeeds and I order as follows:

- i. The Notice of Motion dated 19th November, 2024 is hereby allowed.
- ii. The Notice of Appeal dated 17th June, 2024 annexed to the application be and is hereby deemed as duly filed and served.
- iii. The applicant will bear the cost of this application.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

L. ACHODE

.....



JUDGE OF APPEAL

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

DEPUTY REGISTRAR

