



Lang’at & another v Jepchumba, Priscilla, Birir Sammy and Rotich (All suing as legal representatives of the Estate of Peter Kipkorir Rotich - Deceased) & 4 others (Civil Appeal (Application) E105 of 2024) [2025] KECA 548 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KECA 548 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E105 OF 2024
GV ODUNGA, JA
MARCH 27, 2025

BETWEEN

RICHARD KIPNG’ENO LANG’AT 1ST APPLICANT

PETER KIGEN KIPRONO 2ND APPLICANT

AND

LEAH JEPCHUMBA RUT’TO PRISCILLA JERUTO BIRIR SAMMY KIPKOECH ROTICH (ALL SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF PETER KIPKORIR ROTICH - DECEASED) 1ST RESPONDENT

THE LAND REGISTRAR, NAKURU 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

DAVID KIBIWOT ACHIKWA 5TH RESPONDENT

(Being an application for extension of time within which to file the Memorandum and Record of Appeal from a judgment/decree of the Environment and Land Court, Nakuru (A. Ombwayo, J.) dated 22nd February, 2024 in ELC Case No 51 of 2020)

RULING

1. Before me is the applicants Notice of Motion dated 18th November 2024 seeking an order for extension of the time of filing the Memorandum of Appeal and Record of Appeal herein.
2. According to the applicants, by a judgement delivered on 22nd February, 2024, the learned trial Judge found in favour of the 1st respondent and dismissed the applicants counterclaim with costs, while finding that the deceased was the legitimate owner of parcel of land known as LR No. 13287/78



- delineated on land survey plan number 143837 I.R. No. 60749 measuring 4.048 hectares in Njoro Town. Aggrieved, the Applicants lodged a Notice of Appeal dated 3rd March, 2024 on 6th March, 2024.
3. The application is premised on grounds that: the applicants have an arguable appeal against the Decree and Judgment with high chances of succeeding on appeal; the applicants requested for typed certified copies of the Judgment, Decree and Proceedings in the matter on 5th March, 2024; the applicants had hoped to get the proceedings in reasonable time to enable them file a Memorandum and Record of Appeal but were informed that the proceedings were not ready; the Proceedings and Decree were ready on 5th September, 2024 some 6 months later outside of the 60 days window period of filing the Memorandum and Record of Appeal as stipulated by the Rules of this Court; even after the proceedings were availed, Counsel on record in this matter was away in India for four months for the treatment of his son and only came back on 22nd October, 2024 but did not immediately return to work as he was still attending to his son at a local children's hospital; the delay of 8 months in and failure to lodge the Memorandum and Record of Appeal within the time stipulated by the Rules of this Court was partly from delay from the trial Court and as a result of inadvertence and a bona fide mistake on the part of the Counsel for the applicants; the delay is not inordinate and the cause thereof has been explained candidly by Counsel; the interests of justice would be better served by allowing the orders herein and giving the Applicants an opportunity have the Memorandum of Appeal and Record of Appeal filed; the respondents will suffer no prejudice if this application is granted; this application has been brought with dispatch upon picking the certified copies of the relevant documents necessary for appeal. The said grounds were rehashed in the supporting affidavit.
 4. In support of the application submissions were filed in which the cases of Nicholas Kiptoo Arap Salat v The IEBC & Others Supreme Court Application No. 16 of 2014, Imperial Bank Limited (In receivership and Another v Alnasir Popat and 18 Others [2018] eKLR, [*Atbuman Nusura Juma v Afwa Mohammed Ramadhan CA No. 227 of 2015*](#)(Unreported) as cited in Ngei v Kibe & Another (Civil Appeal Application) E359 of 2021 [2021] KECA 243(KLR) were cited in support of the application. The applicants also attached a draft Memorandum of Appeal in which 10 grounds of appeal have been identified which the applicants believe are not frivolous but are arguable.
 5. In opposition, the 1st Respondent/Petitioner advocate Peter Muthomi Mutege lodged a replying affidavit sworn on 29th January 2025 wherein he avers that; a Notice of appeal was filed by the applicants herein on 6th March 2024 and served on his firm; whereas the application states that it is supported by an affidavit sworn by the affidavit of Richard Kipng'eno Lagat, the supporting affidavit is sworn by Ogada Meso, thus the application and the supporting affidavit incurably defective; according to rule 84 (1) of this Court's Rules, 2022, the appeal ought to have been instituted on 6th May 2024; the applicant has annexed a copy of the letter bespeaking the proceedings dated 5th March 2024 but has not demonstrated that he served the letter on the deponent's firm and the rest of the respondents; the applicant has not demonstrated that he indeed obtained a certificate of delay from the superior court or that he has made an application to the superior court to be provided with such a certificate of delay; without a certificate of delay, this Court has no jurisdiction to extend the time of filing the memorandum and record of appeal as the procedure for the same is clearly laid down under rule 84; the reasons advanced by the applicant's advocates that he was unable to file the memorandum and record of appeal within time are irrelevant in this matter given that this Court is not seized with jurisdiction under rule 84 of this Court's rules; the firm of Prof. Tom Ojienda & Associates has many advocates who could have handled the matter; Mr. Ogada has not annexed air tickets showing when he left Kenya for India to enable this Court to exercise its discretion properly; and the applicant's application be dismissed with costs. The same grounds were replicated in the submissions in which reliance was placed on Corrugated Sheets Limited v Kimwwoya & another (Civil Application E045 of 2023) [2024] KECA 175 (KLR), Mistry



Premji Ganji (Investments) Limited v Kenya National Highways Authority [2019] eKLR, Onchiri v Kenya Airports Authority & 4 Others (Application 34 of 2018) [2019] KESC 3 (KLR)

6. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon. The respondents have taken issue with the fact that there is no evidence that the proceedings were sought and no certificate of delay has been exhibited. In my view, the objective for seeking proceedings and copying the letter to the other parties is to enable the intending appellant take advantage of the freeze in time during the period of the typing and preparation of the proceedings. Where no such letter was sent, the time is not frozen and a certificate of delay becomes of no use. In those circumstances, the only avenue available to the intended applicant is to seek for extension of time. In fact, it is the failure to apply for proceedings and obtain the certificate of delay that compels the intended appellant to seek extension of time since if the proceedings are complied with in time and the letter bespeaking the same is copied timeously to the other parties and the certificate of delay is obtained, there would be no need to seek for extension of time. In *Wanjiru Muhia v Nganga Mutura* [1999] 1 EA 209 [1999] 1 EA 20, it was held that issue of whether or not the letter bespeaking the proceedings was copied to the respondent does not fall to be decided in an application for extension of time.
7. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are well settled. This Court has unfettered discretion to extend the time prescribed for taking any action permitted under the Rules. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain considerations that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly (possibly), whether the proceedings for which time is sought to be extended is frivolous; and fourthly, whether the respondent in those proceedings will be unduly prejudiced if the application were to be granted. See *Leo Sila Mutiso v Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997* [1999] 2 EA 231.
8. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations. The Court would of course also consider the overriding objective spelt out in Sections 3A and 3B of the *Appellate Jurisdiction Act*.
9. Those principles were restated by Waki, JA in *Fakir Mohamed v Joseph Mugambi & 2 Others* [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso v Mwangi Civil Appl. NAI. 255 of 1997 (UR)*, *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR)* and *Murai v Wainaina (No 4)* [1982] KLR 38.”
10. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No. 16 of 2014 [2014] eKLR, while expressing itself on the matter, opined that extension of time is not a right of a party but an equitable remedy available to a deserving



party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

11. Regarding the length of the delay, it is clear that 8 months delay is a long period of time. However, in the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR it was appreciated that:

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

12. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. All the surrounding circumstances, including the reason for the delay must be considered by the Court. It was therefore held in *Boniface Njuguna Gakuru v Paul Njoroge Gakuru Civil Application No. Nai. 301 of 2009*, that:

“The Court have, apart from considering the factors which guide the court in the exercise of the court’s discretion under rule 4 of the Court of Appeal Rules, also considered the factors that assist in giving effect to the overriding objective as set out in the *Appellate Jurisdiction Act*. This is because the 02 principle is the whole objective of the *Appellate Jurisdiction Act* and therefore the 02 principle is both substantive and procedural. The factual basis is that the total delay occasioned was 37 days which period elapsed as the applicant made arrangements to change representation and the I have also taken into account that the matter involves ownership of land. In addition, I have also taken into account the apparent arguability of what prima facie appears to be a substantive jurisdictional issue touching on the initial tribunal and the decision subsequent making bodies and thus my inclination is to grant a reasonable extension of time. Since the purpose of the overriding objective is to enable the Court to do justice in the special circumstances of each appeal, I consider that in the special circumstances before me (to the effect that the applicant’s erstwhile advocate had advised her that there was nothing more that could be done), preventing the applicant from having an appeal which touches on jurisdiction heard on merit because of a delay of 37 days and which has been satisfactorily explained would be unjust.”

13. The reason for the delay in this case is that the trial court delayed in supplying the applicant’s advocates with copies of the proceedings and that the advocate handling the matter had a sick child who had to be taken to India for treatment. Upon his return, he had to attend to him as he still required medical attention locally. It is true that the matter could have been taken over by another advocate in the firm. However, such mistakes have been known to occur but as this Court held, while citing *Murai*



v Wainaina (No. 4) [1982] KLR 38, in Shital Bimal Shah & 2 Others v Akiba Bank Limited [2006] 2 EA 323:

“Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the 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 a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

14. Ringera, AJA, as he then was in *Githiaka v Nduriri* [2004] 2 KLR 67 held that:

“Under rule 4 of the Court of Appeal Rules the court is perfectly invested with a clear and unfettered discretion to extend the time limited by the Rules or its decisions and such a discretion like all judicial discretions, is to be exercised judicially, that is to say on sound reason other than whim, caprice, or sympathy. In exercising the discretion the Court’s primary concern should be to do justice to the parties and in considering which way the scales of justice tilt, the Court should among other things consider the length of the delay in lodging the notice and record of appeal and, where applicable, the delay in lodging the application for extension of time, as well as the explanation therefore; whether or not the intended appeal is arguable; and the public importance, if any, of the matter, and generally the requirements of the interest of justice in the case... Oversight has been defined to mean the omission or failure to see or notice. It is inadvertence. Whilst ignorance may not be equated to a mistake, it may and normally does arise through negligence.”

15. Appreciating that oversight on the part of counsel may warrant extension of time, Shah, JA when faced with a similar situation in *Michael Njoroge B. & Others v Vincent Kimani Chege Civil Application No. Nai. 217 of 1997* held that advocates may have many things to deal with leading as a result of which an oversight may lead to delay in rectifying mistakes and that such mistakes should not be visited on the client and that the Court of Appeal being the last court ought to give a litigant a chance to be heard on merits. The learned single Judge appreciated that whereas it is appreciated professional standards must be maintained, if an error is remediable, the client ought to be heard.

16. In *Mwangi v Mwangi* [1999] 2 EA 234, it was held, while citing *Njoroge “B” And Others v Chege* [1997] LLR 614 B (CAK); *Macfoy v United Africa Company Ltd* [1962] AC 152; *Pantin v Wood* [1962] 1 QB 594 that:

“Rules of procedure are said to be good servants but bad masters. This is not to say that they can be flouted with impunity. All rules have their specific purpose(s) but a rule of procedure should not drive a litigant out of judgement seat if other rule(s) allow such a litigant to come back to Court. The tendency of the court of last resort ought to give a chance to the litigant to be heard on merits as far as possible. Our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance...Simple inaction by a lawyer coupled with client’s careless attitude may be enough to say: “I am not going to exercise my discretion” but when the litigant himself shows that he is doing his best the Court ought to exercise its discretion which is wide enough, subject only to the requirement of justice to both sides. Procedural requirements are designed to further the



interests of justice and any consequences which would achieve a result contrary to those interests should be treated with considerable reservation.”

17. I am therefore satisfied that the reason given for the delay is in the circumstances of this case justifiable. Regarding the prospects of success of the reference, the consideration of this issue, however, does not apply in all cases. Dealing with that consideration, this Court in *Mwangi v Kenya Airways Ltd* [2003] KLR 486, where the court stated:

“It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a “possible” consideration, not that it must be considered. This is understandable because the “the chances of an appeal succeeding” is normally dealt with by this Court under the rubric of “an arguable appeal” or “an appeal which is not frivolous” and the full court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of *Bhaichan Ghagwanji Shah v D Jamnadas & Co. Ltd* [1959] EA 838 where Sir Owen Corrie, Ag. JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:

‘..... It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant’s affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application.’

18. The court then observed that the *Shah* case (ante) was decided under rule 9 of the former rules which required that “sufficient cause” be shown before extension of time could be obtained. It then concluded: -

“It must not be forgotten that even the recent case of *Mutiso* did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration.”

19. In *Ramesh Shah v Kenbox Industries Limited* [2007] eKLR, this Court debunked the myth surrounding the arguability of the intended appeal in applications of this nature by observing that:

“The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay.”

20. While in certain borderline cases the Court may consider the chances of success of the intended action, in my view, that condition plays a very peripheral role where the other conditions have been fulfilled particularly where the applicant has a right to take up the proceedings in question. In this case however, I have considered the intended grounds of appeal and I do not find them frivolous. While they may not necessarily succeed, that however is not a determination that is within the province of a single Judge.



An arguable process, it has been held, is one which ought to be argued fully before the court; one which is not frivolous. See Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008.

21. As regards the issue of prejudice, I cannot see any. Lakha, JA in Touring Cars (K) Ltd & Anor v Ashok Kumar N. Mankanji Civil Application No. 78 of 1998, was of the view that rule 4 of the Court of Appeal Rules confers the widest measure of discretion in an application for extension of time and draws no distinction whatsoever between the various classes of cases and that the rule clearly requires the Court to look at the circumstances and recognises the overriding principle that justice must be done. He further held that prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one.
22. Waki, JA, while citing Grindlays Bank International (K) & Another v George Barbour Civil Application No. Nai. 257 of 1995 and Gichuhi Kimira v Samuel Ngunu Kimotho & Another Civil Application No. Nai. 243 of 1995 in Janet Ngendo Kamau v Mary Wangari Mwangi Civil Application No. Nai. 338 of 2002 held that:

“Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court’s discretion, the Court should in so far as it may be reasonable prefer, in the wider interest of justice, to have a case decided on its merits... The consideration that one case should not hang over the heads of parties indefinitely must be weighed against the wider interests of justice, namely that where possible cases must be brought to a close after a hearing on the merits.” [Emphasis mine].
23. It is now appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. In Chemwolo and Another v Kubende [1986] KLR 492; [1986- 1989] EA 74, it was held that:

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”
24. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the respondent contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs.
25. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See Waljee’s (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.
26. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicant. I accordingly allow the Notice of Motion dated 18th November 2024. I extend the time limited for filing and service of the Memorandum and Record of Appeal with a further period of 14 days from the date of this ruling.
27. The costs of this application are awarded to the respondents.
28. It is so ordered.



DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF MARCH 2025.

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

