



**Otieno v County Government of Kisumu & 2 others (Civil Appeal
(Application) E191 of 2024) [2025] KECA 474 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 474 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E191 OF 2024**

WK KORIR, JA

MARCH 7, 2025

BETWEEN

PAUL VICTONE OTIENO APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

GEORGE ASUKE 2ND RESPONDENT

NATIONAL LANDS COMMISSION 3RD RESPONDENT

*(Being an application for leave to file an appeal out of time against
the Judgment of the Environment and Land Court at Kisumu (A.
Ombwayo, J.) dated 11th March 2022 in ELC Appeal No. 19 of 2020)*

RULING

1. Paul Victone Ochieng, the applicant herein, moved the Court through a notice of motion dated 4th October 2024, seeking leave to file and serve a notice of appeal and record of appeal out of time. The application is premised on the grounds on its face and averments in an affidavit sworn by the applicant in support of the motion.
2. The applicant avers that a notice of appeal dated 6th November 2023 was duly lodged and served on the respondent by his counsel. Due to an administrative lapse in the counsel's office, the appeal was not filed in time, resulting in the automatic withdrawal of the notice of appeal. It is his position, therefore, that the delay is due to the mistake of counsel and should not be visited upon him as a litigant. He avers that his appeal raises triable issues and that the respondents have not moved the Court to strike out the notice of appeal and that they stand to suffer no prejudice if the prayer for enlargement of time is granted.



3. The 1st respondent, George Asuke, filed a replying affidavit sworn on 5th February 2025 in opposition to the application. He avers that the present application is a reaction to his application, Kisumu Civ. Appl. E112 of 2024 - *George Asuke vs. Paul Otieno Victone & Another*, seeking to strike out the appeal on the grounds that it was filed, without leave, after a delay of about 2 years. He deposed that the said application was served upon the applicant's counsel on 2nd September 2024 and was scheduled for hearing on 10th February 2025. Additionally, it is his deposition that the notice of appeal dated 4th October 2024 does not relate to the judgment dated 11th March 2022 but to a ruling dated 26th October 2023, which declined the applicant's application to set aside the judgment dated 11th March 2022. The 1st respondent holds the view that the intended appeal does not raise triable issues as it is an attempt to have a second bite at the cherry in litigating against the judgment which he had previously sought to set aside. He prays that the application be disallowed.
4. When this application came up for hearing, none of the parties had filed written submissions. The principles for exercising discretion under rule 4 of the *Court of Appeal Rules* are well established by this Court. I refer to the holding in *Paul Wanjohi Mathenge vs Duncan Gichane Mathenge* [2013] eKLR that:

The discretion under Rule 4 is unfettered, but it has to be exercised judicially, 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...”
5. In this application, it was incumbent upon the applicant to satisfactorily explain the delay in bringing the instant application. In addition to tendering a plausible explanation for the delay, an applicant should also declare the whole period of delay as held by the Supreme Court in *County Executive of Kisumu vs. County Government of Kisumu & 8 Others* [2017] eKLR.
6. Whereas in the citation of the motion it is indicated that the application is for enlargement of time in respect to an intended appeal against the judgment dated 11th March 2022, the notice of appeal filed is in respect to the ruling dated 26th October 2023. It is also observed that the Index of the Record of Appeal annexed to the applicant's supporting affidavit relates to an appeal from the judgment dated 11th March 2022. This state of affairs leaves the Court at a crossroads, unable to pinpoint or assess the specific or estimated period of delay.
7. The foregoing notwithstanding, the applicant avers that the delay in filing the notice of appeal was occasioned by administrative lapses at the chambers of his counsel. In *Rajesh Rughani vs. Fifty Investments Limited & Another* [2016] eKLR the Court clearly stated that mere allegation of counsel's indolence is not enough to warrant extension of time. Other than laying blame on former counsel, the applicant has not shown any positive steps that he took to correct the lapses so as to demonstrate diligence on his part. In other words, the applicant has not established that he was not complicit in the delay.
8. The applicant also averred that the respondents had not filed an application to strike out the notice of appeal. This turned out to be an incorrect averment by the applicant. As it turns out, the present application is nothing but a reaction to the 1st respondent's application in Kisumu Civil Application E112 of 2024 - *George Asuke vs. Paul Otieno Victone & Another*. A party who approaches the Court for the exercise of its discretionary jurisdiction should do so with candour.



9. Considering that the applicant has not offered any satisfactory explanation for the delay, there is no basis upon which the Court can exercise its discretionary jurisdiction for enlargement of time. The application therefore lacks merit. Consequently, the Notice of Motion dated 4th October 2024 is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH 2025.

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

