



REPUBLIC OF KENYA



**Ndorko v Olgos (Civil Application E294 of 2024)  
[2025] KECA 902 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 902 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E294 OF 2024  
LA ACHODE, JA  
MAY 23, 2025**

**BETWEEN**

**MATINTI NDORKO ..... APPLICANT**

**AND**

**OLOIPOI SOINE OLOIBOR OLGOS ..... RESPONDENT**

*(Being an application for extension of time to file record of appeal out of time against the judgment of the Environment and Land Court (Gicheru. J) delivered on 3rd November 2022 in ELC NO. 141 of 2018)*

**RULING**

1. Matinti Ndorko the applicant, filed a Notice of Motion dated 12<sup>th</sup> June 2024 under rule 4 of this [Court of Appeal Rules 2022](#) seeking to be granted leave to file his record of appeal against the judgment of Gicheru J, delivered on 3<sup>rd</sup> November 2022 out of time. Olopoi Soine Oloibor Olgos is the respondent.
2. The main ground of the application as set out on the face thereof and in the supporting affidavit sworn by the applicant on 12<sup>th</sup> June 2024 is that the applicant was unable to trace his advocate. He learnt later that the advocate was unwell and was taken to India for further treatment.
3. The applicant avers that it was not until sometime in March 2024 that his advocate contacted him to inform him that the judgment was delivered in November 2022, and that the respondent had served him with his Bill of Costs. He deposed that because of breakdown in communication between him and his advocate, he did not give instructions to file an appeal against the judgment.
4. The applicant averred further that despite a protracted and diligent search of the court file to be supplied with the certified records of proceedings, order and decree, he has been unsuccessful. The file has not been traced in the registry.



5. The respondent replied in a replying affidavit, dated 26<sup>th</sup> September 2024 and deposed that the applicant's averment that he could not trace his advocate due to poor health is patently false and made to mislead the Court. That the delay of more than two years to file the instant application for extension of time is not only inordinate but inexcusable.
6. The respondent deposed that the applicant was aware of the judgment and that the application for extension of time is made in bad faith as a reaction to the taxation of the respondent's Bill of Costs and the intended appeal has no serious chances of success as there is no draft Memorandum of Appeal attached to it.
7. The Deputy Registrar of this Court sent the parties herein a Hearing Notice vide an email on 14<sup>th</sup> January 2025. The email indicated that the application would be disposed of by way of written submissions on Tuesday, 21<sup>st</sup> January 2025 by a single Judge, and that parties were not required to be present.
8. The applicant did not comply with the directions on the filing of submissions.
9. The respondent filed his written submissions dated 26<sup>th</sup> September 2024 through the firm of M/s Naikuni, Ngaah & Miencha Co. Advocates and urged that the applicant has not tendered any satisfactory reasons for the delay in filing the appeal within the prescribed period. Also, that the applicant had not attached any evidence showing that his advocate was sick and he has no arguable appeal.
10. I have considered the grounds of the application, the affidavits and the respondent's submissions on records. Rule 4 of this *Court's Rules* gives the Court the unfettered discretion to extend time otherwise limited by these Rules or decision of this Court or Superior Court. The said Rule stipulates thus:

“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.”
11. The principles that guide this Court in the exercise of its mandate under the mentioned rule have been crystallized by case law. I am guided by this Court's decision of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Nairobi CA No 255 of 1997 where it was stated that:

“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. To begin with, there is no basis to find that the intended appeal herein has any serious chances of success, there being no draft Memorandum of Appeal annexed, to enable the Court to assess whether there be any arguable ground in the intended appeal.



13. Considering the length of the delay, the rules do not set out the number of days that may be considered as inordinate delay. Each case is to be determined on its own facts. The Court of Appeal stated this in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR, as follows:

“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.”

14. Extension of time is not a right of a party, it is an equitable remedy that is only available to a deserving party at the discretion of the Court. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis to establish whether the reason for the delay is reasonable. The delay should be explained to the satisfaction of the Court. - See Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Supreme Court of Kenya Application No 16 of 2014.

15. The impugned judgment was delivered on 3<sup>rd</sup> November 2022 while the notice of appeal was filed on 21<sup>st</sup> March 2024 and this application on 12<sup>th</sup> June 2024. There is a delay of 587 days from the date when the impugned judgment was delivered to the date when this application was made.

16. The delay has been attributed to the applicant having difficulty tracing his advocate, who was out of the country for treatment. However, neither the applicant’s advocates, nor the applicant himself has attached any document to prove indeed, his advocate was sick, or out of the country, thus out of touch.

17. The issue of placing blame on the applicant’s advocate was addressed by the Court of Appeal in the case of Rajesh Rughani v Fifty Investments Limited & another (2016) eKLR thus:

“In Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR, this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

18. The delay herein was inordinate by any standard and in my view it has not been explained sufficiently. It is also not lost on the Court that the applicant was not serious enough to file submissions. It may very well be that this application was made in bad faith as a reaction to the taxation of the respondent’s Bill of Costs as averred by the respondent. In the circumstances, I consider it futile to consider the question on whether there is prejudice to be suffered by parties, if the orders sought are granted.

19. Consequently, I find that the excuse given for the delay is unsatisfactory, the delay itself is inordinate and there is no evidence that the intended appeal is arguable. As such, the application dated 12<sup>th</sup> June 2024 is dismissed with costs to the respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

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



Signed

DEPUTY REGISTRAR

