



REPUBLIC OF KENYA



**Mukolwe & another v Malilo (Civil Application E103 of 2024)
[2025] KECA 889 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KECA 889 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E103 OF 2024
F TUIYOTT, JA
MAY 16, 2025**

BETWEEN

SARAH NYANGALA MUKOLWE 1ST APPLICANT

BENSON MILLER SAKWA WAKHULE 2ND APPLICANT

AND

WILKISTER SHIUNDU MALILO RESPONDENT

(Being an application for extension of time to file an Appeal out of time from the judgment of the High Court of Kenya at Kakamega (S. Chirchir, J.) dated 19th December, 2023 in Succession Cause No. 649 of 2009)

RULING

1. When the learned judge, S. Chirchir J. delivered judgment on 19th December, 2023 in Kakamega Succession Cause No. 649 of 2023 relating to the administration of the estate of Wellington Nyangule Mulama (deceased), the applicants herein, being aggrieved by the said decision, filed a notice of appeal dated 11th January, 2024 on 12th January, 2024.
2. In a joint affidavit sworn on 30th July, 2024, the applicants aver that their advocate on record applied for certified copies of proceedings on 16th January, 2024 and made several follow ups with the registry staff. The advocate was informed that the file was missing and it was not until 8th July, 2024 after the advocate escalated the delay to the Deputy Registrar twice, that the file was traced. They contend that while the proceedings have now been supplied and a certificate of delay issued, the statutory period for filing an appeal has lapsed. They argue that the delay was not deliberate and was beyond their control. It is pleaded that the application dated 30th July 2024, brought under rule 4 of the Rules of this Court, for leave to file an appeal out of time be allowed as they have an arguable appeal with high chances of success.



3. The respondent filed a response through an affidavit sworn on 14th October, 2024. With regard to the application, he contends that the applicants have not sufficiently established reasonable grounds and explanations for the delay, to be allowed to file their appeal out of time and the application should be dismissed with costs.
4. Both parties have filed their submissions which are a mirror of their dispositions above.
5. Rule 84 makes provision for institution of appeals and reads: -
 - “(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
6. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
7. The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”
8. The applicant’s advocates did not copy the letter dated 16th January, 2024 bespeaking the proceedings and judgment to respondent’s advocates and as there is no disposition by the applicants that the letter was served on the said advocates, then it must be safe to presume that it was not done. The effect is that the applicants cannot benefit from the proviso to sub-rule 1 of rule 84 which suspends the period required for preparation of copies of the judgment from the count of time for instituting an appeal. For that reason, the time within which the applicants were required to file the appeal begun to run on 12th January, 2024 when the notice of appeal was lodged and lapsed on or about 12th March, 2024. I must however bear in mind that while the applicants cannot benefit from the certificate of delay, the typed proceedings were not ready for collection until 8th July, 2024 and this application dated 30th July, 2024 was brought almost immediately thereafter.
9. The delay is not inordinate and is well explained. Exercising my discretion, I will excuse this delay to give the applicants a chance to pursue their right of appeal and in doing so I note that the respondent has not stated or demonstrated that he will suffer substantial prejudice if the application were to be granted. I trust that I have considered this matter within the parameters in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR).
10. The upshot is that Notice of Motion dated 30th July, 2024 is allowed. The record of appeal to be filed and served within twenty-one (21) days of this Ruling. Costs shall be in the appeal.

DATED AND DELIVERED IN KISUMU THIS 16TH DAY OF MAY, 2025.



F. TUIYOTT
JUDGE OF APPEAL

