



**In re Estate of Richard Ochana (Deceased) (Civil Appeal (Application)  
E226 of 2024) [2025] KECA 822 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 822 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E226 OF 2024  
LA ACHODE, JA  
MAY 9, 2025**

**BETWEEN**

**MOSES EMONGOLE ..... APPELLANT**

**AND**

**EVANS EMADAU ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL KAPULE ..... 2<sup>ND</sup> RESPONDENT**

**FELIX EDUKATA ..... 3<sup>RD</sup> RESPONDENT**

**HAGGAI ENARACH ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for extension of time to serve the Memorandum of Appeal, and  
Supplementary Record of Appeal out of time in an intended Appeal against the Judgement of the  
High Court at Busia (W. Musyoka J) dated 27th May, 2024 in HC Succ Cause No. E002 of 2023)*

**RULING**

1. The Applicant is self-represented and that may explain why the wrong provisions of the law are invoked and the prayers are omnibus. The Notice of Motion dated 5<sup>th</sup> December 2024 is expressed to be brought under Order 1 Rule 3 and Order 50 Rule 6 of the Civil Procedure Rules 2010, Section 1A and 3A of the *Civil Procedure Act*, Article 159 (2) (d) of *the Constitution* and all other enabling provisions. The application advances several prayers which can be summarized as leave to file an appeal against the judgment of Musyoka J dated 27<sup>th</sup> May, 2024 out of time. That the time within which the appeal should be filed be named, the proposed appeal once filed, be heard on priority basis and the cost of this appeal to abide the outcome of the appeal.
2. The grounds of the application are set out on its face. The supporting affidavit dated 8<sup>th</sup> November 2021, is sworn by the Applicant. In the Notice of motion, the Applicant states that the Judge acting of



- his own motion, and without considering the facts and the law generally, revoked the grant issued on 23<sup>rd</sup> January 2024 to the Applicant and ordered that new administrators be appointed within 14 days.
3. The intended appeal arises from a ruling dated 27<sup>th</sup> May, 2024 that was delivered by Musyoka J in the High Court at Busia, in HC Succ Cause No. EOO2 of 2023. The learned Judge made findings, inter alia, that the succession cause was filed secretly without the knowledge of the respondents and that the respondents were not served with the Citation No. E127 of 2021.
  4. This decision grieved the Applicant and he sought to exercise his right of appeal. In this regard, he filed a Notice of Appeal on 7<sup>th</sup> June 2024, within 14 days from the date of the judgement as prescribed by the rules of this Court. The Memorandum and Record of Appeal on the other hand were filed later on 16<sup>th</sup> September 2024.
  5. The Applicant is also seeking for a motley of orders that are misplaced in this application. Such orders are: to allow him to file additional documents that were not available despite due diligence and effort to obtain them; to grant him leave to serve the Respondents with the additional documents, including the proceedings, land control board register, forensic report and the Supplementary Record of Appeal; for one Simon Ochana to give an explanation in regard to Citation No. E127/2021 and the consent annexed to the Memorandum of Appearance dated 15<sup>th</sup> March, 2022 appointing the firm of Okeyo Ochiel Advocates; for the Land Controls Board and the Registrar of Lands to release minutes for the transaction of parcel No. North Teso/Kocholia/6159 and transfer documents for land parcels No. North Teso/Kocholia/991 and 976; an order for Busia CCIO to expeditiously release the forensic report requested by ODPP on 10<sup>th</sup> September, 2024.
  6. All the said orders sought above cannot issue in an application of this nature which is circumscribed under rule 4.
  7. The Applicant filed submissions dated 10<sup>th</sup> February, 2025 citing Order 50 Rule 6 of the Civil Procedure Rules which do not apply in an application for extension of time in the Court of Appeal. He however, also made reference to rule 4 of the Court of Appeal Rules in which the mandate of the Court to enlarge time reposes.
  8. The Applicant referred to the case of Mutiso vs Hellen Mwangi [1999] 2 EA 231 in which the Court set out the parameters to be considered in the exercise of the discretion under rule 4. To further bolster his case, he also relied on the case of Anti counterfeit authority vs Francis John Wanyage and four others [2019] and Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others [2018] eKLR, concerning the possibility of the intended appeal to succeed. The Applicant concluded that the application has satisfied the criteria laid out in the authorities cited.
  9. There is no replying affidavit or Respondents' submissions in the file. The Applicant submitted that the application herein was served upon the Respondents' counsel on 9<sup>th</sup> December 2024 without eliciting any response.
  10. I have considered the grounds of the application, the affidavit, the submissions on record the authorities cited and the law applicable. Rule 4 of this Court's Rules clothes the Court with 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. In *Muchugi Kiragu v James Muchugi Kiragu & another* Civil Application No. NAI. 356 of 1996, this Court had the following to say regarding the discretion donated under rule 4:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

12. The Supreme Court outlined the principles applicable in the exercise of discretion in an application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat* (*supra*) as follows:

1. “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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

13. In an application for extension of time to file a notice of appeal, the applicant must demonstrate a good cause for the delay. The Court will weigh factors including the length of the delay, reasons for it, potential prejudice to parties, and whether the intended appeal has merit before granting an extension. Essentially, it is a discretionary remedy that requires a satisfactory explanation for the delay.

14. I have considered the length of delay in the instant application. 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, as held in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR in which the Court of Appeal stated that:

“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.”

15. Rule 84 of this Court’s rules required the record of appeal to be filed within sixty (60) days from the date when the Notice of Appeal was lodged on 7<sup>th</sup> June 2024. The Memorandum and Record of



Appeal were however, filed on 16<sup>th</sup> September 2024, about 100 days later and therefore 40 days out of time.

16. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour for the Applicant. There is no reason stated in the application before me to justify the delay. There is therefore no justification upon which the Court may found a conclusion that the excuse is reasonable and the delay is not inordinate in the circumstances. It is remembered that this discretion is exercised on a case by case basis.
17. As to whether the intended appeal has merit, the Appellant argued that the Judge acting of his own motion, and without considering the facts and the law generally, revoked the grant issued on 23<sup>rd</sup> January 2024 to the Applicant and ordered that new administrators be appointed within 14 days.
18. In Imperial Bank Ltd (in receivership) (supra), this Court adverted to the possibility of the intended appeal to succeed as follows:

“In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

19. It is not my duty as a single Judge while considering an application under rule 4, to delve into the merits and demerits of the intended appeal. Suffice it for me to state that the grounds set out above are not idle and say no more on this issue, lest I embarrass the bench that may be seized of the appeal, should it ever live to see the light of day.
20. I shall let the question of the prejudice to be suffered by the parties lie, since no submission was made on it.

Consequently, the Notice of Motion dated 5<sup>th</sup> December 2024 is found to lack merit and is therefore dismissed. Costs of the application shall be borne by the Applicant.

It is hereby ordered.

**DATED AND DELIVERED AT KISUMU THIS 9<sup>TH</sup> DAY OF MAY, 2025**

**L. ACHODE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

