



**Namunaba v Lubisia & 2 others (Civil Application
E158 of 2024) [2025] KECA 792 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 792 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E158 OF 2024**

HA OMONDI, JA

MAY 9, 2025

BETWEEN

JOHN WANJALA NAMUNABA APPLICANT

AND

JULIUS WASIKE LUBISIA 1ST RESPONDENT

BERITA NASIMIYU WASIKE 2ND RESPONDENT

GRACE NALIAKA WASIKE 3RD RESPONDENT

(RULING (Being an application from the judgment of the High Court of Kenya at Kisumu (S. N. Riech, J.) dated 16th November 2021 in Cause No. 88 of 2006))

RULING

1. Upon the death of the family patriarch, Wasike Namunaba Murunga, the applicant and the respondents were appointed as joint administrators of his estate; grant was issued, and the respondents made a proposal on the mode of distribution, which elicited a protest by the applicant who filed a counter proposal on distribution of the estate. The matter was heard, and judgment was delivered on the 16th November 2021, but the applicant became aware of the judgment just recently. Being aggrieved by the outcome, the applicant intends to file an appeal against the judgment, but cannot do so without leave of the court since the statutory time limit lapsed. The applicant has thus, by a Notice of Motion dated 2nd October 2024, sought that:
 - a. Leave to appeal out of time against the judgment delivered on the 16th November 2021 in Bungoma High Court P&A Succ. Cause No.88 of 2006 or alternatively;
 - b. that leave be granted to the applicant to file his cross petition of appeal out of time against the respondents herein in Kisumu Court of Appeal Succ. Appeal No. E177 of 2022 between



Joseph Nabukhwesi Munyefu vs. Julius Lubisia Wasike, Berita Nasimiyu Wasike, Grace Naliaka Wasike, John Wanjala Namunaba and Moses Wamalwa;

- c. upon granting prayer 1 or 2 sought above, leave be granted to the applicant to file his notice of appeal, lodge and serve the said notice together with the intended memorandum of appeal or cross petition of appeal out of time against the judgment and decision in Bungoma High Court P&A Succ. Cause No.88 of 2006 which is subject to Kisumu COA Succ. Appeal No. E177 of 2022.
 - d. the costs of this application to abide by the outcome of the intended appeal.
2. The applicant explains that the delay in filing his application as well as the appeal was occasioned by a communication breakdown after he became ill for some time, and was unable to visit his advocate's office and give instructions. He was also not able receive the several correspondences that had been written to him because the postal address he was using had been closed down for failure to pay annual rent by the holder.
 3. He explains that the failure to file the appeal in time and an application for leave to file the appeal out of time was not intentional; that the respondents shall not suffer any prejudice if the application herein is granted since the contested judgment is yet to be implemented at the lands office; and the being a subject of another appeal in this Court vide Civil Appeal Case Number No. E177 of 2022 between Joseph Nabukhwesi Munyefu vs. Julius Lubisia & 2 others, where the applicant is indicated as one of the interested parties; that the applicant was also cited as an interested party in Kisumu COA Succ. Appeal No. E177 of 2022 which is pending for hearing and final disposal which he was also not aware of until in the recent times.
 4. The applicant further indicates that, although he had a chance to ventilate his grievances in the said appeal by filing a cross petition of appeal, time to do so statutorily has also lapsed and unless the same is extended, he may not have the capacity to file the cross petition of appeal; that the failure to file the appeal or the subsequent application for leave to file the appeal, the cross petition of appeal in time is therefore excusable; and although there is some delay in filing these particular applications by the applicant, no prejudice will be occasioned to the respondents as they may be paid costs in this particular application as well as the anticipated appeals in the event that the applicant's intended appeal or cross petition of appeal are dismissed; and in any event the status quo prevailing in terms of use of the deceased's parcel of land comprised in L.R No. Ndivisi/Ndivisi/1XX0 and 1XX1 created out of the old title comprised in L.R No. Ndivisi/Ndivisi/6X2 where the applicant has interest still subsists.
 5. In opposing the application, the respondents by a joint replying affidavit (which procedurally really ought to have been separate affidavits sworn by each respondent, or sworn by one on behalf and with the authority of the others) point out that the applicant had a counsel on record who was present when the decision was delivered, and there is nothing stated by the said counsel to indicate that she had challenges in communicating with the applicant; that if there was any lapse on the part of counsel, then that is a matter between her and the client, which does not warrant a favourable exercise of discretion by this court as equity does not aid the indolent; that no medical records have been presented to confirm that the applicant had been ailing for over 3 years from the date of judgment.
 6. The respondents urge this Court to reject the applicant's lament about an abandoned postal address, saying that there is no evidence of the mail being returned undelivered by the post office; and in any case, in this day of swift technology, a phone call or text message would have eased the situation.
 7. Rule 4 of the Court of Appeal Rules provides as follows:



The Court may, on such terms as may be 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.

8. Clearly, under Rule 4 of this Court's rules this Court has unfettered discretion to extend time for any step intended to be done within the period stipulated by the Rules. For instance, in *Paul Wanjohi Mathane vs. Duncan Gichare Mathenge* [2013] eKLR this Court stated that:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, 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.”

9. Rules 4 of the Court of Appeal Rules grants this Court unfettered discretion without paying regard to several factors which were set out in various authorities such as *Fakir Mohammed vs. Joseph Mugambi & 2 others* which was quoted in *Mukunga Njoka vs. Wanjiku Njoka* (2005) eKLR. It has also been pointed out in various authorities by this Court that extension of time is not a right to a party, rather it is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks extension of time has the burden of laying basis to the satisfaction of the court. In considering the prayer, a court must also take into account whether there will be any prejudice suffered by the respondent if extension is granted; and whether the application has been brought without undue delay. I acknowledge that indeed, the Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR set down the guiding principles to consider in the exercise of discretion.
10. So, in this instance, what was the period of delay? A period of three (3) years; and the reason given is twofold, namely communication barriers and ill health. In support of this, the applicant has annexed notices of the judgment sent to him by his advocate to an address he claims was no longer in use. Whose duty was it to pass on the information regarding this obstacle? Certainly not the advocate, the duty lay squarely with the applicant, and he cannot run away from the tag of being described as an indolent litigant. The responsibility of the litigant to follow up their case was stated by Waki, J.A. in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR as follows:

“It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

11. As for the medical condition, what the applicant has presented are treatment records from Webuye District Hospital dated 9th December 2021, and an x-ray film which do not in any manner portray an ailment lasting three years, all it does is to show that a month after delivery of the decision, the applicant visited a health facility, but does not suggest that he thereafter underwent prolonged medical care spanning a period of three years; this does not predispose the applicant to a favourable consideration or exercise of discretion.
12. Finally, on the issue as to whether or not the intended appeal has no chance of success, the applicant has annexed a copy of the draft memorandum of appeal, this Court is conscious of the fact that it is



not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of Athuman Nasura Juma vs. Afwa Mohammed Ramadhan [2016] eKLR:

“...this Court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.

13. I bear in mind the afore-going principles whilst determining this application, I have already pointed out that there has been inordinate delay which is not redeemable by the sob-story the applicant has attempted to spin; and I think it would be an abuse of the court’s discretion to grant the prayers sought. Consequently, the application is dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

H. A. OMONDI

JUDGE OF APPEAL

