



**Ondicho v Angwenyi & another (Civil Application
E167 of 2024) [2025] KECA 794 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 794 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E167 OF 2024
HA OMONDI, JA
MAY 9, 2025**

BETWEEN

JIM KENNEDY ONDICHO APPLICANT

AND

JOHN ANGWENYI 1ST RESPONDENT

JOSEPH NYACHOTI T/A MINMAX AUCTIONEERS 2ND RESPONDENT

*(An application for extension of time to lodge a Notice of Appeal and Record of Appeal
in the intended appeal from the Ruling and Order of the Environment and Land
Court at Kisii (Munyao, J.) dated 24th July 2024 in Misc. Application No. 10 of 2023)*

RULING

1. The genesis of this application stems from a tenancy relationship that existed between the applicant and the respondent, wherein the applicant had leased a space on the 1st respondent's premises LR No. Municipality/Block III/2X2 and established a garage. The 1st respondent instituted proceedings at the Business Premises Rent Tribunal being case No. BPRT/E033/2023 and obtained orders of eviction against the applicant on 30th day of May 2023. Subsequently, on 9th day of June 2023, 1st respondent through Minmax Auctioneers, the 2nd respondent, forcefully evicted the applicant from the said premises.
2. Being aggrieved by the said actions of the respondents the applicant moved the Environment and Land court seeking leave to lodge an appeal out of time among other orders. In a ruling delivered on 24th day of July 2024 the application was dismissed with costs to the respondent.
3. As a consequence, he filed this application dated 11th day of November 2024 seeking extension of time to file a Notice of Appeal and Record of Appeal; and that costs of and incidental to this application abide the result of the intended appeal. The application is premised on the annexed supporting affidavit



of Jim Kennedy Ondicho and the grounds listed on the face of the application. The applicant states that upon delivery of the ruling which was read in part, his counsel was unable to access the whole ruling either through Case Tracking System (CTS) or physically from the court file until 8th day of October 2024 when the same was uploaded. That upon receiving and reading the ruling, the applicant was aggrieved by the same and he gave instructions to lodge an appeal to the Court of Appeal. However, the period within which to lodge the notice of appeal had lapsed hence this application.

4. The applicant intended appeal has high chances of success since the act of eviction meted upon him in effect divested the Tribunal of its jurisdiction; he is likely to be prejudiced as he would have been condemned unheard; and the respondents on the other hand will not suffer any prejudice if the orders sought herein are granted.
5. In opposing the application, the respondent in the written submissions acknowledges that the application is anchored under rule 4 of the Court of Appeal Rules, 2022 and the principle espoused by the Supreme Court in *County Executive of Kisumu vs. County Government of Kisumu & 8 Others* [2017] eKLR, wherein the following principles were laid in the guidance by the Courts regarding the extension of time as follows:

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicholas Salat* case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

- i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
6. The applicant argues that the application herein is the second of its nature, seeking extension of time by the applicant, for the reason that the application emanates from the decision of Honourable Justice Munyao Sila sitting at Kisii, in *Environment and Land Court Miscellaneous Application No. 10 of 2023*, in an application dated 20th July, 2023 and filed on 19th December, 2023, had sought to enlarge time within which the applicant could lodge an appeal from the order of the *Business Premises Rent Tribunal* dated 29th May, 2023; that the Court sitting at Kisii in its ruling stated at paragraph nine (9)



that the discretion to lodge an appeal out of time is not stated under the Act, but proceeded to list material factors, in the consideration for the extension of time.

7. In response to the applicant's contention that he has an appeal with chances of success; the respondent draws this Court's attention to paragraph twelve (12) of the ELC ruling which addressed the question of whether, the application to appeal out of time, if allowed, would result in the appeal still being effective; and the finding that applicant could still achieve the orders sought by moving the Business Premises Rent Tribunal in setting aside the ex-parte orders made, and having the Notice before it heard inter-partes.
8. The respondent submits that the Ruling in Kisii ELC Miscellaneous Application No. 10 of 2023 was delivered on the 24th July, 2024 in the presence of the applicant's counsel and counsel for the 1st respondent; that upon the application by the applicant herein being dismissed, his counsel never sought to be supplied with copies of the ruling, for purposes of preferring an appeal. The respondent pokes holes at the applicant's claims that the court file could not be accessed at the registry, and that he caused to write a letter to the Deputy Registrar, on the 4th September, 2024 (42 days later), seeking to trace the file, for purposes of preferring an appeal, arguing that the wording of rule 77 of the Court of Appeal Rules on filing of the Notice of Appeal is mandatory in that the word "SHALL" is used; that the applicant herein has neglected, failed and/or refused to give an explanation on the steps taken from the 24th July, 2024, upto and until the 7th August, 2024, the period within which the 14 days were to lapse in filing a Notice of Appeal. That although the applicant states that the ruling was obtained on the 8th October, 2024. The present application is dated 11th November, 2024 (another Thirty-Four (34)) days, prior to the filing of the application herein.
9. The respondent argues that it is a cardinal principle in equity that equity aids the vigilant and not the indolent and further that delay defeats equity, relying on pronouncements of the Court of Appeal of East Africa in *Shah vs. Mbogo and Another* (1969) EA 116 which held that:

“...discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

10. It is submitted that the failure to lodge the Notice of Appeal within the statutory period was not as a result of an accident, inadvertence or excusable mistake, rather it was occasioned by failure and negligence on the part of the applicant thus the application ought to be dismissed.
11. Rule 77(2) of the Court of Appeal Rules 2022 provides that a Notice of Appeal shall be lodged within fourteen (14) days after the date of the decision against the decision for which the appeal is lodged. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. Rule 77 of the Court of Appeal Rules provides that an intended appellant shall, before or within seven (7) days after lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal. The discretion that I am called to exercise in the determination of this application is provided under rule 4 of the Court of Appeal Rules which provides as follows:

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.



12. Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. The case of *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

“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.”

13. Again, in the case *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application No.190 of 2019 observed that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

14. How long was the delay in this instance? 76 (seventy six days).

There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“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. Undoubtedly the notice of appeal should be lodged within 14 days of the delivery of the decision which it seeks to appeal against and served within 7(seven) days after lodging that actually happened. The reason as explained in the supporting affidavit is that after the delivery of the decision on 24th July 2024, there were technological challenges, so the ruling was only read in part, then followed another technological headache affecting the loading of the CTS; and the physical file was also not available in the registry; it was not until 7th October 2024, when eventually the applicant was notified that the situation had been sorted out; as fate would have it, a copy of the ruling was not available, prompting the applicant’s counsel to write to the Deputy Registrar, a letter dated 4th September 2024; and by the October 2024, when a copy of the ruling was eventually made available, the time within which the appeal should have been lodged had lapsed.

16. From the trail of activities and explanations by the applicant, his conduct cannot be described as indolent, I take judicial notice that technological challenges, ranging from interrupted network



connectivity, a refusal by the computer system to obey commands, are lived realities that are posed by the embracing of technology. It is not anyone's fault, and least of all the applicant who did not have control of the intervening chain of mishaps. I am satisfied with the explanation given, and the upshot is that the notice of motion dated 11th November, 2024 be and is hereby allowed. Accordingly, I make the following orders:

- a. That the time within which to file and serve the respondents with the notice of appeal and the record of appeal is enlarged.
- b. The Notice of appeal and the Record of Appeal shall be served on all the other respondents within 30 (thirty) days from the date of this ruling.
- c. Costs of this application shall abide the appeal.

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

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

