



**Kandie v Kapkoros alias Elizabeth Kimoi Jacob Kapkoros (Civil Application E037 of 2024) [2025] KECA 742 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KECA 742 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E037 OF 2024**

**JM MATIVO, JA**

**MAY 5, 2025**

**BETWEEN**

**PHILOMENA KANDIE ..... APPLICANT**

**AND**

**KIMOJ KAPKOROS ALIAS ELIZABETH KIMOJ JACOB  
KAPKOROS ..... RESPONDENT**

*(Being an application from judgment of the High Court of Kenya at Eldoret (R. Nyakundi J.) dated 17th July 2023 in Succession Cause No. 145 of 2000)*

**RULING**

1. Vide an application dated 2<sup>nd</sup> July 2024, brought under Sections 3A, 3B and 5 of the *Appellate Jurisdiction Act*, Rules 4, and 42 of the Court of Appeal Rules 2022, the applicant prays for extension of time within which to file and serve notice of appeal and record of appeal against the Judgment issued on 17<sup>th</sup> July 2023 in Eldoret High Court Succession Cause No. 145 of 2000.
2. The application is premised on the grounds listed on the face of the application and the applicant's supporting affidavit sworn on 2<sup>nd</sup> July 2024. The grounds in support of the application are: (a) the applicant filed the notice of appeal dated 29<sup>th</sup> August 2023, applied for the proceedings and Judgment in a letter dated 29<sup>th</sup> August 2023 and paid the requisite court fees; (b) the notice of appeal dated 29<sup>th</sup> August 2023 was struck out in Civil Appeal No. E047 (stay application) and E048 of 2023 (striking out application) (consolidated) vide ruling delivered on 7<sup>th</sup> June, 2024; (c) that the applicant has an arguable appeal which needs to be heard on merits in the interest of justice; (d) the delivery of the Judgment was made without notice and it was only on 29<sup>th</sup> August 2023 that they came across a copy of the Judgment and they immediately filed a notice of appeal.
3. The application is opposed vide replying affidavit sworn on 4th February, 2025 by Hanna Jebiwot Lagat who is the sole surviving child to the estate of the respondent. The deponent avers that: (a) the



instant application is frivolous since the applicant has not demonstrated any sufficient ground that warrants the grant of orders of extension of time for filing the notice of appeal and record of appeal out of time; (b) the notice of appeal was lodged 29 days outside the prescribed 14 days timeline after Judgment having been filed on 31<sup>st</sup> August, 2023; (c) the application is an afterthought having been filed after the applicant was served with ELD ELC Miscellaneous Application No. E008 of 2023 which sought to execute Judgment of the High Court which is still pending determination; (d) the delay of 29 days in filing the notice of appeal has not been explained at all; (e) Judgment was to be delivered on notice on 16<sup>th</sup> June 2023. However, it took almost three months after the notice was issued for the applicant to visit the registry and discover that Judgment had already been issued; (f) the applicant had sufficient time to correct the anomaly of filing the notice of appeal late but he chose to wait for the same to be struck out; (g) that the respondent will be prejudiced if the orders sought are granted since the matter is two decades old and the children of the deceased have been given equal shares from their father's estate.

4. In his submissions filed in court on 30<sup>th</sup> April 2025, in support of the application, Mr. Cheptarus learned counsel for the applicant reiterated the content of the affidavit in support of the application and contended that the delay was occasioned by not being aware of delivery of the impugned Judgment after time to file a notice of appeal had already lapsed.
5. As at the time of writing this ruling the respondent's submissions were not on record.
6. I have considered the application, the affidavit in support thereto and the annexures, the replying affidavit, and the written submissions by the advocate for the applicant. The only question for determination is whether the applicant has met the threshold for the exercise of this Court's discretion to grant leave for her to file and serve a notice of appeal and record of appeal out of time. The application is governed by Rule 4 of the Court of Appeal Rules 2022 which provides that:

“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.”
7. The Supreme Court pronounced itself in the question of extension of time in the case of Andrew Kiplangat Chemaringo vs Pasul 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.”
8. This application will turn on the question whether the applicant has tendered sufficient reasons for not filing her notice of appeal and record of appeal within the stipulated time and whether the respondent will suffer any prejudice should the application be allowed.
9. The applicant's reason for the delay is that she was not aware of the delivery of Judgment and that it is on 29<sup>th</sup> August 2023 that her advocate stumbled upon a copy of the Judgment at the registry. In his rejoinder, the respondent maintained that the judgment was to be delivered on notice on 16<sup>th</sup> June, 2023. However, the applicant was indolent since it took almost three (3) months after the notice was issued for the applicant to visit the registry and discover that Judgment had already been issued.



10. Having considered the applicant's explanation and the fact that the notice of appeal dated 29<sup>th</sup> August 2023 was struck out vide ruling delivered on 7<sup>th</sup> June 2024, this application will turn on two questions, namely (a) whether it is open for the applicant to file a fresh application since his first application was struck out, and (b) whether the applicant the delay of 25 days in filing this application is inordinate.
11. Regarding the first question, there is a clear distinction between where a suit or an application is "struck out" as in this case and where it is "dismissed." As was held by the High Court in *Swan Carriers Limited vs. Samuel Koskei Kibet* [2010] eKLR:

“...Once a matter or application is dismissed, there is finality to it. If a matter is “struck out” on a technicality, then the said (sic) aggrieved party is permitted to file a court (sic) application in the same court. In this case, the applicants had the option to file the application struck out a fresh before the magistrate’s court where the application was struck out on technicalities. They chose to come to the High Court. Is this res judicata.”
12. Similarly, this Court in *Allan Robinson & two Others vs. Philip Gikaria Muthami* Civil Application No. 187 of 1997 (unreported) held that an appellant whose appeal has been struck out for being incompetent has the right to move the court afresh for extension of time to file a competent appeal. (See also *Ngonoi-Matengo Co-operative Marketing Union Ltd vs. Ali Mohamed Osman* [1959] EA 577).
13. I now turn to the question whether the explanation offered by the applicant is reasonable and whether the 25 day delay is excusable. The basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both sides. This approach was illuminated in *National Union of Mineworkers vs. Council for Mineral Technology* [1998] ZALAC 22 at para 10 as follows:

“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”
14. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. An applicant for condonation must therefore provide a satisfactory explanation for the period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the prospects of success of the appeal. An applicant must make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the cause of the delay. In the end, the explanation must be reasonable enough to excuse the default.
15. Equally important is that an application for condonation must be filed without delay. Thus, where the applicant delays filing the application, absent a proper and satisfactory explanation for the further delays. I have considered the period of delay in this case. I find the reasons for the delay to be plausible, therefore, the delay was in the circumstances excusable.



16. On the chances of the intended appeal succeeding, I am guided by the sentiments of this Court in Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

17. In the end, I find that the applicant merits the exercise of this Court’s discretion for the above stated reasons. I accordingly allow the applicant’s notice of motion application dated 2<sup>nd</sup> July 2024, on the terms that the applicant is granted extension of time to file and serve a notice of appeal and a record of appeal against the judgment delivered by Nyakundi J. on 17<sup>th</sup> July 2023 in Eldoret High Court Succession Cause No. 145 of 2000 within 7 days from the date of this ruling. There shall be no order as to the costs of the application.

**DATED AND DELIVERED AT ELDROET THIS 5<sup>TH</sup> DAY OF MAY 2025.**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

Signed.

Deputy Registrar.

