



Sang & 2 others v Kugun & 8 others (Civil Application E043 of 2024) [2025] KECA 739 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KECA 739 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E043 OF 2024**

JM MATIVO, JA

MAY 5, 2025

BETWEEN

**BENJAMIN SANG 1ST APPLICANT
KENNETH SANG 2ND APPLICANT
JULIUS LIMO 3RD APPLICANT**

AND

JOSEPH KIBUNGEI KUGUN & 8 OTHERS & 8 OTHERS & 8 OTHERS RESPONDENT

(An application from the judgement in the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.) dated 18th November 2022 in ELC No.233 of 2012)

RULING

1. Vide an application dated 24th July, 2024, brought under Section 3A and 3B of the *Appellate Jurisdiction Act*, Rules 4 and 84 of the Court of Appeal Rules 2022. The applicants pray for extension of time within which to file and serve notice of appeal and record of appeal against the Judgment issued on 18th November 2022 in Eldoret ELC No.233 of 2012.
2. The application is premised on the grounds listed on the face of the application and the supporting affidavit sworn on 24th July 2024 by Benjamin Sang, the 1st applicant. The grounds in support of the application are that:- (a) they instructed their advocate Mukabane & Kagunza Advocates to file a notice of appeal and were assured of the appeal being timely filed; (b) that their advocate never filed the record of appeal on time; (c) they have appointed the firm of Ketter N.K. Advocate in place of Mukabane & Kagunza Advocates; (d) the mistakes if at all of their former advocate should not be vested on an innocent litigant; (e) the intended appeal arguable as evidenced in the memorandum of appeal and ought to be heard on its merit.



3. The application is opposed vide replying affidavit sworn on 26th August 2024 by Geoffrey Kipruto Koech who swears the affidavit on his behalf and behalf of his brother John Kipkemboi and the 1st and 2nd Interested Parties. The deponent avers that: (a) a suit belongs to the litigant and not his advocate; (b) no material has been placed before this Court to demonstrate that the applicants made efforts to contact his advocate between filing the notice of appeal on 1st December 2022 and filing of the instant application on 25th July 2024, a duration of 19 months; (c) the delay in bringing the instant application is ordinate and inexcusable; (d) there is no prayer seeking for extension of time as regards service of the letter bespeaking typed proceedings as required by Rule 84 (2) of the Court of Appeal Rules, 2022; (e) this court cannot grant what has not been sought; (f) the application is fatally defective for failure to include orders of extension of time to serve the letter bespeaking typed proceedings.
4. In rejoinder, the 1st applicant vide supplementary affidavit sworn on 11th September 2024 averred that: (a) they have placed receipts of legal fees to show contact with their advocate and that they sought extension as soon as they knew the appeal was not filed; (b) the issue of typed proceedings is not a consideration if it is the mistake of counsel; (c) their property in risk if the orders of stay are not granted.
5. Vide submissions filed in court on 9th September, 2024, Mr.Ketter learned counsel for the applicant contended that mistakes of a former advocate should not be visited on an innocent litigant since they had duly instructed their advocate to institute the appeal.
6. The 1st respondent in support of the application maintained that the applicants' appeal arguable and ought to be heard on its merit since the failure to file a record of appeal was wholly a result of their advocate mistake. Counsel cited the case of Wasike vs. Swala [1984] KLR 591 where this Court held that a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.
7. In opposing the application, the 1st and 2nd Interested Parties reiterated the content of the replying affidavit sworn on 26th August 2024 and submitted that the sole reason for failure to file and serve the appeal in time is due to indolence and since cases belong to litigant and not advocates the applicants needed to demonstrate that they did not condone or collude in the delay as was held in Rajesh Rughani vs. Fifty Investments Limited & Ano. [2016] eKLR.
8. On the failure by the applicants to include a prayer for extension of time to serve the letter bespeaking typed proceedings, counsel cited Kisumu [CA E089 of 2022](#) Paul Kiprop Chepkuto vs. The University Council of Moi University & 3 Others [unreported] where Ngugi, JA held that failure to include orders of extension of time to serve the letter bespeaking typed proceedings is fatal.
9. I have considered the application, the affidavit in support thereto and its annexures, the replying affidavit, and the written submissions by the advocates for the parties. The only question for determination is whether the applicants have met the threshold for the exercise of this Court's discretion to grant them the leave sought. This 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.”
10. The Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR summed up the applicable considerations as follows: -



- i. Extension of time is not 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.
11. In *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 this Court held 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.” [Emphasis supplied].

12. In granting leave, the Court has to balance the competing interests of the Applicant(s) with those of the Respondent(s) or in this case, the Interested Parties who are opposed to the application. (See *M/s Portreitz Maternity vs. James Karanga Kabia Civil Appeal No. 63 of 1997*). In deciding whether the reasons provided are plausible, 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 parties. 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.” (Emphasis added)

13. Significant for determination of such applications is that condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him/her to the court’s indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays. As was held by the Supreme Court in *Yusuf Gitau Abdalla vs. The Building Centre (K) Ltd & 4 Others* [2014] eKLR even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not of mercy. It is also bound by the law and more so *the Constitution* which binds all. Based on the cited decisions, it is apparent that the question is whether the reason(s) provided is a sufficient explanation for not filing their record of appeal within the stipulated time and whether the Interested Parties who are opposed to this application will suffer any prejudice should the application be allowed.
14. The applicants’ reason for the delay is that their erstwhile advocates caused the same. However, the same issue has been subject of several judicial pronouncements. For example, this Court in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR stated as follows:

“In this case, however, the erstwhile advocates are simply accused of inaction. In the case of *Rajesh Rughani vs Fifty Investments Ltd & Ano.* [2005] eKLR the Court of Appeal held, “It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.
15. Have the applicants demonstrated any steps taken to find out if their erstwhile advocates had filed the record of appeal pursuant to their instructions. The applicants have annexed receipts in support of legal fees they paid to their erstwhile advocate to demonstrate that they are not guilty of inaction. However, a perusal of the supporting affidavit sworn by the 1st applicant in support of the application does not demonstrate any other step taken towards pursuing the appeal. Importantly, on record, there is no request for typed proceedings and/or a certificate of delay to prove that the applicants have been diligent in pursuing the appeal. Consequently, I find that the reasons advanced for the delay of about 19 months are not plausible and as such they do not unlock the discretion of this Court in favour of the applicants.
16. In the circumstances, I am disinclined to exercise my discretion in favour of the applicants. There must be an end to litigation and re-opening this matter after the 19 months of an unexplained delay would be prejudicial to the Interested Parties. The application is accordingly dismissed with costs to the 1st and 2nd Interested Parties.

DATED AND DELIVERED AT ELDORET THIS 5TH 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.

