



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rachuodho v Akoo (Civil Application E183 of 2024)  
[2025] KECA 1169 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1169 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E183 OF 2024  
HA OMONDI, JA  
JUNE 20, 2025**

**BETWEEN**

**FRANCIS OKELLO RACHUODHO ..... APPLICANT**

**AND**

**Jael Apondi Akoo ..... RESPONDENT**

*(Being an application for leave to file memorandum of appeal and record of appeal out of time from the judgment of the High Court of Kenya at Siaya (Ogembo, J.) dated 23rd May 2024 in HCCA No. E005 of 2022)*

**RULING**

1. By a notice of motion dated 19<sup>th</sup> November 2024, supported by the affidavit by Francis Okello Rachuodho of even date, the applicant prays to be granted leave to file his Memorandum of Appeal and Record of Appeal out of time in respect of the judgment dated 23<sup>rd</sup> May 2024 delivered in Siaya Family Civil Appeal No E005 of 2022. It is premised on grounds that this Court has unfettered discretion to determine whether to extend time or not; the length of the delay in filing the Notice of Appeal is not inordinate and is excusable; the failure to prepare and file the Notice of Appeal on time was on account of the counsel's mistake. Apparently, the applicant being aggrieved by the said judgment he instructed his advocate to file the Notice of Appeal immediately but the same was lodged later on the 17<sup>th</sup> June 2024; the delay by the applicant is not malicious, deliberate nor is it reckless; the intended appeal has very high chances of success as per the record of appeal; and that the application is made in good faith with the sole interest of justice.
2. In the supporting affidavit, the applicant explains that after delivery of the judgment, he immediately instructed his advocate to pursue an appeal, but apparently, he had a disagreement and/or misunderstanding with his advocate on record, Mr. Agina from Agina and Agina advocates. Soon thereafter, the applicant filed a Notice to Act in person dated 26<sup>th</sup> July 2024. He further explains that



being a lay person not familiar with the court timelines for filing appeals as he was now acting in person, he delayed in filing the Memorandum of Appeal on time. It was only after inquiries that he personally applied for certified copies of proceedings and judgment on 26<sup>th</sup> July 2024; and soon thereafter he instructed the firm of Ben Oduol and Nyanga Advocates to enter appearance on his behalf, leading to the annexed Notice of Appointment of Advocates dated 25<sup>th</sup> September 2024. Eventually, the new advocate on record filed the annexed consent dated 2<sup>nd</sup> October 2024 to come on record on his behalf in place of Agina and Agina advocates.

3. Further, that it was after all these travails, that he got to learn that all along, his previous advocate Mr. Agina had been sick and was receiving treatment in Nairobi; therefore, the instructions he had been giving from Nairobi were not being implemented by his firm on time hence the Notice of Appeal being filed on 17<sup>th</sup> June 2024 and the Consent to Act being signed and filed on 2<sup>nd</sup> October 2024. The applicant's new advocate then wrote to the Deputy Registrar at Siaya High Court on 7<sup>th</sup> October 2024 requesting for copies of judgment and proceedings; this was followed up with a letter to dated 1<sup>st</sup> October 2024 requesting for copies of judgment and proceedings (Annexed and marked as For-008 copy of letter to the Deputy Registrar dated 11<sup>th</sup> October 2024; and he was eventually issued with certified copies of proceedings and judgment on 14<sup>th</sup> October 2024, by which time within which to file the appeal had already lapsed.
4. The applicant reiterates that failure to file the notice of appeal on time was due to a mistake by his counsel which should not be visited on me as that would be unjust and unfair; that delay is not deliberate nor malicious, or as a result of reckless; that the intended appeal has very high chances of success as per the memorandum of appeal and that the application is made in good faith with the sole interest of justice.
5. The respondent did not file a replying affidavit, but has filed written submissions in response to the application.
6. In support of this application, the applicant in his written submissions points out that this Court's jurisdiction under Rule 4 of the Court of Appeal Rules is premised on principles in respect of the exercise of discretion as was stated in *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* Civil Application No Nai. 255 of 1997 (UR); it is argued that the length of the delay in filing the Notice of Appeal is not inordinate, in any case the failure to file the said document was due to previous falling sick, resulting in the instructions he had been giving from Nairobi not being acted upon by his firm.
7. The applicant submits that it has an arguable appeal as regards the contested status and relationship between the respondent and the late William Ogolla Opondo as regards parental lineage and non-disclosure. In this regard the applicant draws from Therefore we submit that we have demonstrated that there exists at least an issue upon which the court ought to pronounce itself as envisaged in *Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers* Union Civil Application Nai. No 72 of 2001 wherein the Court addressing itself on this principle postulated that:

“He (the applicant) need not to show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision.”
8. Further that the demonstration of just one arguable point will suffice in favour of the applicant as established in *Kenya Railways Corporation v Edermann Properties Limited*, Civil Appeal No Nai. 176 of 2012. The applicant reiterates that the delay is not deliberate nor propelled by malice, but was an honest mistake visited upon his counsel; and to ameliorate the situation as well as demonstrate his



interest in pursuing the appeal he actually filed a Notice to Act in Person, and even applied for certified copies of the proceedings and judgment.

9. In opposing the application, the respondent submits that the application is misconceived, vexatious, an afterthought and an abuse of the court process being contrary to Order 43 of the [Civil Procedure Rules](#), as the applicant was obligated to seek and obtain leave to appeal against the order from the court that made the order under the provisions of Order 43 Rules (2) and (3) of the [Civil Procedure Rules](#), in this case the High Court of Kenya at Siaya.
10. That from the wording of section 79G of the [Civil Procedure Act](#) that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time; and in support of this proposition, reference is made to the case of [Diplack Kenya Limited v William Muthama Kitonyi](#) [2018] eKLR; that sufficient cause has not been demonstrated in the current application as the only basis cited is the failure of his advocate to file the appeal on time. The applicant is faulted for heaping the blame on his then advocate on grounds that a case belongs to the litigant who should always be diligent; and not to the advocate, thus parties should not merely blame their advocates for non – prosecution of their cases but should be proactive in prosecuting them. Reference is made to the decision in [Habo Agencies Ltd v Wilfred Odhiambo Musingo](#) [2015] eKLR, and [Bank of Africa Kenya Ltd v Put Sarajevo General Engineering Co. Ltd & 2 others](#) [2018] eKLR)
11. The respondent points out that the Judgment was delivered on 23<sup>rd</sup> May, 2024; the applicant filed the instant application dated 19<sup>th</sup> November, 2024 on 6<sup>th</sup> December, 2024.; that it has taken the applicant approximately six months and thirteen (13) days between the date of judgment delivered in the trial court and the time when he filed the instant application; and urges this court to find that this application amounts to a fishing expedition, as that the delay of over six months and thirteen (13) days was inordinate and that the said application be dismissed with costs to the respondents.
12. As regards the prayer for extension of time within which to serve the already filed Notice of Appeal, Rule 79. Provides that:
  1. An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal. This did not happen; and the applicant seeks to salvage the situation courtesy of 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.
13. It is clear that, under Rule 4, this Court has unfettered discretion to extend time for any step intended to be done within the period stipulated by the Rules. This was aptly set out in [Paul Wanjohi Mathane v Duncan Gichare Mathenge](#) [2013] eKLR this Court held thus:

“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.”

14. So, in this instance, what was the period of delay? 6 months and 13 days from the date the decision was delivered. What was the reason for the delay? A communication breakdown where after instructing counsel the instructions got derailed as counsel was not in his office. Is there any evidence that such instructions had been given, and that the applicants were unwell, hospitalized; and relaying instructions to his firm, which were not acted upon?
15. I am aware that in the case of *Rajesh Rughani v Fifty Investment Ltd. & another* (2005) eKLR, this Court 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”.
16. Was there indolence on the part of the applicant? From her actions, it appears to me that upon realising that there was a growing loud silence from her then advocate, she took quick remedial steps within 2 (two) months after delivery of judgment and filed a Notice to act in person, quickly followed by a request for copies of proceedings and judgment, and several letters addressed to the Deputy Registrar as a follow up to the request. The applicant did not wait for 6 months to remedy the situation, and in my view these actions do not speak of indolence or deliberate delay so as to maliciously vex the respondent.
17. Granted, the applicant has not attached any letter of instruction either from herself to her advocate, or from her advocate to his firm regarding filing of the appeal. Worse still, there is no affidavit filed by Mr. Agina to confirm that he was indisposed for a prolonged period, or that he had been issuing certain instructions to his office related to filing an appeal in this matter. Is this fatal? I think not, given that there seems to have been a breakdown that resulted in the applicant eventually instructing another counsel. Thus, to expect her to obtain these documents from one with whom she had a strained relationship would be unrealistic.
18. From the explanation by the applicant’s counsel, there was a challenge in reaching the applicant; and by the time they connected, time had lapsed. 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. For instance, in *Andrew Kiplagat Chemaringo v 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.”
19. In my considered view, that is not tantamount to delaying tactics with an intention to scuttle fruits of the outcome. In the present application, the applicant has given the reason for the delay in lodging the appeal in time. The period of delay is not inordinate, the reason given is plausible; and no prejudice is occasioned to the respondent as he will have his day in court on appeal, bearing in mind that he does not allude to any execution process having begun.
20. I hold that the application is merited and is allowed. The applicant is granted extension of time to lodge and serve the notice of appeal. The same shall be filed and served within fourteen (14) days of today’s date. There shall be no orders as to costs.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**



**H.A. OMONDI**

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**JUDGE OF APPEAL**

Signed

**DEPUTY REGISTRAR**

