



**Towett & another v Chelagat & 3 others (Civil Appeal (Application)
E191 of 2024) [2025] KECA 1078 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1078 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E191 OF 2024
LA ACHODE, JA
JUNE 20, 2025**

BETWEEN

ALICE CHELANGAT TOWETT 1ST APPLICANT

JULIE CHEMUTAI TOWETT 2ND APPLICANT

AND

RAEL CHELAGAT 1ST RESPONDENT

DAVID NGASURA KONE 2ND RESPONDENT

GEORGE OGENGO 3RD RESPONDENT

LAND REGISTRAR 4TH RESPONDENT

((Being an application for extension of time for serving the Record of Appeal dated 21st November, 2024 upon the Respondents, against the Ruling of the Environment and Land Court at Nakuru (Ombwayo J) dated 5th October, 2023 in ELC No. 87 of 2018))

RULING

1. By a Notice of Motion dated 2nd May, 2025, and expressed to be brought under Article 159 of *the Constitution*, Sections 3A and 3B of the *Appellate Jurisdiction Act*, and rule 4 of the Court of Appeal Rules 2022, Alice Chelangat Towett, the 1st applicant and Julie Chemutai Towett the 2nd applicant, seek orders for leave and extension of time to serve the Record of Appeal upon the 2nd and 3rd respondents, in relation to the ruling delivered 5th October, 2023, in the Environment and Land Court [ELC], at Nakuru in ELC No. 87 of 2018 by Ombwayo J. That upon grant of the orders sought the respondents be deemed to have been duly served and costs of the application be provided for.
2. The 1st to 4th respondents are Rael Chelagat, David Ngasura Kone, George Ogengo and the Land Registrar respectively.



3. The grounds as stated on the face of the application and deposed in the supporting affidavit sworn by the 1st applicant, on 2nd May 2025, are that the applicant filed an application dated 9th March 2023 seeking for: review of the orders made on 2nd February 2022 dismissing their suit for want of prosecution and for leave to prosecute the main suit and mount a defence to the respondents' counterclaim.
4. The application was dismissed with costs in a ruling dated 5th October, 2023. Aggrieved by the decision, the applicants filed a Notice of appeal dated 13th October 2023 on 16th October 2023, together with a letter bespeaking certified copies of proceedings. The Notice of Appeal was served upon the 1st and 4th respondents on 19th October 2023 and upon the 2nd and 3rd respondents on 23rd October 2023, all within time.
5. The proceedings were certified on 28th August 2024, a Certificate of Delay issued on 13th November 2024 and the Record of Appeal filed on 16th December 2024 within the requisite 60 days. The Record of Appeal was served on the Attorney General on 16th December 2024 but the other two firms of advocates having already closed for Christmas Vacation, were to be served when they resumed work.
6. However, in January 2025 the applicants' advocates' were involved in moving offices from the old location to its current location and changing partnerships and the name of the company. In the process, some of the files were misplaced including the applicants' Record of Appeal. When order was restored in the firm, the Record of Appeal was found and served immediately upon the 2nd and 3rd respondents' advocates, physically in Eldoret on 24th February 2025, without delay.
7. The applicants avers that: in the circumstances, the delay was not inordinate and is excusable; that the respondents shall suffer no injustice if the application is granted; that the appeal has huge chances of success and is not a mere frivolity; and, that it is in the interest of justice for the application to be allowed.
8. The application is opposed by the replying affidavit of Rael Chelagat, the 1st respondent, sworn on 23rd May 2025. She deposes that the application is an abuse of the court process, is based on misrepresentation of facts, is made in ignorance of facts already on record, is misconceived, in bad faith, lacks merit and is ripe for dismissal with costs. She deposes that the applicants have not offered sufficient explanation why the proceedings having been ready on 28th August 2024, were only collected on 13th November 2024. That at that point, this application should have been made and as such, it is an illegality ab initio.
9. That the period of delay from when the proceedings were ready on 28th August 2024 till the date of this application on 2nd May 2025, is 248 days and is unexplained. The 1st respondent deposes that this application is a last ditch effort to salvage the appeal in light of the pending application dated 26th March 2025, filed by the 2nd and 3rd respondents to strike out the appeal. She prays that this application be dismissed with costs.
10. The applicants filed written submissions dated 22nd May 2025, through the firm of Kipkoech B. Ngetich GKL Advocates LLP, while the firm of Kiplenge, Andama & Makau Advocates filed those for the 1st respondent. They both reiterated the depositions in their respective affidavits.



11. This being an application for extension of time, the jurisdiction of this Court is invoked under rule 4 which clothes the Court with the mandate to exercise the discretion to extend time, otherwise limited by these rules, or a decision of the Court, or Superior Court. The rule 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.”

12. The discretion of this Court under rule 4 in considering an application for extension of time is unfettered. However, in the exercise of such discretion, the court must act upon reason[s] not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. See the case of Paul Musili Wambua v Attorney General and 2 Others [2015] eKLR.

13. In the instant application, it is not disputed that the applicants filed the Notice of appeal, together with the letter bespeaking certified copies of proceedings and served them upon the respondents within time. Upon the Certificate of Delay being issued on 13th November 2024, the Record of Appeal was filed on 16th December 2024 within the requisite 60 days, and served upon the Attorney General on 16th December, 2024.

14. The other two respondents were not served at the same time because the firms of their advocates were closed for Christmas Vacation. They were to be served when they resumed work. The reasons given for the delay from January to 24th February 2025 were that in January, the applicants’ advocates moved offices and changed partnerships and the name of their company. In the process, some of the files were misplaced including the applicants’ Record of Appeal. When order was restore in the firm, the Record of Appeal was found and served immediately upon the 2nd and 3rd respondents’ advocates, physically in Eldoret on 24th February 2025 without delay.

15. In my view, and in the circumstances of this case, the delay was not inordinate and the reason therefor is excusable. I see no prejudice to be suffered by the respondents if the application is granted as they will get a chance to ventilate their case. The issues raised in the memorandum of appeal are not idle but as to whether the appeal has “huge chances of success” is a matter to be left to the bench that shall be seized of the appeal to determine. In the end, I am satisfied that it is in the interest of justice for the application to be allowed.

Consequently, the Notice of Motion dated 2nd May, 2025, be and is hereby allowed. The 2nd and 3rd respondents be and are hereby deemed to have been duly served.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

L. ACHODE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

