



**Ongoro v Abello & another (Civil Application E189 of 2024)
[2025] KECA 1447 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1447 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E189 OF 2024
MSA MAKHANDIA, JA
JULY 31, 2025
[IN CHAMBERS]**

BETWEEN

DORAH KEMUNTO ONGORO APPLICANT

AND

GRACE AWINO ABELLO 1ST RESPONDENT

PHILIP ABELLO 2ND RESPONDENT

(Being an Application for leave to file Notice of Appeal and Record of Appeal out of time from the Judgment and decree of the Environment and Land Court at Kisumu, (Asati, J.) dated 7th November, 2024. in ELCLA No. E020 6 of 2023)

RULING

1. The application before me is dated 17th December, 2024, and seeks that; leave to file and serve notice of appeal as well as the record of appeal out of time be granted to the applicant. Further that, should the leave be granted, the applicant should be given sixty days within which to lodge and serve the record of appeal.
2. The application is expressed to be brought pursuant to Article 159(2) (d) of the *Constitution of Kenya* and Rule 4 of the *Court of Appeal Rules*. The grounds in support of the application and which give the background to the application are that; by a judgment rendered on 7th November 2024, the Environment and Land Court “the ELC” at Kisumu found in favour of the respondent.
3. However, the applicant was not informed of the delivery of the judgment by her then lawyer, Juliet Dima. She only became aware of the judgment and decree on 10th December 2024. She then immediately instructed her current advocates on record to initiate the appellate process. However, time to do so has already lapsed, hence the instant application.



4. From the foregoing the applicant states that the error or inaction on her part was not deliberate and should not therefore be visited upon her. That she was a lay person not familiar with the intricacies of court procedures. She insists that she is keen on prosecuting the intended appeal which she argues has overwhelming chances of success. That this Court should exercise its discretion in her favour with the object of serving substantive justice. Finally, she proclaims that the respondent will not suffer any prejudice if the application is allowed. On the other hand, she faces imminent eviction from the suit property if the application is not granted.
5. The application is further supported by the affidavit by the applicant. The affidavit merely reiterates and expounds on the grounds aforesaid and therefore there is no need to rehash. Suffice to add that she attributes the advocate's failure to communicate with her to the death of the advocate's child at the time.
6. The application was vehemently opposed by the respondent through a replying affidavit sworn by the 1st respondent. She depones that the application was filed by a stranger as the advocates who filed the motion never sought leave to come on record in place of the previous advocates. That the applicant's allegation that he was prevented from pursuing the appeal on account of not being made aware of the judgment was spurious and without any evidence to back it up. That in any event, the intended appeal lacks merit and the delay in bringing the instant application was inordinate. That whilst it is true that this Court on applications of this nature has wide and unfettered discretion, however, the exercise of such discretion has to be judicious and not capricious. The least that the applicant could do is to allow the respondents to benefit from the fruits of their judgment.
7. The application was canvassed by way of written submissions only and without appearance by counsel. In her written submissions filed by Messrs Kagna & Co. advocates, the applicant submitted that Rule 4 of this *Court's Rules* clothes this Court with discretion to extend time limited by the rules of the court for the doing of an act. Relying on the principles set out in the following cases, *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR, *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR and *Sokoro Savings and Credit Cooperative Society Ltd* [2023] KECA 381 (KLR), counsel maintained that the application had met the threshold. That the conduct of the applicant was such that it could not impugn the exercise of the Court's discretion in her favour, that she had conceded to the delay and given valid reasons for her inaction and that the delay was in any event not inordinate. Counsel submitted further that the application was lodged without undue delay and consequently, the respondent would suffer no prejudice if the extension is granted. On arguability of the intended appeal, it was submitted that indeed the intended appeal was not frivolous but arguable. Finally, counsel submitted that mistakes of counsel should not be visited upon an innocent litigant.
8. Responding, Mr. Geoffrey Okoth, learned counsel for the respondent submitted that the applicant had failed to show that her conduct brought her under the auspices of the principles of granting of extension of time. That the applicant's conduct as set out in the respondent's replying affidavit denied her from benefitting from those principles. That there was downright and brazen disregard of the timelines on the part of the applicant as confirmed by her failure to offer reasonable explanation for the delay and the explanation at all was not plausible. That in any event the application was incompetent as it was filed by an advocate who was not properly on record. Because of all these infractions, counsel submitted that the applicant was disqualified from the enjoyment of the discretionary powers of this Court.



9. I have carefully read and considered the application, the grounds and affidavit in support thereof, the respondent's replying affidavit, rival submissions and the law and this is my take! Extension of time is governed by Rule 4 of the [Court of Appeal Rules](#). 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.

10. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, in which it was held as follows:

It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.

11. In the instant application, the impugned judgment was delivered on 7th November 2024. The present application was filed on 17th December 2024, 2024, about forty-one (41) days later. To my mind this cannot be termed as inordinate delay. The explanations given by the applicant are plausible contrary to the submissions by the respondents. The events that took place signal the fact that they were beyond the control of the applicant. Or even if they were, they should not be visited upon an innocent applicant.

12. As stated in the case of [Philip Keipto Chemwolo & Anor v Augustine Kubende](#) [1986] KECA 87 (KLR):

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on merit ”

13. In my view therefore, the applicant has explained to my satisfaction the delay and the reasons for the delay.

14. I have looked at the grounds in the draft memorandum of appeal filed and I can say that they are not frivolous. Though the respondents claim that allowing this application will seriously prejudice them and prolong their suffering as they will be locked out of enjoying the fruits of their judgment, but this will be momentarily or temporary set-back or hiatus.

15. Turning to whether the application is incompetent having been filed by an advocate who was not properly on record, I note that in the ELC proceedings, the applicant was represented by Messrs M.I Advocates up to the judgment. However, this application was filed by Messrs Kagna & Co advocates. According to the respondents this was irregular as counsel for the applicant ought to have complied with the requirements of Order 9 rule 9 of the [Civil Procedure Rules](#) which is in terms that, an advocate who comes on record post judgment must seek leave of court to do so or at file a consent in court between the exiting advocate and the incoming advocate allowing the current advocate to come on record. However this was not done and accordingly the application as filed was incompetent having been filed by a stranger to the proceedings. I do not think this is entirely correct proposition. Proceedings in this court are new proceedings and therefore the above requirement is inapplicable.



What matters in this Court is the filing of a Notice and thereafter Rule 23 of the [Court of Appeal rules](#) which deals change of advocates kicks in. In my view therefore, this application is competent contrary to the submissions by counsel for the respondents.

16. In the ultimate, the applicant has brought herself within the equitable embrace of Rule 4 of the [Court of Appeal Rules](#). Consequently, the application dated 26th November, 2024, is for allowing, and I hereby do so. Costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

