



**Khaminwa v Spiga & 6 others (Civil Appeal (Application)
68 of 2020) [2025] KECA 1308 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1308 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) 68 OF 2020
GWN MACHARIA, JA
JULY 18, 2025**

BETWEEN

DR JOHN MUGALASINGA KHAMINWA APPLICANT

AND

PAOLO SPIGA 1ST RESPONDENT

GIAFRANCO MARIA SANTUCCI 2ND RESPONDENT

ESTELLA COMPANY LIMITED 3RD RESPONDENT

ESTELLA DUMINGA FURULI 4TH RESPONDENT

ANGELO 5TH RESPONDENT

ILARIO BARBIERI 6TH RESPONDENT

SERGIO BATTIST 7TH RESPONDENT

*(Being an application for extension of time to serve Notice of Appeal of
Civil Appeal No. 68 of 2020 upon the 4th, 5th and 7th Respondents)*

RULING

1. The applicant filed a Notice of Motion dated 12th July 2023 which is brought under Rule 4 of the Court of Appeal Rules, 2010, Order 50 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, seeking enlargement of time for the applicant to effect service of his Notice of Appeal upon the 4th, 5th and 7th Respondents; and that the costs of the application be in the cause.
2. The application is supported by the grounds on the face of it and the supporting affidavit sworn by the applicant. He contends that, by an order of this Court dated 26th May 2023, he was directed to serve the 4th, 5th and 7th Defendants within thirty (30) days which could not be possible due to factors beyond his



- control; that he forwarded the hearing notices to the Ministry of Foreign Affairs; and that the Ministry in turn forwarded them to the Kenyan Embassy in Rome for service to the respective respondents who live outside the Court's jurisdiction, namely in Italy.
3. A replying affidavit dated 18th August 2023 was filed by Muli & Ole Kina Advocates on behalf of the 1st and 2nd Respondents. Counsel deposed that the delay in serving the afore-stated respondents was inordinate, and that the respondents herein filed the suit way back in April 2009 which has not been heard for the reasons that it is stuck with service of a counterclaim and now the application for extension of time to serve a notice of appeal which exacerbates the situation; that no sufficient reason has been given for the delay in effecting service as directed by the Court; that the 1st and 2nd respondents are the owners of the suit premises and have been locked out from enjoying the benefits of their investment since August 2008; and that the instant application is no longer reasonable, is an abuse of the court process and should be dismissed with costs.
 4. The applicant filed written submissions dated 26th in 2023 but in a month that I am not able to deduce from the way it is inscribed. It is contended that Order 5 Rules 21(a) & (b), 25, 27 and 29 of the Civil Procedure Rules, 2010 demand that the actual service be done by the Ministry of Foreign Affairs and that, therefore, the applicant had no control of the process of service and could not therefore be blamed for the delay in service. He relied on this Court's cases of Chumo vs. Koech (1991) KLR 11 which underscores that a litigant cannot be punished for the mistake of counsel; and that, as a counsel, he wholly relied on the Ministry of Foreign Affairs to effect the service, and hence his hands are tied; and Mwioko Housing Co limited vs. Equity Building Society (2000) eKLR where this Court in an application for extension of time held that the reason for delay had to be explained; and that in this instance, he had explained the delay which has been occasioned by circumstances beyond of his control.
 5. At the hearing of the application on 22nd May 2025, there was no appearance for counsel for the 1st and 2nd Respondents despite having been served with a hearing notice. No submissions were also filed on behalf of the two respondents.
 6. Counsel for the applicant, Dr. Khaminwa, basically emphasized the reasons as to why the Notice of Appeal had not been served upon the 4th, 5th and 7th Respondents; that this was occasioned by the difficulty encountered with the Kenyan Embassy in Rome, which is expected to assist with service in Italy. He sought additional time of between 60-100 days, sighting geographical challenges and unresponsiveness of the Kenyan Embassy in Rome.
 7. The Court enquired on the status of the prior service efforts to which Dr. Khaminwa reiterated that the previous attempts to effect service had been unsuccessful, consequent to which he was seeking the extension of time.
 8. I have considered the application and the grounds on which it is anchored. Rule 79(1) of the Court of Appeal Rules, 2022 mandates that 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.
 9. The genesis of the present application is the ruling delivered by G.V. Odunga, JA. on 26th May 2023 in Civil Appeal (Application) No. 68 of 2020 in which the Applicant sought extension of time to serve the Notice and Record of Appeal upon the 3rd to 7th Respondents. It was contended therein that these respondents had not been served previously due to difficulties in locating them, some of whom are Italian nationals residing outside Kenya while the location of the 3rd Respondent's office was unknown. The Applicant sought to serve the 3rd Respondent via newspaper advertisement and the 4th, 5th, and 7th respondents through service outside the jurisdiction.



10. The 1st and 2nd Respondents opposed the application, arguing that it was an abuse of the court process and that it was not supported by sufficient cause.
11. The learned Judge emphasized the need to ensure justice is served by involving all parties that are directly affected by the intended appeal. He noted that although the applicant had failed to meet all legal thresholds for substituted service, an earlier ruling by the High Court had already allowed such service, and that circumstances had not changed significantly. He highlighted the guiding principles for granting extension of time and substituted service, including absence of undue delay, prejudice to respondents, and the potential merit of the appeal. He concluded that strict compliance with procedure must be balanced with the need to give all parties an opportunity to be heard. Ultimately, the learned Judge granted the Applicant a 30-day extension to serve the Notice of Appeal, and permitted the requested modes of service, being: advertisement for the 3rd Respondent and service outside Kenya for the 4th, 5th, and 7th Respondents.
12. It is worth noting that the 30 days' period starting from 1st June 2023 were to expire on the midnight of 30th June 2023. It was not until 23rd June 2023, 7 days to the expiry of the prescribed period that the Applicant wrote to the Ministry of Foreign Affairs which replied on 30th June 2023 within a time frame of 7 days. The 3rd Respondent was also served on 8th June 2023 way after the expiry of the 30 days prescribed period. No explanation was given as to why there was delay in serving the 3rd Respondent.
13. There can be no doubt that the exercise of discretion that I have under Rule 4 of this Court's Rules, 2022, albeit that the Applicant brought the application under the 2010 Rules which are no longer applicable, is unfettered and does not require establishment of "sufficient reasons". Nevertheless, it ought to be guided by consideration of factors stated in many 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 if the application is granted, and whether the matter raises issues of public importance, amongst others – See *Fakir Mohamed vs. Joseph Mugambi & 2 others* (2005) eKLR. There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.
14. As at the time of hearing, counsel for the Applicant had not produced any evidence of continued follow up with the Ministry of Foreign Affairs regarding the position of the service in Italy. He only said that there was delay in getting communication from the Kenyan Embassy in Rome.
15. The Supreme Court in *County Executive of Kisumu vs. County Government of Kisumu and others* (Civil Application No. 3 of 2016) KESC 16 (KLR) (Civ) (12 April 2017) stated:

“Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as: “the under-lying principles that a Court should consider in exercise of such discretion:

 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
16. I have perused the documents annexed to the application, which are; Order issued 31st May 2023 pursuant to the ruling by Odunga, JA. of 26th May 2023, a copy Star Newspaper page dated 8th June 2023 but whose content I am not able to read, a copy of a letter dated 23rd June 2023 to the Ministry of Foreign Affairs and a copy of a letter dated 30th June 2023 from the Ministry of Foreign Affairs acknowledging forwarding the request to the Kenyan Embassy in Rome to assist in the service. The applicant has explained that the failure to serve the Notice of Appeal was neither deliberate nor inordinate. He stated that the Kenyan Embassy in Rome took long to respond.
17. I have also taken note of the 1st and 2nd Respondents’ reply to the application to the effect that there is a pending suit which was filed way back in April 2009 which has not been heard due to the delay in serving the counterclaim and now the Notice of Appeal; and that the suit premises belong to the 1st and 2nd Respondents and has remained locked up since August 2008, and is being wasted.
18. Taking into consideration all factors cumulatively, I shall exercise the inherent discretion conferred on me in favour of the applicant. I hold this view bearing in mind that the failure to serve may have been inadvertent and not deliberate, more so considering that the applicant is dependent on another party, being the Ministry of Foreign Affairs to effect service. See *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR in which this Court held thus:
- “As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of this parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”
19. On the Principle that service must be effected and having underscored the circumstances obtaining in this matter, I find that this an application for allowing. I extend the time within which the Applicant shall effect service of the Notice of Appeal upon the 4th, 5th and 7th Respondents. The service shall be effected within 60 days of the date of this ruling. Costs shall be in the cause.
20. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 2025.

G.W NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original



Signed

DEPUTY REGISTRAR

