Leipoi v Kesaika (The Legal Representative of the Estate of the Late Koinasei ole Kitaika) (Civil Application E497 of 2024) [2025] KECA 1326 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1326 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E497 OF 2024

DK MUSINGA, JA

JULY 18, 2025

BETWEEN

KASEENCHA OLE LEIPOI ..... APPLICANT

AND

D SEPEIKAN KOIWASEI KESAIKA ..... RESPONDENT

THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE KOINASEI OLE KITAIKA

(Being an application for extension of time to file and serve a notice of appeal and record of appeal out of time from the Ruling of the Environment and Land Court at Kajiado (Komingoi, J.) delivered on 2nd November 2023 in ELC Appeal Case No. 19 of 2019)

RULING

1. The applicant's notice of motion dated 30th September 2024 seeks extension of time for the filing and service of notice of appeal from the ruling of the Environment and Land Court at Kajiado (Komingoi, J.) delivered on 2nd November 2023. In his affidavit in support of the application, the applicant states that being dissatisfied with the judgment of the Chief Magistrates' court dated 8th August 2019 which related to a land dispute, he preferred an appeal to the Environment and Land Court (ELC), which appeal was dismissed on 2nd November 2023; that he was dissatisfied with the said decision; that he is a person of humble financial means and he did not have sufficient resources to file an appeal in time; that he believes his intended appeal is arguable; and that unless the leave sought is granted, he will suffer irreparably as he will not be able to challenge the impugned decision.

2. The respondent did not file an affidavit in response to the application but filed submissions. The respondent argues that the applicant did not take any steps to file a notice of appeal within the stipulated statutory period or to pursue an appeal in accordance with the law. The respondent also argues that the application is incompetent because it has been filed by an advocate who is not properly

on record as he was not the one who acted for the applicant in the first appellate court. He cited Order 9 rule 9 of the Civil Procedure Rules, 2010 in that regard. This ground is not meritorious since under the rules of this Court, an advocate who has not acted for a party in the lower court may be instructed to file an appeal before this Court as these are different proceedings and therefore the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010 are not applicable.

3. This Court in Tobias M. Wafubwa v Ben Butali [2017] eKLR, held;

> " ...Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate."
>
> The court went further to state;
>
> "As this dispute concerned an appeal from the Principal Magistrate's Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the Respondent's counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the court to be placed on record."

4. I have considered the application and the supporting affidavit thereto as well as the respondent's submissions.

   The applicant did not file any submissions and if he did, they are not on record.

5. The principles that guide this Court in an application for extension of time to file an appeal were well considered by the Supreme Court in Nicholas Kiptoo Arap Salat vs IEBC & 7 Others [2014] eKLR. The Court stated:

> " The underlying principles a court should consider in exercise of such discretion should include:
>
> 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."

6. The impugned judgment was delivered on 2nd November 2023 and no action was taken by the applicant until 30th September 2024, a delay of almost eleven (11) months.

That kind of delay is inordinate. No sufficient explanation has been advanced by the applicant for that inordinate delay. It is not sufficient for an applicant to state that he did not have financial resources to mount an appeal. It is well known that litigation is expensive, and once a person has chosen to move to court, he must be prepared to bear all the necessary attendant costs of that litigation. The applicant did not state that he was incapable of filing a notice of appeal in person, if at all he did not have financial resources to engage an advocate to do so on his behalf.

7. In Andrew Kiplagat Chemaringo vs 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."

8. Having found that there was inordinate delay that was not properly explained, I have no basis to consider the other factors. But even if I were to do so, having perused the impugned judgment and the draft memorandum of appeal,

   I am not persuaded that the intended appeal has good chances of success.

9. In regard to prejudice that may be suffered by the respondent if this application is allowed, it is a trite principle of law that litigation must come to an end. It is not in the interest of justice to grant leave to a party to institute a second appeal out of time in the circumstances as highlighted here above.

10. All in all, I find this application lacking in merit and dismiss it with costs to the respondent.

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

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.