Mutugi & another (Suing as the Legal Representatives of Samuel Mugera Mutugi (Deceased)) v Oewa & another (Civil Application E073 of 2021) [2025] KECA 1329 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1329 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPLICATION E073 OF 2021

GWN MACHARIA, JA

JULY 18, 2025

BETWEEN

MICHAEL KARIUKI MUTUGI ..... 1ST APPLICANT

LUCY MONICA WANJIRU ..... 2ND APPLICANT

SUING AS THE LEGAL REPRESENTATIVES OF SAMUEL MUGERA MUTUGI (DECEASED)

AND

JOHN OCHIENG OEWA ..... 1ST RESPONDENT

RAJAB ALI ..... 2ND RESPONDENT

(Being an application under Rules 4, 41 and 75(1) of the Court of Appeal Rules for extension of time to file and serve Notice of Appeal from the Judgement of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) dated 6th December 2019 in Civil Suit No. 70 of 2015)

RULING

1. By a Notice of Motion dated 20th August 2021 brought under Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9, Laws of Kenya and Rule 4 of the Court of Appeal Rules, 2010, the applicants seek orders that: this Court be pleased to grant an extension of time for the applicants to file and serve the Notice of Appeal in the intended appeal out of time; costs of the application do abide the results of the intended appeal; and for any other order that the Court deems fit and just to grant.

2. The background to the application is that in Mombasa High Court Civil Appeal No. 70 of 2015, the Respondents, John Ochieng Orwa and Rajab Ali, challenged a trial court decision that found them fully liable for a fatal road accident and awarded Kenya Shillings One million Five Hundred and Ninety Thousand and Twenty (Kshs.1,590,020) in damages to the Applicants, who were the legal

representatives of the deceased, Samuel Mugera Mutugi. They contested the Judgment, arguing that there was insufficient evidence proving negligence on their part, and that the trial court erred both in apportioning liability and determining damages. They maintained that no eyewitness testified as to the occurrence of the accident; that the burden of proof was improperly shifted upon them; and that the income basis used to calculate loss of dependency was unproved and excessive.

3. On appeal, P.J.O. Otieno, J. found that the learned trial Magistrate had indeed erred by concluding that the respondents were liable without sufficient evidence from the Applicants to support this finding; that the only direct evidence regarding the accident was from a police abstract which indicated that the matter was still under investigation, but that it did not conclusively establish fault; that the applicants failed to prove negligence on a balance of probabilities, a requirement under civil law; and that the doctrine of res ipsa loquitur was not pleaded, which might have aided the applicants' case. Consequently, the High Court allowed the appeal, set aside the trial court's judgment on liability, and awarded costs to the respondents.

4. The application is supported by the grounds on its face and the affidavit of Michael Kariuki Mutugi, the 1st applicant sworn on 20th August 2021. In summary, he deposes that they were notified of the outcome of the Judgment in good time, but that the delay in filing a notice of appeal and the appeal was occasioned by economic hardship, and that the Covid-19 pandemic had made things worse; that, as a result, they could not mobilise even the required finances to enable them file the instant application; that the intended appeal raises serious issues that require to be determined by the Court, more particularly being that since the dispute is as a result of an injury, this Court needs to determine which driver, between the two who were involved in the accident, was to blame; that no prejudice or miscarriage of justice will be occasioned to the respondent if the application is allowed; that once the application is granted, the applicants will pursue the appeal with diligence to its logical conclusion.

5. It is also the applicants' assertion that by a letter dated 20th August 2020, they have already requested for certified copies of the proceedings for purposes of preparing the record of appeal which is annexed to the application. They have also annexed to the application a copy of the impugned Judgment dated 6th November 2019 and an undated and unsigned draft memorandum of appeal.

6. The application is strenuously opposed by way of a replying affidavit sworn on 20th December 2024 by John Ochieng Orwa, the 1st applicant. He deposes that the impugned Judgement was delivered on 6th December 2019; that no notice of intention to appeal was served upon them until 30th November 2024 when the present application was served upon his advocates, which was sixty (60) months after the conclusion of the suit; that the instant application was filed on 21st October 2021 and its service was effected on 30th November 2024; that the delay in filing the notice of appeal is inordinate given that no reasonable explanation was given; that in any case, the cost for filing a notice of appeal is only Four hundred and fifty Kenya shillings only (Kshs.450); that the letter requesting for copies of typed proceedings does not attract any charges; that therefore, it is a mere excuse that the notice of appeal was not filed because of economic hardships; and that, consequently, the application should be dismissed.

7. To further support their application, the applicants filed a further affidavit dated 16th May 2025 and written submissions dated 3rd December 2024. On the ground of delay, they argue that the delay is excusable in that it was unforeseen and beyond their control, blaming the financial difficulty occasioned by the Covid-19 pandemic. They stated they have an arguable appeal based on the draft memorandum of appeal. They relied on the case of Nicholas Kiptoo Arap Korir Salat vs. Independent Electrol and Boundaries Commission & 7 others 2014 eKLR where the Supreme Court outlined the principles to be considered in an application for extension of time.

8. The respondents too filed written submissions dated 15th January 2025 detailing all the aspects of the delay; that judgment was delivered on 6th December 2019; that the application for extension of time was filed 22 months after judgment; that the application was served 59 months after Judgment and 37 months after it was filed; that it only costs Kshs.450 to file a notice of appeal; that the letter requesting for typed copies of proceedings was not filed within 30 days; that the overriding objective under Sections 3A and 3B of the *appellate Jurisdiction Act* and Article 159 of *the Constitution* is that matters should be determined without delay; and that the delay of 59 months in serving the application was inordinate. Reliance was placed on the case of Manyasa vs. Chairman Secretary, Board of Management Our Lady of Mercy Girls Secondary School Civil Application No. 194 of 2020) (2021) KECA 9 KLR for the proposition that lack of funds is not sufficient cause for inordinate delay.

9. I heard the application on 22nd May 2025. Learned counsel Mr. Githinji appeared for the Applicants while learned counsel Mr. Jengo appeared for the respondent. Each counsel highlighted the respective parties' submissions which, for all intent and purposes were a regurgitation of the averments in support of, and in opposition to, the application. I shall therefore not restate the oral highlights.

10. I have accordingly considered the application, the respective oral and written submissions and the law.

11. This Court in Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] KECA 701 (KLR) while quoting Wasike Vs. Swala [1984] KLR 591 stated:

> "As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors: -
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> a. That there is merit in his appeal.
>
> b. That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and
>
> c. That the delay has not been inordinate."

12. I find that the Applicants have not met the threshold for grant of the orders sought, as they averred that they were notified of the outcome of the Judgment in time but blamed the delay on financial distress which they did not substantiate to this Court. Just but to restate facts as submitted by the respondents: the impugned judgment was delivered on 6th December 2019; the application for extension of time was filed 22 months after the judgment; the application was served 59 months after Judgment and 37 months after it was filed; it only costs Kshs. 450 to file a notice of appeal; and the letter requesting for typed copies of proceedings was not filed within 30 days.

13. Clearly, from this chronology, applicants are guilty of laches at every step that they were required to do something. During the hearing, I put learned counsel Mr. Githinji to task to explain why, even what was required to be done without finances, was not done. I also put him to task to demonstrate evidence of impecunity of the applicants as well as what steps had been taken to mitigate this. While I acknowledge that an advocate represents the client's interests, no forthright answer was forthcoming, yet counsel was expected to have had the full brief to these answers. On this score, I conclude that the delay is not only inordinate, but also not unexplained. These are two cardinal bases upon which the Court exercises its discretion in granting an application of this nature. For sure, a delay of close to two years is inordinate in the circumstances, more so given the fact that the cost of filing the notice of appeal is only Kenya Shillings Four Hundred and Fifty (Kshs.450).

14. It must also be emphasised that a court ought to balance justice not just for one party, but for all parties in the litigation. Dilatory conduct of a litigant must be discouraged at all costs. It is a catalyst for denial

of justice to those who come to court knowing too well that litigation has an end. A case belongs to a party, and when a party is indolent in doing even the minutest of the task required of him/her, it cannot expect clemency from the court.

15. This is a case that is laced with laches all through as a result of the applicants' dilatory conduct. Importantly, the applicants did not even attempt to undertake activities that did not require money, for instance writing a letter requesting for typed proceedings timeously. This is not one case where I can extend leniency to the applicants even under Article 159(2)(b) of *the Constitution*.

16. This Court in Mae Properties Limited vs. Joseph Kibe & another [2017] KECA 238 (KLR) stated;

> "We do so alive to the need for expedition in the pursuit of justice. We frown upon indolence and dilatoriness. We still hold the view we expressed in Martin Kabaya vs. David Mungania Kiambi Nyeri Civil Application no 12 of 2015;
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> "The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog."

17. As was held in the case of Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others [2013] eKLR by Kiage, JA, courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the "process of judicial adjudication and determination fair, just, certain and even-handed...."

18. Further, the Supreme Court in the case of Raila Odinga & 5 Others vs. IEBC & 3 Others Petition 5/2013 SC [2013] eKLR, also held that Article 159 (2) (d) of *the Constitution* is not a panacea for all procedural shortfalls, "...it is plain to us that Article 159(2) (d) is applicable on a case to case basis."

19. It follows that this an application destined to fail. I find that the Notice of Motion dated 20th August 2021 is devoid of merit and is hereby dismissed with costs to the respondents.

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