Kipkemboi ((Suing as the Administrator of the Estate of Kibet Arap Ngisieri – Deceased)) v Jepkemboi & another (Civil Application E006 of 2025) [2025] KECA 1272 (KLR) (11 July 2025) (Ruling)

Neutral citation: [2025] KECA 1272 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPLICATION E006 OF 2025

WK KORIR, JA

JULY 11, 2025

BETWEEN

JULIUS KIPKEMBOI ..... APPLICANT

(SUING AS THE ADMINISTRATOR OF THE ESTATE OF KIBET ARAP NGISIERI – DECEASED)

AND

JANE JEPKEMBOI ..... 1ST RESPONDENT

BETHWEL K. LIMO ..... 2ND RESPONDENT

(Being an application for leave to file an appeal out of time against the judgment of the Environment and Land Court at Kapsabet (M. Mwanyale, J.) dated 3rd October 2024 in E&LC Case No. E004 of 2023)

RULING

1. In the notice of motion dated 21st January 2025, the applicant seeks enlargement of time to file a record of appeal. The application is grounded on the reasons adduced therein and the affidavit sworn by the applicant in support of the application. In summary, the applicant avers that upon the delivery of the judgment by the Environment and Land Court on 3rd October 2024, he instructed his erstwhile counsel, Mr. Moses Kipyego Rotich, to file an appeal and paid the requisite fees, consequent to which a Notice of Appeal dated 15th October 2024 was filed.

   However, the advocate did not file the record of appeal in time despite having instructions to do so. It was only on 17th January 2025 when, upon visiting the advocate's chambers, he was informed that the appeal had not been filed. It is the applicant's case that the failure to file the record of appeal on time was due to a mistake by counsel, which mistake should not be visited upon him. Further, that he has moved the Court without unnecessary delay.

2. The respondents oppose the application through a replying affidavit sworn by the 1st respondent. They term the application as meritless, frivolous, misplaced and a gross abuse of the court process. According to the respondents, the application is an afterthought and a knee-jerk reaction that does not meet the threshold for granting the orders sought. They aver that the applicant slept on his laurels and only reacted upon receiving a letter from the surveyor dated 14th January 2025 notifying him of a visit to the suit parcel to conduct survey works. The 1st respondent further avers that the applicant failed to comply with directions issued on 24th January 2025, requiring service of the application within three days and instead served it on 29th January 2025, outside the stipulated period. Additionally, the respondents contend that the prayers sought in the application are vague, hence not capable of being issued. They also fault the applicant for improperly changing advocates and further contend that the intended appeal has been overtaken by events.

3. This application was heard by way of written submissions. Both the applicant and the respondents duly filed their respective submissions, which I highlight hereunder.

4. Through submissions dated 11th February 2025, counsel for the applicant argued that the delay was occasioned by the mistake of counsel and the mistake should not be visited upon the applicant. To buttress this point, counsel relied on *Philip Kiptoo Chemwolo & Another v Augustine Kubende* [1980] KLR 495. Counsel also submitted that the intended appeal is arguable and that the respondents will not be prejudiced should the application be allowed. In rebuttal to the alleged change of advocate without the filing of a notice to that effect as required by rule 23 of the *Court of Appeal Rules*, counsel submitted that there was no change of advocate in this case.

5. For the respondents, the firm of Cheruiyot & Co. Advocates filed submissions dated 18th February 2025 in opposition to the application. Counsel reiterated the grounds of opposition and urged that the intended appeal has been overtaken by events. Counsel submitted that the application lacks merit and that the orders sought are ambiguous, hence incapable of being granted by the Court. Additionally, counsel urged for the dismissal of the application on the ground that the applicant's counsel is not properly on record as there is no notice of change of advocate contrary to rule 23(1) of the *Court of Appeal Rules* which

requires that a notice should be field whenever there is a change of advocate.

6. On the question as to whether the applicant did not comply with rule 23(1) of the *Court of Appeal Rules*, I agree with the applicant that there has been no change of advocate in this application to warrant compliance with the said rule. I therefore find no merit in the respondent's opposition to the application on this ground.

7. Now turning to the merits of the application, the principles governing the exercise of the discretion for enlargement of time were expressed by the Supreme Court in *Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] KESC 12 (KLR) as follows:

> " This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
>
> 1. 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;
>
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

8. Guided by the stated principles, I have reviewed the application as well as submissions by counsel for the parties. In my view, the issue for determination is whether the delay in filing the appeal has been satisfactorily explained and, if so, whether the respondents will be prejudiced if the time for filing an appeal is enlarged.

9. According to the applicant, the delay in filing the appeal was occasioned by the mistake of his former counsel. The applicant further avers that he made the requisite payment to counsel and that he only became aware of the failure to file the appeal on 17th January 2025. In *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio, Patrick K. Mulisho, Mohamed Godhana & Amos Amitai* [2015] KECA 674 (KLR), the Court while addressing the question as to how the courts should treat the mistake of counsel held that:

> " From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it
>
> affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic."

10. That the period of delay is not provided and it is only the reason for the delay that must be satisfactory was explained in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR as follows:

> " 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."

11. In the present application, the impugned ruling was delivered on 3rd October 2024, and a notice of appeal was filed on 15th October 2024. The record of appeal, therefore, ought to have been filed by around 15th December 2024. The present application being dated 21st January 2025, the delay period was about 20 days considering the Christmas recess period (21st December 2024 to 7th January 2025). In my view, the reasons advanced by the applicant and the delay period of about 20 days is excusable.

12. The next question is whether the respondents will be prejudiced if time is enlarged. I hear the respondents contend that the judgment has been executed, and seemingly, the intended appeal has been overtaken by events. Knowing that an order of enlargement of time or the filing of an appeal does not act as an

order of stay, unless expressly provided, I see no prejudice or anything barring the respondents from proceeding with execution. The fact that a judgment has been executed does not mean that a deserving

party should be denied an opportunity to ventilate their grievances through the appellate process in deserving cases, like the present one.

13. Flowing from the foregoing, I am satisfied that the present application has merit and is hereby allowed. The applicant shall file and serve the record of appeal within 30 days from the date of the delivery of this ruling. The costs for the application shall be in accordance with the order on costs in the intended appeal.

14. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2025

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR