



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oramisi v Kungu (Civil Application E123 of 2023)  
[2024] KECA 507 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 507 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E123 OF 2023  
HA OMONDI, JA  
APRIL 26, 2024**

**BETWEEN**

**SUSAN MILKA ORAMISI ..... APPLICANT**

**AND**

**JAMES MBUTI KUNGU ..... RESPONDENT**

*(An application for extension of time to file and serve Notice of Appeal from the decision of Kakamega Environment and Land Court dated 26<sup>th</sup> July 2018 in \*\*Case No. 51 of 2014)*

**RULING**

1. The application dated 20<sup>th</sup> September 2023 is brought pursuant to rule 4 [Court of Appeal Rules](#), 2010; and seeks that this Court be pleased to extend time within which to file appeal against the judgment in Kakamega ELC case no. 51 of 2014; and that costs abide the outcome of the intended appeal. The application is supported by an affidavit of even date sworn by Susan Milka Oramisi, the applicant.
2. The applicant had filed a suit against the respondent in Kakamega ELC No. 51 of 2014; however, the nature of the claim, and reliefs sought remain unknown as no copy of the judgment has been annexed. Judgment was delivered on 26<sup>th</sup> July 2018, but the applicant claims to have been unaware of delivery of the said judgment, as she had been unwell for almost 5 years; and could not adequately instruct her counsel to pursue an appeal. The applicant is apprehensive that she stands to suffer prejudice and financially, in the event that she is not allowed to pursue the intended appeal.
3. There is no Replying Affidavit or written submissions filed by the respondent.
4. Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso vs. Rose Wangari Mwangi* Civil Application No. Nai. 255/97 (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in [Julius Kamau](#)



*Kithaka vs. Waruguru Kithaki & 2 Others* (2013) eKLR. Discretion also depends on circumstances of each case as per *Mongira & Another vs Makori & Another* [2005] eKLR.

5. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR sets down these principles as follows:
- i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
  - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
  - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case- by-case basis.
  - iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
  - v. Whether there will be any prejudice suffered by the respondent if extension is granted.
  - vi. Whether the application has been brought without undue delay.
  - vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of Julius Kamau Kithaka (*supra*) is whether *prima facie* the intended Appeal/Appeal has chances of success or is a mere frivolity.

6. In the present application, the applicant has not availed the contested judgment nor filed any submissions, so that as matters stand, this application is actually unprosecuted. In any event, the applicant only states that she was unaware of the judgment as she was unwell for around 5 years. However, there is no evidence to that effect in the form of a doctor's note or medical/treatment records, to show the extent and gravity of her illness.
7. The upshot is that the applicant has failed to meet and satisfy the principles set out for this Court to exercise its discretion in her favor and grant the extension. The delay in serving the Record of Appeal has not been explained satisfactorily for this court to exercise its discretion in the applicant's favor; and the application is dismissed.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

