



REPUBLIC OF KENYA



**Sang & another v Igare Auctioneers Limited & 2 others (Civil Application  
E115 of 2023) [2024] KECA 623 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 623 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E115 OF 2023  
FA OCHIENG, JA  
MAY 24, 2024**

**BETWEEN**

**SAMWEL KIPRONO SANG ..... 1<sup>ST</sup> APPLICANT**

**PETER KIPLANGAT RONO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**IGARE AUCTIONEERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**AFRICAN BANKING CORPORATION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**DAVID KIPRUTO RONO ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time to file Notice of Appeal and Memorandum of Appeal out of time from the judgment of the Environment and Land Court at Kericho (M. C. Oundo, J.) delivered 19th October 2023 in ELC Case No. 137 of 2017)*

**RULING**

1. Before me is an application dated 14<sup>th</sup> November 2023, in which the applicants seek leave to file the Notice of Appeal, the Memorandum of Appeal, and the Record of Appeal, out of time.
2. The applicants have expressed a desire to lodge an appeal against the judgment that was delivered on 19<sup>th</sup> October 2023.
3. The application is supported by an affidavit sworn by Johnson Mitey, Advocate, who practices as such at the Law Firm of J. K. Bosek & Co. Advocates, which is the firm representing the applicants.
4. The deponent stated that on 1<sup>st</sup> December 2023, his firm was served with the following documents, through email;

# An order issued on 28<sup>th</sup> September 2023 (Attached and Market ‘SPL1’ is a copy of the Order.



A Bill of Costs dated 24<sup>th</sup> September 2023. A notice of Motion dated 24<sup>th</sup> September 2023. Copy of a judgment delivered on 19<sup>th</sup> October 2023 in Kericho Environment and Land Court Case No. 137 of 2017. (Attached and marked ‘SPK2’ is a copy of the judgment).” Counsel deponed that the applicants’ advocates were never served with a Notice indicating that the judgment would be delivered on 19<sup>th</sup> October 2023. In answer to the application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit which was sworn by Faith Nteere, who is the 1<sup>st</sup> respondent’s legal Manager. The affidavit was sworn on 19<sup>th</sup> February 2024. The two respondents confirmed that they served the applicants’ advocates with the documents set out above, by the applicants. However, the respondents categorically denied the applicants’ contention that the notice for the judgment had not been served upon them. It was the respondents’ case that the notice for the judgment, which was dated 31<sup>st</sup> July 2023 was duly served upon the applicants. In an endeavour to support their said contention, the respondents’ annexed a copy of the notice for the judgment, together with an extract of the email which was used to transmit the said notice. The application was canvassed by way of written submissions.

10. On their part, the applicants reiterated that the reason for the delay in filing the notice of appeal was the fact that they were not served the notice for judgment. As a consequence, the applicants remained unaware of the judgment until 1<sup>st</sup> December 2023.
11. In a nutshell, the applicants held the view that they had proffered a plausible explanation for the delay in lodging the notice of appeal.
12. The applicants also urged the court to find that they took reasonable steps, within the shortest time after learning about the judgment. In a manner of speaking, the applicants feel that their application was filed without undue delay, having been lodged 14 days from the date when the applicants first became aware of the judgment.
13. On the other hand, the respondents were convinced that the applicants were guilty of laches, contrary to the doctrines of equity.
14. The parties’ respective positions on this matter are diametrically opposed. When called upon to make a determination in an application for an extension of time, the court has an unfettered discretion. As ably spelt out in the case of *Mwangi vs Kenya Airways Ltd* [2003] KLR 486;

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

15. As the judgment was delivered on 19<sup>th</sup> October 2023, the applicants ought to have lodged their notice of appeal within 14 days from that date. By my calculations, the applicants had until 2<sup>nd</sup> November 2023, to lodge the notice of appeal.
16. It is trite that there is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant to the leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In the case of *Andrew Kiplagat Chemaringo v 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.”

17. Therefore, if the applicants were not aware of the judgment until 1<sup>st</sup> December 2023, they could not have filed the notice within the prescribed time.
18. But in this case, I must first address my mind to the issue concerning whether or not the applicants were duly notified about the date when the judgment would be delivered. I so find because if the applicants had prior information of the date for judgment, they ought to have attended court on the scheduled date; and they should then have filed a notice of appeal timeously. The email address provided by the applicants’ advocates is; “miteylegal@gmail.com”.
19. That is the address appearing on the face of the documents filed by the applicants.
20. That is the same address appearing on the extract of the email dated 31<sup>st</sup> July 2023. I note that the applicants remained silent when faced with the replying affidavit, through which the respondents said that their advocates had served them with the notice for the judgment.
21. In the circumstances, the only conclusion that I can derive from the material placed before me is that the applicants were duly served with the notice for the judgment. Accordingly, I find no justifiable reason for the delay in lodging the notice of appeal on time.
22. In the result, the application for an extension of time to file a Notice of Appeal is without merit and is hereby dismissed. The applicants will pay the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the costs of the application.

**DATED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

