



REPUBLIC OF KENYA



**Isatsiro v Mary & 2 others (Civil Application E005 of 2024)
[2024] KECA 657 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 657 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E005 OF 2024
HA OMONDI, JA
JUNE 7, 2024**

BETWEEN

DAVID AMAYI ISATSIRO APPLICANT

AND

JANET AKETCH MARY 1ST RESPONDENT

EPHRAHIM LIVAMBULA 2ND RESPONDENT

ANDREW IMBEGO 3RD RESPONDENT

*(Being an application for extension of time to file and serve Notice of Appeal
from the judgment from the Environment and Land Court at Vihiga
(E. Asati, J.) dated 21st September 2023 in ELC Case No. E003 of 2022)*

RULING

1. The application before this Court is dated 19th January 2024 brought pursuant to rule 4 and 41 of the [Court of Appeal Rules](#), seeks that the applicant the time within which to file appeal against the judgment in Vihiga ELC Case No. E003 of 2014, be extended, to enable the applicant file his appeal; and that costs be provided for. The application is supported by a supporting affidavit of even date sworn by David Amayi Isatsiro, the applicant.
2. The applicant had filed Vihiga ELC Case No. E003 of 2014 against the respondents seeking their eviction and demolition on a parcel of land over which he claimed ownership as the registered owner. In the matter, he was represented by counsel; and judgment was delivered electronically via “TEAMS”, on 21st September 2023, the suit was dismissed. The applicant laments that his counsel on record failed to inform him of the outcome of the judgment; and he only became aware of the judgment when he was served with the decree on 15th January 2024; that had his counsel informed him of the judgment and its outcome, he would have given instructions to file an appeal. He is dissatisfied with the outcome;



and wishes to proceed with the appeal which he believes is arguable and has high chances of success. He states that he has since changed representation, but his pursuit for the appeal is hampered by the fact that three months have lapsed and requires leave to lodge the Notice of Appeal out of time.

3. In opposing the application, the respondents through the replying affidavit of Janet Aketch Mary, the 1st respondent herein, points out that the applicant's counsel on record, P.M. Makau, participated all through the hearing and was even present on the day judgment was delivered. The respondent also avers that there is inordinate delay in bringing the present application, over 4 months. The respondent further argues that it was up to the applicant to follow up on his case as he was fully aware of the judgment date; that this delay in filing the appeal is stopping the respondents from enjoying the fruit of the judgment; the respondent corrects the assertion by the applicant that he was served with a decree on 15th January 2024, as the applicant was served with said decree on 21st November 2023 which was served immediately upon the applicant and his counsel on record; and there is no proper reason and/or explanation for the delay in filing appeal.
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 v 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 v Waruguru Kithaki & 2 Others](#) [2013] eKLR.
5. M'Inoti, J, had this to say concerning Rule 4 in [Imperial Bank \(IR\) & Anor v Alnashir Popat and Others](#) [2018] eKLR:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”

6. Discretion also depends on circumstances of each case as per [Mongira & Another v Makori & Another](#) [2005] eKLR

The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of [Nicholas Kiptoo Korir Arap Salat v 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 Kitheka (*supra*) is whether *prima facie* the intended Appeal/Appeal has chances of success or is a mere frivolity.

- 7. The applicant only states that his counsel on record did not inform him of the judgment and its outcome. The applicants in their submissions have attempted to explain the delay as an omission and/or mistake on the part of their previous lawyers and not their own fault; and that they acted without undue delay the moment they realised the state their matter was at. I must point out that the alleged mistake of counsel does not of itself cure a litigant’s own inaction, basically because it is a litigant’s case and not that of his counsel. The primary responsibility to act within the prescribed timelines under this Court’s Rules rests heavily on the litigant’s shoulders. Indeed, with regard to the responsibility of the litigant to follow up their case, Waki, J.A. had this to say in [Habo Agencies Limited v Wilfred Odhiambo Musingo](#) [2015] eKLR:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

- 8. On the issue as to whether or not the intended appeal has no chance of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of [Athuman Nasura Juma v Afwa Mohammed Ramadhan](#) [2016] eKLR:

“...this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.

I bear in mind the afore-going principles whilst determining this application.

- 9. The fact that the consent to change representation was signed by the then advocate on record, there was nothing stopping the applicant or his current advocate on record to request the advocate on record to swear an affidavit to bolster the applicant’s case for extension of time, in the absence of that, then this blame is merely a techni-coloured sob story.
- 10. I agree with the respondent that having been served with a decree on 21st November 2023, the delay in bringing the instant application is inordinate and not satisfactorily explained; and the fault of the advocate storyline does not sell. I find that the applicant has failed to meet and satisfy the principles set out for this Court to exercise its discretion in his favor and grant the extension. The application is thus without merit; and is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 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

