



**Kandie v Mogeni & another (Civil Appeal (Application)  
E060 of 2023) [2024] KECA 821 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 821 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL (APPLICATION) E060 OF 2023**

**WK KORIR, JA**

**JULY 12, 2024**

**BETWEEN**

**CHEBII CHEROGONY KANDIE ..... APPLICANT**

**AND**

**JUSTUS BARINGTON NYECHIEO ..... 1<sup>ST</sup> RESPONDENT**

**ZABLON ONDIMU MOGENI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to file a Notice of Appeal out of time against the judgment and decree of the Environment and Land Court at Nakuru (L.A. Omollo, J) issued and dated 19th June 2023 in EL&C Appeal No. E005 of 2021 (As consolidated with E007 of 2021))*

**RULING**

1. Through the notice of motion dated 25<sup>th</sup> July 2023 the applicant, Chebii Cherogony Kandie, has moved the Court seeking enlargement of time to file a notice of appeal against the judgment and decree in Nakuru E&LC Appeal No. E005 of 2021 as consolidated with E007 of 2021. The application is premised on the grounds on its face and the averments of the applicant in the supporting affidavit sworn on 24<sup>th</sup> July 2023.
2. Zablon Ondimu Mogeni and Justus Barington Nyechieo are the respective 1<sup>st</sup> and 2<sup>nd</sup> respondents.
3. According to the applicant, the judgment he intends to appeal against was delivered on 19<sup>th</sup> June 2023 in the presence of all the advocates for the parties. Attempts by his advocate to reach him so as to inform him of the judgment were futile. He avers that it was only on 17<sup>th</sup> July 2023 when he went to his advocate's chambers seeking to know the progress of his matter that he was informed of the delivery of the judgment. By then, the time for filing a notice of appeal had lapsed. He is, however, dissatisfied with the judgment and he intends to appeal against it. The applicant blames the breakdown in communication between him and his advocate for the delay in filing the notice of appeal.



4. The 2<sup>nd</sup> respondent swore a replying affidavit in opposition to the application on the grounds that the application is defective for being lodged under repealed rules; that the explanation tendered by the applicant for the delay is insufficient and not backed by evidence of the alleged attempts by the advocate to reach the applicant; that no memorandum of appeal has been annexed to indicate whether the intended appeal is on matters of law only hence there is no arguable appeal; that the delay between the time of the alleged discovery of the delivery of the judgment and the lodging of the instant application has not been explained; and, that he will be prejudiced should the application be allowed.
5. The application was disposed of through written submissions.

Counsel for the applicant referred to the Supreme Court decision in [Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR and submitted that the applicant had met all the requirements to merit an order for enlargement of time. Counsel relied on [Hudson Kidaha Kisigwa v. Romagego Kenya Ltd](#) [2019] eKLR to argue that failure by counsel to inform the client of the delivery of judgment is excusable. Counsel further submitted that the dispute concerned ownership of land and it would be in the interest of justice to allow the applicant an opportunity to appeal against the impugned judgment. Counsel consequently urged that the application be allowed.
6. Likewise, counsel for the respondent in opposing the application relied on [Nicholas Kiptoo Arap Korir Salat](#) (*supra*) to highlight the principles underpinning an application for extension of time. According to counsel, the reasons advanced by the applicant in support of his application were an afterthought and not sufficient to warrant an extension of time. Counsel urged the Court to find that the delay of 21 days was inordinate in the circumstances. Counsel also submitted that the intended appeal is not arguable. Ultimately, counsel urged for the dismissal of the application asserting that while the discretion of the Court to extend time is unfettered, the applicant did not deserve the exercise of the Court's discretion in his favour.
7. Although the applicant also sought stay of execution of judgment pursuant to rule 5(2)(b) of the [Court of Appeal Rules](#), I will not consider the prayer because my jurisdiction as a single judge is limited to addressing the application for extension of time under rule 4 of the [Court of Appeal Rules](#). The principles upon which this Court determines an application for extension of time under rule 4 are now well settled and they include the length of the delay, the reason for the delay, and the degree of prejudice to be occasioned to either party should the application be allowed or declined. These principles have been reiterated in numerous decisions of the Court, including [Paul Wanjobi Mathenge v. Duncan Gichane Mathenge](#) [2013] eKLR, where it was stated that:

“The discretion under [Rule 4](#) is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
8. Abiding by the above principles, this application will be determined by answering the question as to whether the applicants have tendered satisfactory reasons for the delay. In this case, given that the judgment was delivered on 19<sup>th</sup> June 2023, the applicant should have filed the notice of appeal on or by 3<sup>rd</sup> July 2023. This application having been filed on 25<sup>th</sup> July 2023, there was a delay of 22 days. The applicant states that the delay was occasioned by counsel's inability to reach him so as to inform him of the delivery of judgment and to secure his instructions to file an appeal.



9. To start with, in principle and as can be gleaned from various decisions of the Court, a delay of 21 days should not be deemed to be inordinate. See *Kibumba v. Kimotho & Another* [2024] KECA 345 (KLR) for instance. The applicant averred that there was a breakdown in communication between himself and his counsel. It would have been better had an affidavit been sworn by his advocate accompanied by evidence showing that there were indeed unsuccessful attempts by counsel to reach the applicant. Had the period of delay been long, the explanation tendered would not hold. However, considering the short period of delay, it is possible that the applicant was actually not aware of the delivery of the judgment until he went to his counsel's chambers. The action of visiting his counsel's chambers to follow up on his matter is an act of diligence that should count in his favour. Additionally, considering that the dispute concerned ownership of land, it would serve the interests of justice to grant the applicant an opportunity to appeal against the impugned judgment.
10. All factors considered, I am persuaded to exercise my discretion and allow the application. I also do not think there will be any significant prejudice to the respondents save for the likelihood that the litigation will be prolonged as the intended appeal awaits hearing and determination. Weighing this likely prejudice against the applicant's right to test the impugned judgment by way of an appeal, the right to appeal should carry the day. The prejudice is not as profound as denying the applicant a chance to appeal to this Court.
11. Accordingly, I order that the time for filing and serving of the notice of appeal is hereby extended by fourteen (14) from the date of the delivery of this ruling. The time for all the other activities consequent to the filing of the notice of appeal shall be in accordance with the rules of this Court. The costs of this application shall abide by the outcome of the intended appeal.
12. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> DAY OF JULY, 2024**

**W. KORIR**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

