



REPUBLIC OF KENYA



**KENYA LAW**  
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**Isiye v Anagori & 4 others (Civil Application E030 of 2024)  
[2024] KECA 814 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 814 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E030 OF 2024  
HA OMONDI, JA  
JULY 5, 2024**

**BETWEEN**

**MORRIS MUNAMEZA ISIYE ..... APPLICANT**

**AND**

**JOSEPHINE KAVETSA ANAGORI ..... 1<sup>ST</sup> RESPONDENT**

**PRISCILLA CHUNGE NYAPELA ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, KAKAMEGA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**EPISCOPAL CHURCH OF AFRICA DIOCESE OF RIVER NZOIA**

**CENTRAL ..... 4<sup>TH</sup> RESPONDENT**

**THE LAND SURVEYOR KAKAMEGA COUNTY ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application for extension of time to file and serve Notice of Appeal  
from the Judgment of the Environment and Land Court at Kakamega  
(D. O. Obungo, J.) dated 31st January 2024 in Case No. E060 of 2022)*

**RULING**

1. The Notice of Motion application dated 4<sup>th</sup> March 2024 brought pursuant to rule 4 of the Court of Appeal Rules seeks that this Court be pleased to grant the applicant leave to appeal out of time against the judgment of Ohungo, J, delivered in Kakamega ELC case No. E060 of 2022 Maurice Munameza Isiye vs Josephine Kavetsa and 5 others; enlargement of time to enable the applicant file the appeal out of time; and that costs in the cause. The application is supported by the affidavit of even date sworn by Maurice Munameza Isiye, the applicant.
2. The background to his appeal is that the 1<sup>st</sup> - 3<sup>rd</sup> respondents commenced proceedings in the magistrate's court against the 4<sup>th</sup> and 5<sup>th</sup> respondents, seeking an order directing the 4<sup>th</sup>



and 5<sup>th</sup> respondents to visit land parcel, numbers Butso/Indangalasia/2XX and Butso/Indangalasia/3XXX to measure and demarcate the access road shared between the said parcels as per the original map and that the OCS Kakamega Police Station to provide security during the exercise. An order for the site visit was granted and a report filed, which was adopted as the final orders of the court; aggrieved by the outcome, there were several applications made in a bid to review the orders; and when all else failed, an appeal from Kakamega ELC Case No. E060 of 2022 was filed. The appeal was heard and dismissed on 31<sup>st</sup> January 2024 judgment was entered against the applicant.

3. The applicant immediately instructed his then advocate to appeal against said decision, but that said advocate delayed in filing appeal, necessitating the applicant to engage another advocate to carry out his instructions to appeal, by which time to appeal had lapsed. The applicant contends that the delay in filing the appeal was inadvertent and excusable owing to the mistake by his then advocate; and in any event, the delay is not inordinate, as it is just a month.
4. By a replying affidavit dated 2<sup>nd</sup> April 2024, sworn by the 1<sup>st</sup> respondent, the application is opposed on grounds that it has been overtaken by events as the wall illegally constructed and blocking public easement has been demolished; the delay is over two months thus inordinate; the applicant had the option to file for stay in the ELC, such the applicant cannot blame his former advocate for delay in filing appeal; the appeal is an academic exercise the substratum of the appeal being no longer in existence.
5. It has been pointed out in various authorities by this Court that extension of time is not a right to a party, rather it is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks extension of time has the burden of laying basis to the satisfaction of the court. In considering the prayer, a court must also take into account whether there will be any prejudice suffered by the respondent if extension is granted; and whether the application has been brought without undue delay. I acknowledge that indeed, the Supreme Court of Kenya in the case of [Nicholas Kiptoo Korir Arap Salat vs. IEBC](#) [2014] eKLR set down the guiding principles to consider in the exercise of discretion. One other consideration in the case of [Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others](#) (2013) eKLR is whether a prima facie of the intended Appeal/ Appeal has chances of success or is a mere frivolity.
6. The applicant in his submissions has attempted to explain the delay as an omission and/or mistake on the part of their previous lawyer and not his own fault; that they acted in a timely manner to ameliorate the situation; and the appeal is arguable.
7. I recognise 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 vs. 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 vs. 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”.
9. I bear in mind the afore-going principles whilst determining this application. In this case, judgment was delivered on 31<sup>st</sup> January 2024; the Notice of Appeal ought to have been filed within 14 days of the judgment. The instant application was filed on 4<sup>th</sup> March 2024. Of course, the applicants have not presented any letter of instruction to their previous advocate, to fortify their claim that they had given instructions. However, to be fair to the applicant, two months after the judgment on 4<sup>th</sup> March 2024, Indeed, the previous advocate is no longer on record, and in his place, features another firm. I think what is critical at this stage is, whether reason for the delay has been adequately explained, and whether thereafter the applicant acted in a timely manner.
10. The respondent argues that this application has been overtaken by events as the illegal wall has since been demolished. If this is the case then I would agree with the respondent that there is nothing to appeal against. On the other hand, despite the wall having been demolished, the same is capable of being monetarily valued.
11. The applicant submits that his former advocate delayed in carrying out his instructions leading to the chain of events that caused the applicant to file this application almost two months after judgment was delivered. The delay, in my view, has been adequately explained, and I do not consider it inordinate and the applicant has made the present application without undue delay; he met and satisfied the principles set out for this Court to exercise its discretion in his favour and grant the extension. Leave is thus granted to the applicants to file and serve the Notice of Appeal, and the Record of Appeal, within 14 (Fourteen) days from the date of this ruling. The costs shall abide the appeal.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF JULY, 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**

