



**Moiyo v Kuto (Civil Application E051 of 2023)
[2024] KECA 1509 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1509 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E051 OF 2023
FA OCHIENG, JA
OCTOBER 25, 2024**

BETWEEN

BARTERA MOIYO APPLICANT

AND

CHRISTOPHER KUTO RESPONDENT

(An application for extension of time to file an appeal out of time from the Judgment and decree of the Environment and Land Court at Eldoret (M. A. Odeny, J.) delivered on 25th November, 2020 in ELC Appeal No. 24 of 2020)

RULING

1. Before me is an application dated 16th October 2023. It is an application for the extension of time for the filing of a notice of appeal, together with the memorandum of appeal.
2. The application is supported by an affidavit which was sworn by the applicant on 16th October 2023.
3. The judgment in respect to which the applicant expressed a wish to appeal, was delivered on 25th November 2020.
4. According to the applicant, the judgment was delivered without his knowledge. He told this Court that it was not until August 2023 that his son visited the registry at the High Court, and learned that the judgment had been delivered.
5. Following the said discovery, the applicant's son tried to reach out to the applicant's advocate but failed to get her on the phone.
6. It was thereafter that the applicant made a decision to instruct new counsel who then filed the current application.



7. The applicant's newly-appointed advocate sought and obtained a copy of the judgment, as well as a copy of the typed record of proceedings.
8. As the Environment and Land Court, Eldoret, had dismissed his appeal, the applicant was dissatisfied. Therefore, with the help of his new advocates, the applicant put together a draft memorandum of appeal.
9. The applicant is cognizant of the fact that there has been a delay in lodging his intended appeal. However, he states categorically, that the delay was not of his own making. His view was that the delay was wholly attributable to his former advocate, who had failed to give him information concerning the delivery of the judgment.
10. In the circumstances, the applicant sought the indulgence of this Court, so that he could lodge his intended appeal.
11. Whilst the applicant believes that the grant of an opportunity to appeal would be in the interest of justice, he also feels that the respondent would not be prejudiced by the extension of time for time to appeal.
12. When the application came up for hearing, on 20th May 2024, Mrs. Khayo advocate represented the applicant, whilst Mr. Kamau Lagat represented the respondent. Both counsel made oral submissions, before me.
13. Mrs. Khayo pointed out that the subject matter of the case is land. Therefore, he was of the view that it was best to have the appeal heard and determined, so as to bring finality to the matter.
14. In answer to the application, Mr. Kamau submitted that the applicant did not meet the criteria for extension of time. In particular, the respondent noted that there was no plausible explanation for the delay of 3 years.
15. Furthermore, the respondent drew attention to the fact that the applicant had a history of delaying proceedings in this case.
16. In order to appreciate the delays in the matter, I find it necessary to set out a brief summary of the case.
17. On 20th July 2006, the learned trial magistrate delivered a ruling, declining an invitation to review an order which had been made by a different magistrate. As the magistrate who had given the orders had left the court station where the case was filed, the applicant was of the view that the order could be reviewed by the magistrate who was at the Principal Magistrate's Court, Kapsabet, at the material time.
18. However, the magistrate rejected the application for review, prompting an appeal to the Environment and Land Court, Eldoret.
19. In her judgment, the learned Judge noted that the application which had been dismissed;

“... was not for the correction of an error on the face of the record as it was not self-evident. The application required elaboration arguments which would result in the learned Magistrate reopening the case to establish facts, hence sitting as an appeal court on his own judgment.”
20. As the learned Judge deemed as an abuse of the court process, the reopening of the case, coupled with the taking of additional evidence, which were questioning the validity or the legitimacy of the judgment, she held that the learned Magistrate made the correct decision when he declined to review the earlier order.



- 21. The learned Judge made the following further findings;
 - “The application also suffered from inordinate delay, having been filed after 5 years from the date of the judgment. The explanation given that the appellant changed advocates is not a sufficient reason to explain away the delay.”
- 22. When I drew the attention of the applicant to that aspect of the judgment, his advocate conceded that the total length of time that had lapsed since the trial court first rendered its decision, was now 9 years.
- 23. No material was placed before me to demonstrate the efforts made by the applicant, to follow up with his advocates regarding the date when the learned Judge delivered the judgment.
- 24. In the case of *Bi-Mach Engineers Limited v James Kaboro Mwangi* [2011] eKLR this Court held inter alia that:
 - “The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”
- 25. This Court has made it clear that a case does not belong to the advocate who was representing a party. The case remains the property of the party, at all times.
- 26. Therefore, the onus is upon a party to follow up with his or her advocate, to ascertain the status of the case. In this case, the applicant failed to provide material from which the court could verify that he had been pursuing his advocate, to keep abreast of the developments in his case. It is thus my considered opinion that the applicant must shoulder the consequences of his inordinate and unexplained inaction.
- 27. Secondly, considering that the intended appeal would, if filed, be seeking to reopen a matter which was determined more than 18 years ago, I find that it would be extremely prejudicial to the respondent, to give to the applicant a platform for use to re-awaken the litigation.
- 28. I find no alternative but to tell the applicant that he must now let go of the litigation whose age is more than a person who was born on the date it was commenced, who is now already an adult.
- 29. The application lacks merit and is therefore dismissed. The applicant is ordered to pay the respondent, the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

