



**Sundia v Francis Tobias Akello (Suing as the administrator of the Estate of Matayi Akello Oloo (Civil Application 39 of 2021) [2022] KECA 111 (KLR) (11 February 2022) (Ruling)**

Neutral citation: [2022] KECA 111 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 39 OF 2021  
PO KIAGE, JA  
FEBRUARY 11, 2022**

**BETWEEN**

**GABRIEL ONYANCHI SUNDIA ..... APPLICANT**

**AND**

**FRANCIS TOBIAS AKELLO (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF MATAYI AKELLO OLOO ..... RESPONDENT**

*(An application for extension of time to file the notice of appeal arising from the Judgement and Decree of the Environment and Land Court (A. K. Kaniaru, J.) dated 20th February, 2019) in BUSIA ELC NO. 44 OF 2015)*

**RULING**

1. The applicant, Gabriel Onyanchi Sundia has filed a notice of motion dated 31<sup>st</sup> March, 2021 seeking, in the main, leave to file a notice of appeal out of time in respect of the judgment delivered on the 20<sup>th</sup> of February, 2019 by the Environment and Land Court.
2. I have contemplated the application, the grounds in support thereof, the replying affidavit filed by the respondent in opposition thereto, the submissions of the applicant and the law. In exercise of my free and unfettered discretion to be exercised on sound principle, I find useful the holding in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi (1999) 2 EA 231*, in which this Court laid down some of the issues for a single judge's consideration on an application for extension of time;

“It is now well settled that the decision whether or not to extend the 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.”

3. The grounds on the face of the application and the supporting affidavit are that, the intended appeal was not filed on time due to a misunderstanding between the applicant and his then advocates M/s Balongo & Co. Advocates. The applicant later instructed the present firm of M/s Okeyo Ochiel & Co. Advocates to file an appeal, which they did on 10<sup>th</sup> June, 2019, being Kisumu Civil Appeal No. 96 of 2019. However, by an application lodged on 20<sup>th</sup> June, 2019, the respondents sought for the appeal to be struck out for being filed out of time and without leave of court. The application proceeded unopposed before this Court and the appeal was struck out on 19<sup>th</sup> March, 2021. The applicant explains that his advocate failed to attend the hearing of that application because he was hospitalized having contracted the COVID-19 virus.
4. The respondent’s Counsel, Mr. Joseph Vitalis Juma filed a replying affidavit on 18<sup>th</sup> November, 2021, contending that he had never been served with this application until he wrote to the deputy registrar of this Court, and on 17<sup>th</sup> November, 2021 he was served with a draft application and submissions.
5. This Court has been clear that there is no fixed time as to what constitutes inordinate or inexcusable delay. The only issue is whether such delay, whatever it be, can be explained. I would add that the explanation ought to have some level of believability. I echo what was said in *Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet [2018] eKLR*;

“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.”
6. From the averments in the applicant’s affidavit and the submissions, it would seem that the main reason for the delay in filing the appeal was the alleged misunderstanding between the applicant and his previous counsel which apparently consumed a lot of time. The applicant through his Counsel has made considerable submissions complaining that his present Counsel Mr. Okeyo had been hospitalised suffering from the COVID-19 virus. However, it is clear from the record that Counsel’s illness only inhibited his attendance at the hearing of the application for striking out. His discharge summary from Busia County Referral Hospital, dated 20<sup>th</sup> March 2021 reads that he was hospitalised between 19<sup>th</sup> February, 2021 to 20<sup>th</sup> March, 2021.
7. Significantly, Mr. Okeyo was appointed to take over the appeal through a notice of appointment of advocate dated 12<sup>th</sup> March, 2019 and a consent order dated 13<sup>th</sup> March, 2019. Despite the foregoing, the record of appeal was filed out of time on 10<sup>th</sup> June, 2019, nearly (4) months after the lodging of the notice of appeal on 22<sup>nd</sup> February, 2019.
8. The applicant’s present counsel having been on record as early as 12<sup>th</sup> March, 2019, I find his explanation for failing to lodge the appeal in time wholly unsatisfactory. The citing of his illness does not afford explanation for the delay that occurred much earlier. It could even be said that the same was raised as a red herring and such want of candour does not open the door whence flows favourable discretion.
9. In the result, this application fails and is dismissed with costs.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**P. O. KIAGE**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

