



REPUBLIC OF KENYA



KENYA LAW
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**Koikai & another v Orinda (Civil Appeal E016 of 2024)
[2025] KEHC 1297 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E016 OF 2024
CM KARIUKI, J
FEBRUARY 27, 2025**

BETWEEN

SAITOTO KOIKAI 1ST APPELLANT

INDOMITABLE AUCTIONEERS 2ND APPELLANT

AND

SAMUEL DOLA ORINDA RESPONDENT

*(Being an application for leave to appeal out of time from the judgment and decree of
Hon. G.Sagero (S.R.M.) delivered on 16/10/2023 in Narok CMCC NO. 135 OF 2021)*

RULING

1. The application dated 04/07/2024 seeks for leave to the firm of Ocheo-onduso & Co Advocates to come on record for the applicants in place of the firm of Kubwa & company Advocates and that the consent between the advocates dated 22/05/2024 be deemed duly filed and leave to file appeal out of time and the memorandum of appeal dated 03/07/2024 be deemed duly filed. The applicants further sought orders of re-hearing of the suit.
2. In opposition to the application, the respondent filed a replying affidavit sworn by Samuel Dola Orinda on 18/07/2024.

The Applicant's Case

3. The judgment was delivered in Narok CMCC No. 135 of 2021 on 16/10/2023.
4. The applicants state that the delay in filing the appeal was inadvertently contributed by the previous advocates who neglected to act on the appellant's instructions to file the appeal.
5. The applicants contend that the appeal is arguable as it raises triable issues.



6. According to the applicants the appeal has a reasonable chance of success and if execution is carried out it will render the entire appeal nugatory.
7. The applicants state that none of the parties herein will be prejudiced by this court granting leave to file the memorandum of appeal out of time pending the hearing and determination of this application and the appeal to follow.

The Respondent's Case

8. The respondent opposes the application on the premise that there is nothing before the court evidencing the applicants' instructions given to their erstwhile advocates within the appointed time or at all to file an appeal.
9. The respondent argues that in the event the applicants had any challenge filing their appeal within the appointed time they were entitled to move this court timeously for an extension of time within which to file the appeal but the applicants have brought the instant application over 7 months late.
10. The respondent contends that the delay is inordinate and the same has not been explained at all.
11. The respondent averred that part of the judgment and decree to be appealed from has already been executed.
12. The respondent contends that all the issues the applicants intend to raise in the purported appeal were never pleaded or proved before the subordinate court therefore they have not demonstrated that they have an arguable appeal.
13. The respondent averred that the order for re-hearing cannot be issued in the instant application which is not an appeal.
14. The respondent contends that the applicants have not demonstrated any irreparable loss they will suffer if the orders are not granted as they will not be left without a remedy for they are at liberty to pursue their erstwhile advocates.
15. The respondent averred that he is entitled to enjoy the fruits of his success and having executed partly the judgment he will be greatly prejudiced.

Directions of the court

16. The application was canvassed by way of written submission.

The Applicants' Submissions

17. The applicants submitted that a mistake of counsel should not be visited upon the client. The applicants relied on section 76G of the CPA, First American Bank Of Kenya Ltd Vs Gulab P Shah & 2 Others Nairobi (Milimani) HCC NO. 2255 Of 2000[2002] 1 EA 65 , and J.G. Builders V Plan International[2014] eKLR.
18. The applicants submitted that they have an arguable appeal which raises triable issues that need to be determined by this court. The applicants relied on Vishva Stone Suppliers Company Limited V RSR Stone [2006] Limited [2020] eKLR, Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi [1999] 2EA, and Fakir Mohammed V Joseph Mugambi & 2 Others [2005] eKLR
19. The applicants submitted that the respondent can be compensated for any prejudice.



20. The applicants submitted that the due procedure has been followed for the firm of Ochego-Onduso & Co Advocates to come on record. The applicants relied on Nelly Wanjiru Njenga V Robinson Maina & 3 Others [2021] eKLR, and Order 9 Rule 9 of the Civil Procedure Rules, 2010.
21. The applicants submitted that it would be in the interest of justice that the memorandum of appeal be admitted as duly filed and served.

The Respondent's Submissions.

22. The respondent submitted that there is no judgment delivered herein. That being the case, the firm of Ochego-onduso & Co Advocates is not seeking to come on record herein post-judgment. The concluded suit in the subordinate court and the appeal/application herein are separate proceedings. Kubwa & Company Advocates are not on record herein. Neither their consent nor an order or leave of this court is required for the firm of Ochego-onduso & Co Advocates to act for the applicants herein. In short, the order prayed for is superfluous and does not avail the applicants. The Court should not make an order in vain. Further, the record shows that the consent between the firm of Ochegoonduso & Co Advocates and Kubwa & Company Advocates is in respect of the suit in the subordinate court. It has been exhibited as an annexure to the supporting affidavit. It is not a consent filed in this matter. That being the case, the said consent cannot be adopted in this matter. The respondent relied on Henry Momanyi Machini v Attorney General & 4 others [2019] eKLR.
23. The respondent submitted that applicants have not demonstrated the reason for the failure to file the appeal. The inordinate delay has not been explained at all. The application has been brought solely to forestall execution in the subordinate court. In the circumstances, the applicants have not laid out any basis for an extension of time. The respondent relied on the supreme court case in Nicholas Kiptoo Arap Korir Salat V Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR, The Court Of Appeal In Republic V Chief Of General Staff & Another [2017] eKLR, Henry Momanyi Machini V Attorney General & 4 Others [2019] eKLR, and Josphat Nderitu Kariuki V Pine Breeze Hospital Ltd [2006] eKLR.
24. The respondent submitted that there is no appeal in existence, the time for appealing having lapsed, the Applicants ought to have obtained an order extending time to appeal out of time first before filing the Memorandum of Appeal which they now pray to be deemed properly filed and served. Further, no filing fees in respect of the Memorandum of Appeal have been paid, there is no Memorandum of Appeal filed herein to be deemed properly filed and served. The respondent relied on the supreme court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR,
25. The respondent submitted that an order for re-hearing of the suit in the subordinate court can only be made upon the hearing and determination of an appeal arising therefrom on merits. There is no such appeal herein. Such an order cannot be made on the hearing and determination of an application such as the instant one
26. The respondent prayed for the costs of the application. The respondent relied on the supreme court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR.

Analysis And Determination.

27. This court has considered the application, the supporting affidavit and annexures thereto, the replying affidavit, and the submissions by respective parties. The issues that arise for determination are;



- I. Whether leave should be granted to the firm of Ochecho-onduso And Co. Advocates to come on record
- II. Whether leave should be granted to file an appeal out of time.
- III. Costs

I. Leave to come on record

28. The question that arises is should an appeal to be treated as a separate suit or a continuation of from original suit filed in the lower court.
29. Ordinarily an Advocate who has been on record in the original suit will not file an appeal without instructions from his client. Instructions initially given are to file the original suit. If a party is aggrieved with the court's determination in the original suit, he/she will decide as to whether to appeal or not. An advocate cannot just file an appeal on behalf of his former client without his instructions.
30. Order 9 Rule 9 of the Civil Procedure Rules 2010 is intended to prevent mischievous litigants from denying costs entitled to Advocates who have acted to the conclusion of the suit. Costs are awarded to parties in both the lower court and appeal if they succeed. The instruction fee is one of the items to be assessed in a bill of costs in both the original suit and appeal.
31. The fact that instruction must be given by the client for an appeal to be filed and the fact that the court makes orders for costs for the appeal, the client should not be barred from instructing a new Advocate for purposes of appeal. Award of costs in the two courts addresses mischief the Order 9 Rule 9 was intended to address.
32. The fact that instructions to file suit in the original suit and appeal have to be given by the client, makes them distinct suits, and a party is at liberty to either continue with the Advocate who acted in the lower suit or engage another lower for the appeal.
33. From the foregoing, leave is hereby granted for the firm of Ochecho-Onduso Advocates to come on record in this matter.

II. Leave to file appeal out of time

34. Section 79G of the *Civil Procedure Act* states: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

35. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers an extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.



36. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that: -

“The underlying principles a court should consider in exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”

37. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, the Court of Appeal in considering an application for an extension of time and leave to file the Notice of Appeal out of time stated the following:-

“... it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

38. The applicants have blamed their previous Advocates for the delay in filing a memorandum of appeal and in respect of the 7-month delay by the current advocate the applicants have not explained.

39. I note that judgment was delivered on 16/10/2023. This application was filed on 08/07/2024. The application has been filed 7 months after delivery of judgment. There is no doubt that the applicants were aware of the delivery of judgment. They averred that they instructed the firm of Kubwa & Company Advocates immediately after the delivery of judgment. They stated that upon noticing the laxity of their former advocates, they instructed the firm of Ochejo-Onduso & Co-Advocates to file this application. They do not indicate when they noticed laxity on the part of the said firm of Advocates.

40. I have perused the judgment attached to the supporting affidavit and note that it was delivered on 16/10/2023. A period of 7 months lapsed before this application; 7 months is too long for a litigant to remain in darkness concerning filing his appeal.

41. Whereas litigants instruct Advocates to act for them, the cases belong to litigants and they have a duty to monitor the progress of their cases. I do not see sufficient explanation for such a lengthy delay. In the



absence of a proper explanation, my conclusion is that the intention to file an appeal by the applicant is an afterthought.

42. From the foregoing, I find that the applicants have not demonstrated sufficient reason to warrant granting them leave to file an appeal out of time

Conclusion and Orders.

43. In the upshot, this court issues the following orders.
- i. Application dated 04/07/2024 is hereby dismissed
 - ii. Costs of this application to the respondent

44. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
27th DAY OF FEBRUARY, 2025**

CHARLES KARIUKI

JUDGE

