



Dahman v Bayusuf (Power of Attorney of Barka Omar Ahmed Bayusuf) (Miscellaneous Civil Application E027 of 2024) [2025] KEHC 4616 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION E027 OF 2024**

**M THANDE, J
MARCH 28, 2025**

BETWEEN

ALI OMAR DAHMAN APPLICANT

AND

SALIM OMAR BAYUSUF (POWER OF ATTORNEY OF BARKA OMAR AHMED BAYUSUF) RESPONDENT

RULING

1. By a Notice of Motion dated 9.4.24, the Applicant seeks stay of execution pending an intended appeal of the orders made in favour of the Respondent, in a judgment of 1.9.23 in BPRT/E011/2023. The Applicant further seeks enlargement of time to file appeal.
2. The grounds upon which the Application is premised are that it was not until the end of March 2024 that the Applicant discovered that judgment had been delivered on 1.9.23. In the judgment, the Applicant was directed to hand over vacant possession of the premises on Plot No. 1389, Malindi to the Respondent before 30.9.23, a period of 29 days. At the time of discovery of the judgment, the period for filing an appeal had already lapsed and being aggrieved, he intends to appeal. He has a good appeal with overwhelming chances of success. He is apprehensive that once the Respondent gets to know of the orders, he shall execute the same.
3. The Respondent opposed the Application vide a replying affidavit sworn on 24.5.24 as well as grounds of opposition of even date. It is the Respondent's contention that the Applicant has always been represented by counsel and has not proved that he was not aware of the decision of the BPRT. Further that the Applicant participated in the proceedings in the BPRT and filed a response and submissions to the citation filed by the Respondent. The Respondent asserted that while the date of the ruling was not given, his advocates kept in touch with a clerk of the BPRT who kept them updated and that it is the duty of a litigant to consistently inquire on the progress of his matter. As such, the Applicant



cannot state that he never knew the outcome of the citation. Further that he had been served with a copy of the order from the BPRT.

4. Parties filed their written submissions which I have duly considered.
5. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the *Civil Procedure Act* which provides:

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 to the appellant 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.

6. The proviso to Section 79G of the Act allows a party who gets caught up and is unable to file an appeal within the stipulated period, to seek extension of time. Such party must however satisfy the Court that there is good and sufficient reason for not filing the appeal on time.
7. An order for extension of the time to file an appeal is discretionary. It is an equitable remedy and not a right of a party. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court listed the following as the under-lying principles that a Court should consider in exercise of its discretion in an application for extension of time:
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
8. The impugned decision was made on 1.9.23. By dint of Section 79G of the *Civil Procedure Act*, the appeal ought to have been filed by 1.10.23. The Application is dated 9.4.24, a delay of over 6 months. The explanation given by the Applicant for the delay is that the BPRT delivered the judgment on 1.9.23 without prior notice to the parties. It was not until end of March 2024 that the Applicant came to know of the judgment.
9. Applying the principles set out in the *Nicholas Kiptoo Arap Korir Salat* case (supra), the Court finds that the Application was filed 6 months after the last date the appeal ought to have been filed, which period constitutes inordinate delay. Further, the reason given that the Applicant was unaware of the judgment of the BPRT and only became aware of it 6 months after, is indicative of an indolent litigant.



It is trite that a suit belongs to the litigant who must diligently follow up its direction at all stages. This was the holding of Koome, JA (as she then was) who in *Johnson Kimathi Kabura & another v Makokoyo Nchoke Leshani & 5 others* [2020] eKLR, stated:

A case belongs to the litigant and therefore if their own counsel failed in his professional obligation to communicate the outcome of the litigation to them, and also failed to renew his practicing certificate, the consequences of those failures cannot be borne by the other side or the court. They must be borne by the litigant who made the choice. Moreover, a litigant also bears the duty of not only instructing counsel but to diligently following up their matter at all stages.

10. The Applicant has not discharged the burden of laying a basis for the grant of the leave sought or proffered a reasonable reason for the delay to the satisfaction of the Court. It would therefore be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.
11. In light of the foregoing, the Court finds that the delay in filing the appeal is inordinate and has not been satisfactorily explained. In the circumstances, the prayer for leave to appeal out of time fails and having so failed, it follows that the prayer for stay of execution of the order of the BPRT must also fail. The Application dated 9.4.24 is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 28TH DAY OF MARCH 2025

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M. THANDE

JUDGE

