



**Busolo v Akothe & another (Miscellaneous Application
E071 of 2024) [2025] KEHC 5205 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E071 OF 2024**

**M THANDE, J
APRIL 25, 2025**

BETWEEN

EDWIN SUYA BUSOLO APPLICANT

AND

JAMES ITHALE AKOTHE 1ST RESPONDENT

ABDIWELE ALI ABDI 2ND RESPONDENT

RULING

1. By an Application dated 4.7.2024, the Applicant seeks leave to file appeal out of time against the judgment of 26.4.24 in Kilifi PMCC No. 2 of 2017 *Abdiwele Ali Abdi v James Ithale Akothe & Edwin Suyu Busolo*.
2. The Applicant's case is that following the hearing of the suit, judgment was to be delivered on notice as the trial Magistrate was on transfer. On 3.6.24, his advocate received a letter from the 2nd Respondent's advocate informing them that judgment was delivered on 26.4.24 without notice to the parties. The Applicant contends that the delay in filing the appeal which is not inordinate, was not deliberate but was occasioned by the failure on the part of the trial court to issue notice of delivery of judgment to the parties. The Applicant further asserts that the intended appeal is not frivolous and raises triable issues on the apportionment of liability against him. Further that no prejudice will be occasioned to the Respondents if the orders sought are granted.
3. In a replying affidavit sworn on 25.10.24 in opposition to the Application, the Respondent contended that the Application has no merit and does not meet the threshold for the grant of prayers sought. The 1st Respondent averred that the Applicant was made aware of the judgment as early as 26.4.24 and could have lodged the appeal without delay. Further that with the e-filing system, notifications are sent to all parties and that the Applicant has failed to show whether it received such notification. Additionally, that his advocates informed the Applicant's advocates of the judgment by a letter dated 31.5.24.



4. It was further averred that following judgment, his advocates and those of the 2nd Respondent engaged in correspondence on the amount payable and copied the Applicant's advocates. The 1st Respondent went on to aver that the delay in filing the appeal and the application is a testament of collusion between the Applicant and 2nd Respondent to prejudice his rights. He added that no draft memorandum of appeal or decree has been filed and urged that the Application be dismissed with costs.
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. (See Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR).
8. On the principles that a court should consider in exercise of its discretion in an application for extension of time, the Court of Appeal in Omar Shurie v Marian Rashe Yafar [2020] eKLR, stated:

[B]ut this Court has over the years devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231 is the locus classicus which laid down the parameters as follows:

"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."

9. The impugned decision is dated 26.4.24. By dint of Section 79G of the Civil Procedure Act, the appeal ought to have been filed by 26.5.24. The Application is dated 4.7.24 a delay of about 1 month and 8 days. Applying the principles set out in Leo Sila Mutiso, the Court finds that while there was some delay in filing the Application and draft memorandum of appeal, the same is not inordinate.
10. As regards, the reason for delay, the Applicant states that judgment which was to be delivered on notice, was delivered without notice to the parties. The Applicant only became aware of the same on 3.6.24 upon receiving a letter from the 1st Respondent's advocates demanding payment. Although the 1st Respondent indicated that the Applicant's advocates had been copied in correspondence between his advocates and those of the 2nd Respondents, there is no evidence that the same was actually received. I am satisfied on a balance of probabilities that the explanation given by the Applicant for not filing the



appeal on time is good and sufficient. I also see no prejudice that will be occasioned to the Respondents if the orders sought herein are granted, and none was demonstrated.

11. In the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR Apaloo, JA. considered a delay in filing of a memorandum of appearance and stated:

But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.

I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs.

12. Duly guided, I am persuaded that the broad equity approach requires that the Applicant be allowed to have his appeal heard and determined on merit.
13. Having said that, I am also mindful of the fact that the decision in question was delivered on 26.4.24 and the Applicant has had more than ample time to obtain the proceedings. It is therefore imperative that the matter is disposed of expeditiously.
14. Accordingly, the Application dated 4.7.24 is allowed on the following terms:
- a. Leave is hereby granted to the Applicant to file appeal out of time on terms that the memorandum and record of appeal shall be filed and served by 9.5.25. In default, the leave so granted shall automatically lapse.
 - b. Costs to abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 25TH DAY OF APRIL 2025

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M. THANDE

JUDGE

