



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogao v Masorori (Civil Appeal 005/007 of 2024)  
[2024] KEHC 4470 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 005/007 OF 2024**

**JM CHIGITI, J  
MARCH 19, 2024**

**BETWEEN**

**NAFTALI ORENGA OGAO ..... APPLICANT**

**AND**

**JAMES ORAGUCHU MASORORI ..... RESPONDENT**

**RULING**

1. Notice of Motion Application dated 30<sup>th</sup> August 2021. It is predicated on the Supporting Affidavit sworn on 30<sup>th</sup> August 2022 and the Appellant's Supplementary Affidavit sworn on 7<sup>th</sup> December 2023.
2. The Respondent filed a Notice of Preliminary Objection. The facts of this application are uncontroverted.
3. In *Akarim Enterprises Ltd v Salesio Ngochi Kagwima (Suing as the legal representative of Grace Kaguna Mwenda (Deceased))* 2021] eKLR, Gitari, J, held, thus:

“Failure to file an appeal before moving the court for extension of time is fatal and the application is an abuse of court process. The application for extension of time to file is not properly before this court and is only good for rejection. Section 79G requires that the applicant files the appeal and at the same time seek leave of the court to have the appeal admitted out of the statutory period. The provision does not in any way provide that an intending appellant first seeks the court permission to admit a none existent appeal.”

4. In the Supreme Court of Kenya (Application No. 4 (E006) of 2021 between Bookpoint Limited and Guardian Bank Limited and Guilders International Bank Limited

“(21) It therefore follows that the applicant ought to have lodged its Notice of Appeal on or before the 4th of January 2021. It did not, and neither has it



sought 7 Application No. 4 (E006 of 2021) extension of time to file its Notice of Appeal out of time. Consequently, there is no valid Notice of Appeal on record and given the jurisdictional importance of a Notice of Appeal as stated in the Nicholas Salat case, this motion for extension to file an appeal out of time is an act in futility. For even if the Court were to be persuaded, upon consideration of the motion on its merit, and be inclined to extend time for filing of the appeal, there is no foundation (Notice of Appeal) upon which such an appeal would be premised.”

5. The instant appeal had been admitted to hearing, before the motion dated 30<sup>th</sup> August 2022 was filed and, by the time the application was so filed, the parties had filed and exchanged submissions.
6. The appeal having been admitted after a record of appeal was filed then the Respondent has not been prejudiced. The application for extension of time to file an appeal must be anchored in an appeal that is already filed.
7. In the case of *Edith Gichugu Koine v Stephen Njagi Thoitbi* [2014] eKLR, the Court of Appeal (Otieno-Odek, JA, as he then was), observed and held that any prejudice requires its proof:
  - “ 11. I have taken into account that the period for delay is 2 months and 8 days. With great reluctance, noting that the applicant's explanation for delay is not convincing, I find the delay is not inordinate taking into account that a Notice of Appeal had been filed. I emphasize the fact that the respondent did not indicate the nature of prejudice, if any that he stands to suffer if the present application is granted. I have considered the overriding objective principles that bind this Court and that the 2010 Constitution of Kenya requires this Court to administer justice without undue regard to technicalities.
  12. The applicant feels aggrieved by the decision of the learned judge. Whether or not she will succeed in the intended appeal is a matter for the appellate court to decide. At this stage, I should not delve into the merits of the intended grounds of appeal and the issues to be raised in appeal. I find that the respondent shall not be prejudiced if the applicant gets her day in court to challenge the judgment of the learned judge. The respondent can be compensated by an order for costs in the event intended appeal is not successful.”
8. In the instant appeal, it is my finding and I hold that the Respondent did not make an effort to demonstrate that he will suffer any prejudice if the orders sought are granted.
9. It is my finding that in any event Article 159 of the *Constitution* is hereby invoked in ensuring that the hearing and determination of the appeal is not impeded by technicalities.
10. In exercising its discretion, the court is guided by the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.
11. The Respondent has not pleaded or proven that he would be prejudiced if the orders sought in the present motion were granted. In any event the Respondent had filed his submissions on the merits of the appeal. Allowing the application accords with the right to hearing as guaranteed under Article 50 of the *Constitution*.



**Order:**

12. The application dated 30<sup>th</sup> August 2021 is allowed with no orders as to costs.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2024**

.....

**CHIGITI. J (SC)**

**JUDGE**

