



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

APPLICATION NO. E008 OF 2025

-BETWEEN-

MILKA AKINYI OTIENO.....APPLICANT

-AND-

CHARLES ODONGO NGANI.....RESPONDENT

(Being an application for extension of time to file a Notice of Appeal and lodge an Appeal at the Supreme Court against the decision of the Court of Appeal sitting in Kisumu ((F. Tuiyott, K. M'Inoti & S. Ole Kantai JJA) dated 17th March 2023 in Civil Appeal No. 67 of 2018 as well as extension of time to file an application seeking certification of the intended Appeal as raising matters of general public importance)

Representation:

Mr. Herman Omiti for the Applicant
(Ngeri, Omiti & Bush Advocates LLP)

Mr. O.M. Otieno for the Respondent
(O.M. Otieno & Company Advocates)

RULING OF THE COURT

[1] UPON CONSIDERING the applicant's Notice of Motion dated 25th March 2025 and filed before this Court on 11th April 2025 pursuant to Article 163 of the Constitution, Sections 15, 15B of the Supreme Court, Cap 9B and Rules 15, 32, 33, 36 and 38 of the Supreme Court Rules, 2020 seeking orders *inter alia* –

a) Spent

- b) **THAT** *this Honourable Court be pleased to extend time and grant the applicant leave to file a Notice of Appeal and lodge an appeal at the Supreme Court out of time against the Judgment of the Court of Appeal (F. Tuiyott, K. M'Inoti & S. Ole Kantai JJA) delivered on 17th March, 2023.*
- c) **THAT** *upon grant of leave to appeal out of time, the Notice of Appeal filed at the Court of Appeal dated 26th June, 2023 be deemed as duly filed and properly on record.*
- d) **THAT** *the Honourable Court be pleased to extend time for filing the application for certification that the intended Appeal raises substantial points of law which constitute matters of general public importance and grant leave to the applicant to file an appeal at the Supreme Court against the Judgment of the Court of Appeal delivered on 17th March, 2023.*
- e) **THAT** *costs of the Application be in the cause.*

[2] UPON FURTHER CONSIDERING the affidavit in support of the Motion sworn by Milka Akinyi Otieno, dated 25th March 2025 and filed on 11th April 2025 together with the written submissions dated 10th April 2025 and filed on 11th April 2025 to the effect that the applicant avers that the Court of Appeal heard her appeal on 18th July 2022 and directed that judgment would be delivered on 2nd December, 2022; that the said judgment was not delivered as scheduled and that her advocates followed up with an email to the Deputy Registrar on 24th January 2023 which elicited no response; that a notice was thereafter issued by the Court of Appeal indicating that judgment would be delivered via email on 17th February 2023 but this was again not done; that a subsequent notice dated 16th March, 2023 indicated that the judgment would be delivered on 17th March 2023; that the said judgment was still not received by the applicant's advocates on the stated date, prompting them to write again to the Deputy Registrar on 11th April 2023; that the judgment was eventually received by her advocates on Monday 26th June 2023 having been

sent via email on the evening of Friday, 23rd June 2023; that from the contents of the email and the judgment, she learnt that the Court of Appeal had delivered the judgment on 17th March 2023 but had inadvertently failed to send it to all parties; that she believes the failure to share the judgment was an inadvertent omission by the registry of the Court of Appeal; and that she and her advocates were only able to apprise themselves of the contents of the judgment once it was received by email on 23rd June 2023; and

[3] UPON FURTHER CONSIDERING that the applicant thereafter filed a Notice of Appeal dated 26th June 2023 and subsequently filed an application dated 11th July 2023 before the Court of Appeal seeking, *inter alia*, stay of execution of the judgment, enlargement of time to file an appeal, certification that the intended appeal raised issues of general public importance, and validation of the Notice of Appeal dated 23rd June 2023; that the applicant contended she was unaware of the outcome of the judgment due to its non-delivery and could not have filed a Notice of Appeal or application for certification within time; that the said application came up for hearing on 16th September 2024 where the Court of Appeal advised the applicant to withdraw the omnibus application and instead file a fresh application limited to enlargement of time before a single Judge, and pursue certification thereafter if successful; that the applicant withdrew the said application dated 11th July 2023 pursuant to Rule 54(1) of the Court of Appeal Rules and instructed her advocates to file a fresh application dated 20th September 2024 seeking to regularize the Notice of Appeal dated 23rd June 2023 and obtain leave to appeal to the Supreme Court out of time; that the Court of Appeal delivered a ruling on 7th March 2025 dismissing the application on grounds that it lacked jurisdiction to enlarge time to appeal to the Supreme Court; that upon receipt of the ruling, the applicant's advocates noted that the court had erroneously delivered a ruling on the withdrawn application dated 11th July 2023 rather than the active application dated 20th September 2024; and that the applicant has since taken steps to have the ruling corrected; and

[4] FURTHER NOTING that the applicant has nonetheless, moved to this Court through the instant application once more seeking enlargement of time to file an appeal against the judgment of the Court of Appeal delivered on 17th March 2023 as well as leave to file an application for certification of the intended appeal as raising matters of general importance out of time. The applicant attributes the delay in filing this instant application to the Court of Appeal Registry sending her advocate a copy of the judgment in the evening of Friday, 23rd June 2023 through email, which email was received by her advocates on Monday, 26th June 2023. She urges the Court to note that by the time the judgment was received by her advocates, they had made several follow ups with the Court of Appeal registry without much success. The applicant asserts that she was by no means indolent and therefore, the merciful hands of equity should treat her favourably. The applicant has further contended that the respondent will not suffer any prejudice if the extension is granted since they will have an opportunity to defend the appeal once filed. On the contrary, she contends that, if the orders of extension are not granted, she will be denied an opportunity to ventilate before this Court, with the eventual consequence of losing her property unfairly. She also submits that she will lose the opportunity to bring to the fore issues of general public importance that this Court should consider. Further, she contends that this application has been brought without undue delay given that immediately upon receipt of the copy of the judgment on 26th June 2023 she moved with speed to file the Notice of Appeal on the same day. Regarding the period between 11th July 2023 when she filed the first application in the Court of Appeal and 11th April 2025 when she filed this application, the applicant blames the Court of Appeal for the long period taken in waiting to be heard due to the back and forth on the issue of whether the application could be heard by a single Judge or the full bench; and

[5] IN SUPPORT OF HER APPLICATION, the applicant relies on this Court's decision in *Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 Others* (Application 16 of 2014)

[2014] KESC 12 (KLR) and the Court of Appeal decisions in *Charles Karanja Kiiru vs Charles Githinji Muigwa* [2017] KECA 131 (KLR) and *Kiu & another v Khaemba & 3 others* (Civil Appeal (Application) E270 of 2021 [2021] KECA 318 (KLR); and

[6] TAKING INTO ACCOUNT the respondent's replying affidavit, together with the written submissions both dated 11th April 2025 and filed on 28th April 2025 wherein the respondent contends that the dispute between him and the applicant emanated from a claim of adverse possession which is a private law claim grounded in the Limitation of Actions Act, Cap 22 and common law principles. He contends that the issues of adverse possession are inherently personal, confined to the disputing parties and do not involve the interpretation or application of the Constitution, nor do they present novel legal questions requiring determination by the Supreme Court. He reveals that the Environment and Land Court at Kisii (*Mutungi, J.*) allowed his claim vide its Judgment dated 6th November 2017 which was upheld by the Court of Appeal at Kisumu vide its Judgment delivered on 17th March 2023. He contends that the legal principles governing adverse possession have firmly been determined by the two superior courts and the applicant has not demonstrated any inconsistency, uncertainty or misapplication of the law that would warrant authoritative determination by this Court; and

[7] FURTHER NOTING the respondent's contention that the applicant has not given sufficient explanation for the delay to warrant extension of time. The respondent contends further that the reasons advanced, namely, late communication of the Judgment by the Court of Appeal registry, are not supported by evidence, any diligent follow-up or inquiry. He also contends that the applicant has not given a persuasive explanation for the further delay in approaching this Court two years later, after the Court of Appeal delivered the Judgment she wants to appeal against out of time. He underscores that the delay from June, 2023 to the date of filing this Application in 2025 is unreasonable, inexcusable and the attempt to revive the matter at this stage is not only prejudicial to him but also contrary to

the principle of finality. The respondent further asserts that the intended appeal has no chance of success, raises no point of law of general public importance, and only seeks to reopen factual findings and settled principles of law; and

[8] Having considered the totality of the application, the responses and submissions put forth, **WE NOW OPINE AND DETERMINE** as follows:

- i. We reiterate the principles for enlargement to time to lodge an intended appeal that were set out in ***Salat Vs Independent Electoral and Boundaries Commission & 7 others*** (Application 16 of 2014) [2014] KESC 12 (KLR), which are now well settled as being:

- 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.”***

- ii. Rule 36(1) of the Supreme Court Rules provides that a person who intends to make an appeal to the Supreme Court shall file a Notice of Appeal within 14 days from the date of judgment or ruling which is the subject of appeal. The instant application was filed more than two years after the delivery of the Court of Appeal judgment on 17th March 2023. Having considered the pleadings and submissions of both the applicant and respondent, it is our finding that no satisfactory explanation and justification have been given for the delay in filing the instant application two (2) years after the delivery of the judgment of the Court of Appeal. The delay is indeed inordinate, and therefore the applicant is undeserving of our Court's discretion to extend time.
- iii. Having found that the application to extend time to file an appeal has failed, we deem it unnecessary to consider the question as to whether this court can grant the applicant leave to file an application for certification of her intended appeal to this Court as raising matters of general public importance.

[9] In line with our decision in ***Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others***, (Petition 4 of 2012) [2014] KESC 31 (KLR), we order that the costs of the application shall be awarded to the respondent.

[10] **CONSEQUENTLY** and for the reasons aforesated, we make the following Orders:

- i. ***The Applicant's Notice of Motion dated 25th March 2025 and filed before this Court on 11th April 2025 be and is hereby dismissed.***
- ii. ***The costs of this application shall be borne by the Applicant.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of January, 2026.

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE
SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
I.LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA

