



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Marwa v Chacha (Civil Appeal (Application) 103 of 2020)
[2025] KECA 2151 (KLR) (1 December 2025) (Ruling)**

Neutral citation: [2025] KECA 2151 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) 103 OF 2020
MS ASIKE-MAKHANDIA, JA
DECEMBER 1, 2025**

BETWEEN

ZEPHANIA MOHONI MARWA APPLICANT

AND

MACHUGU CHACHA RESPONDENT

(Being an application to serve Record of Appeal and the Record of Appeal filed be deemed as properly filed and served arising from the Judgment of the Environment and Land Court at Migori, (Ongondo, J.) dated 20th May, 2020 in ELC No. 248 of 2017))

RULING

1. This application seeks extension of time within which to serve Record of Appeal and the Record of Appeal filed be deemed as properly filed and served. The application is brought pursuant to Article 159 of *the Constitution*, Section 3A and B of the *Appellate Jurisdiction Act* and Rule 5(2)(b) of the court of appeal rules.
2. Obviously the foundational basis of the application is misconceived and mistaken. The application being for extension of time ought to be brought under Rule 4 of the Court of Appeal Rules “COAR”. However, the omission notwithstanding, Article of 159 of *the Constitution* comes in handy for the applicant. I will therefore treat the application as properly made under Rule 4 of the COAR.
3. In support of the application, the applicant claims that, he all along thought that the Record of Appeal had been filed and served on the respondent on time. It was when the appeal was being processed for hearing and directions given for the filing of written submissions that it transpired to him that the record had in fact not been served on the respondent as required and this was five years down the line. That the fault of his counsel in not serving the Record of Appeal on the respondent should not be visited upon him. That not allowing this application would drive the applicant permanently from the seat of justice, yet he had an arguable appeal.



4. In opposing the application, the respondent stated that the applicant filed the Record of Appeal three (3) months after the lodging the notice of appeal which was out of time and without leave of court. That it had been five years since the said Record of Appeal was allegedly filed but not served on the respondent. No explanation had been offered for this egregious delay. That the applicant also failed to serve the respondent with the letter bespeaking proceedings, contrary to Rule 84(2) of the COAR, and therefore cannot invoke the proviso to this rule in the computation of time. That the respondent had already filed an application to strike out the appeal on that score which is pending determination in this court. To the respondent, the instant application was a reactionary attempt to defeat his aforesaid application. It is also averred that the applicant had ignored several written requests by the respondent demanding to be served with the filed Record of Appeal to no avail, and had only acted when confronted with the application seeking to strike it out as aforesaid. That such conduct disentitles the applicant to the Court's equitable discretion.
5. The application was canvassed by way of written submissions only and without appearance of counsel and or the parties. Their respective submissions merely reiterated and expounded on grounds already set out elsewhere in this ruling and there is no need to rehash.
6. Under Rule 4 of the COAR, extension of time is a discretionary power grantable on well settled principles. In *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR, the Court reiterated such principles be the length of the delay, the reason for the delay, the chances of the appeal succeeding, the degree of prejudice to the respondent, and the conduct of the parties. See also *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1991] eKLR.
7. Applying these principles to the present application, the applicant has fallen short on all fronts. The unexplained three-month delay in filing and five-year delay in serving the Record of Appeal is inordinate and inexcusable. It is common ground that the applicant lodged the Notice of Appeal but waited three (3) months before filing the Record of Appeal. This violated Rule 85(1), which requires filing the Record of Appeal within 60 days unless the proviso under Rule 84(2) is invoked. I cannot believe that a party to an appeal would take five years without checking on the progress of his appeal and whether there was procedural compliance.
8. This Court has consistently held that unexplained delays are fatal.

For instance, in *Bi-Mach Engineers Ltd v James Kahoro Mwangi* [2011] eKLR, extension was refused where delay lacked explanation. The applicant's omission to explain the delay demonstrates negligence and lack of diligence, which this Court has repeatedly declined to excuse. It has also been averred and not contested by the applicant that the respondent had severally demanded to be served with the Record of Appeal to no avail. That the applicant was only awoken from his deep slumber after he was served with the application seeking to strike out the Record of Appeal as aforesaid. Such conduct, in my view and as correctly submitted by the respondent disentitles the applicant to the Court's equitable discretion.
9. The explanation for the delay being that the applicant was led down by counsel does not sell. Of course I am aware that in Kenyan law, the general principle is that the mistakes of counsel should not be visited upon an innocent litigant. However, courts may hold a litigant responsible (i.e "visit the sins of counsel upon a litigant") when the litigant fails to demonstrate due diligence and personal responsibility in following up on their case. Indeed, in the case of *Karinga Gaciani & 11 Others v Ndege Kabibi Kimanga & Another*, Civil Application No E004 of 2023, the Supreme Court of Kenya stated thus: "...it is not enough for a party to simply blame the Advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel and it does not matter whether the party is literate



or not”. This is a clear case, in my view, of the applicant’s indolence which this Court should not countenance.

10. I am also tempted to agree with the respondent’s observation that this application is meant to pull the rack under the feet of the respondent. The applicant only presented this application after being served with the respondent’s application to strike out the Record of Appeal. It is therefore obvious the application is reactionary, an afterthought, and intended to defeat the respondent’s substantive application. In *Patrick Kiruja Kithinji v Victor Mugira Marete* [2015] eKLR, the Court held that delay cannot be cured by filing an application only after being confronted with a striking-out motion. Similarly, in *Dilpack Kenya Ltd v William Muthama Kitonyi* [2021] eKLR, it was held that indolent litigants cannot use applications for extension of time to sanitize irregular appeals.
11. Allowing the application may even be in vain considering, the applicant’s failure to serve the letter bespeaking proceedings to the respondent to trigger the application of the proviso to Rule 84(2) of COAR. This proviso allows the taking into account the time taken in the preparation of the proceedings in the computation of time by court. However, this is dependent on whether an applicant had requested for the proceedings and served the letter bespeaking proceedings on the respondent within 14 days of the ruling or judgment sought to be appealed against. The applicant never served the respondent with such a letter. Consequently, computation of time may not exclude the period required for preparation of proceedings.
12. In *Mae Properties Ltd v Joseph Kibe & Another* [2017] eKLR, the Court held that service of the letter bespeaking proceedings is mandatory for invoking Rule 84(2). Failure to serve means the 60-day limit runs uninterrupted.
13. Allowing the application, given all the foregoing would, in my view be rewarding indolence and exacerbate the prejudice suffered by the respondent, contrary to the principles of fair and timely disposal of appeals. To my mind therefore, the applicant has not demonstrated any sufficient cause to warrant the Court’s exercise of discretion under Rule 4. The five-year delay in serving the Record of Appeal is unreasonable, unexplained, and aggravated by failure to serve the letter bespeaking proceedings, ignoring correspondence, and filing the application only as a reaction to the respondent’s application to strike out the Record of Appeal.
14. The application is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 1ST DAY OF DECEMBER, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

