



**Awal Limited v Malonza & another (Civil Suit 699 of 2019)  
[2024] KEHC 11387 (KLR) (Civ) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 699 OF 2019**

**JN NJAGI, J**

**SEPTEMBER 25, 2024**

**BETWEEN**

**AWAL LIMITED ..... APPLICANT**

**AND**

**MUTUKU MALONZA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH NZAMALU MUTUNGI T/A HIGH SPEED TYRES .. 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This court on the 15<sup>th</sup> December 2022 delivered a ruling in which it dismissed an application by the Respondents herein where they were seeking that the court dismisses the Applicant's application dated 30<sup>th</sup> September 2019 for want of prosecution. The court on dismissing the Preliminary Objection ordered the Applicant to fix the application dated 30/9/2019 for hearing within 3 months from the date of the delivery of the ruling failure to which its application "will stand dismissed."
2. The Applicant did not fix its application for hearing within the time given by the court. They have now filed an application dated 17<sup>th</sup> April 2024 seeking for orders that:
  - (1) The Honourable Court be pleased to enlarge and extend time for listing the application dated 30<sup>th</sup> September 2019 for hearing.
  - (2) The Notice of Motion application dated 30<sup>th</sup> September 2019 be and is hereby ordered reinstated for hearing and determination on merit.
3. The grounds in support of the application are that the court had on the 23<sup>rd</sup> November 2022 fixed the matter for ruling on 15<sup>th</sup> December 2022. That when on that date counsel for applicant checked the court's cause list, there was a notice that the judge who was presiding over the matter was away handling an election petition and that all matters coming up before him had been scheduled for 15<sup>th</sup>



march 2023. That on 15<sup>th</sup> March 2023 counsel tried to log into court but was unable to access the court. That he subsequently fixed the matter for hearing but later learnt on 13<sup>th</sup> July 2023 that the ruling had been delivered on 15<sup>th</sup> December 2022 in their absence. That they were thus not aware of the orders of the court issued on 15<sup>th</sup> December 2022 that they list the application for hearing within 3 months of the date of the ruling.

4. It was the contention of the applicant that his advocate inadvertently made an error by misunderstanding the notice issued by the court. That the mistake of counsel should not be visited on his client. They further contended that the respondent will not suffer any prejudice if the application is allowed.
5. The application was opposed by the respondents vide a replying affidavit sworn by Muema Kituku, Advocate, on 12<sup>th</sup> June 2024. Counsel deposed that the application is not deserved. That the alleged misunderstanding by Counsel for the applicant of the Notice issued by the court on 15<sup>th</sup> December 2022 should not be a ground for extending time. That it is well established that mistakes of counsel do not constitute sufficient reason to ground extension of time especially where such mistakes exhibit a lack of due diligence.
6. It was deposed that the Applicant's repeated failure to attend scheduled hearings demonstrate blatant lack of seriousness in prosecuting their case. That Article 159 of the *constitution* cited by the applicant does not mandate that procedural requirements be disregarded entirely but emphasizes importance of substantive justice and does not excuse indolence or negligence by a party. Therefore, that allowing the application would encourage parties to disregard court timelines.
7. Counsel deposed that the applicant's suit before the lower court was filed on 27<sup>th</sup> January 2009 and was determined in favour of the respondents on the 25<sup>th</sup> February 2019 which is 5 years ago. That litigation has to come to an end. That the continued attempt by the applicant to prolong the matter is unjust and inequitable. That it is a clear case of injustice for this court to allow the applicant more time to prosecute an already dismissed application. That the court is *functus officio* due to the orders of 15<sup>th</sup> December 2022 which effectively closed the case upon the applicant's failure to act within the specified time.
8. It was deposed that the respondents will suffer significant prejudice if the extension is granted as they had legitimate expectation that their litigation will be conducted expeditiously and within prescribed timelines. That prolonging the matter would result in unnecessary legal costs and continued uncertainty.

### **Applicant's Submissions**

9. The applicant submitted that this court has unfettered discretion to allow an application for extension of time. They cited the principles for extension of time as stated by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR and in the case of *Stecol Corporation Limited v Susan Awwor Mutemb* (2021) eKLR. In the latter case, the court cited the Court of Appeal decision in *Charles Karanja Kiiru v Charles*



*Gitbinji Muigwa* [2017] eKLR where the Court cited the decision in *Wanjiru Mwangi & Another* [2015] eKLR and *APA Insurance Co. Ltd v Michael Kinyanjui Muturi* [2016] eKLR and stated that:

The Court of Appeal in the above Case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

10. The applicant submitted that they have explained the delay. They stated that they were not indolent as they made attempts to fix the matter for hearing not knowing that a ruling had already been delivered.
11. It was submitted that Article 48 of the *Constitution* guarantees every person access to justice and Article 50(1) guarantees the right to have disputes decided in a fair public hearing. That the ultimate goal and purpose of the justice system is to hear disputes fully and as such no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. The applicant urged the court to exercise its discretion and allow the application as no prejudice will be suffered by the respondent.

#### **Respondents' submissions**

12. The respondents relied on the principles for extension of time as stated by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR and in the case of *Mwangi Kaimenyi v Attorney General & another* (2014) eKLR to submit that the application lacks justification in that the delay, which they attribute to a ruling delivered in their absence and misunderstanding of a court notice, is inordinate. That the applicant has consistently failed to comply with court orders and procedural timelines which indicates a lack of diligence and respect of judicial directives. Moreover, that the applicant has not presented sufficient reasons to justify enlargement and extension of time. That their failure to prosecute the matter in a timely manner and their disregard for previous court orders suggests that granting their request would further undermine the principles of judicial efficiency and finality in litigation.
13. The respondents submitted that the invocation of Article 159 of the *constitution* by the applicant does not assist the applicant as courts have emphasized that invocation of the constitution should not justify ignoring clear procedural rules established by statute. That courts have been consistent in holding that adherence to procedural requirements is crucial for the administration of justice. In this respect the respondents cited the holdings in *Stephen Mwaliyo v County Government of Kilifi* (2021) eKLR and *Jaldesa Tuke Dabelo v Independent Electoral and Boundaries Commission & another* (2015) eKLR.
14. The respondents submitted that granting the extension will prejudice them as they had legitimate expectation that litigation will be conducted expeditiously and within the prescribed timelines. That litigation cannot be allowed to go on endlessly as was stated in the cases of *George W. M. Omondi v National Bank of Kenya Ltd & 2 others* (2001) eKLR and *Benson Ngugi v Francis Kabui Kinyanjui & 3 others* CA NO.1 of 1986 (unreported).
15. It was submitted that this court is functus officio regarding this matter due to the orders of 15<sup>th</sup> December 2022 which effectively closed the case upon the applicant's failure to act within the specified timeframe. That the applicant has waited for over 5 years for this matter to be resolved and it would



be unfair for this court to allow the application sought. That the application constitutes an abuse of court process.

### **Analysis and Determination**

16. I have considered the principles for enlargement of time as set out in the cases of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* (*supra*) and *Mwangi Kaimenyi v Attorney General & another* (*supra*). The principles to consider are: whether there has been delay and the period of delay; the reasons given for such delay; whether the application has been brought without undue delay and if there will be any prejudice to be suffered by the respondent if extension is granted.
17. The court has unfettered discretion in an application for extension of time. The applicant herein was ordered to fix the application for hearing within three months and failed to do so. The explanation they have given for not complying with the order is that they were not aware of the order as the ruling which ordered so was delivered in their absence.
18. I have considered that the subject ruling was delivered in the absence of counsel for the applicant. It is therefore possible that the applicant was not aware of the order and directions of the court. Though there was inordinate delay in filing the instant application, I find no evidence that the same was intentional. In my view justice can still be done in the case despite the delay. It is a cardinal principle of law that a court of law should not drive away a litigant from the seat of justice without justifiable cause.
19. In an application for reinstatement of suit the court is obligated to consider the prejudice that may be suffered by the applicant if the suit is not reinstated and by the respondent if the suit were reinstated. I am not satisfied that the respondents herein will suffer any prejudice if the suit is reinstated. The can be compensated for the delay by way of costs.
20. The upshot is that the court finds merit in the application dated 17<sup>th</sup> April 2024. The application is allowed as prayed. Consequently, the Notice of Motion application dated 30/9/2019 is reinstated for hearing.
21. Costs to be in the cause.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:-

Miss Taib for Applicant

Mr. Kiamba HB for Muema Kituku for Respondents

Court Assistant – Amina

30 days Right of Appeal.

