



**Kariuki & 2 others (as trustees of Kihinganda Self Help Group) v Kakuzi Limited  
& 3 others; National Land Commission (Interested Party) (Environment &  
Land Case 18 of 2021) [2023] KEELC 16717 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16717 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 18 OF 2021  
LN GACHERU, J  
MARCH 28, 2023**

**BETWEEN**

**ISAAC NJOROGE KARIUKI ..... 1<sup>ST</sup> PLAINTIFF  
PRISCAH WANGUI WAWERU ..... 2<sup>ND</sup> PLAINTIFF  
DAVID MAINA NGURE ..... 3<sup>RD</sup> PLAINTIFF  
AS TRUSTEES OF KIHINGANDA SELF HELP GROUP**

**AND**

**KAKUZI LIMITED ..... 1<sup>ST</sup> DEFENDANT  
KAKUZI PLC ..... 2<sup>ND</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
DIRECTOR OF SURVERY ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**RULING**

1. By an amended notice of motion application dated December 19, 2022, the 2<sup>nd</sup> defendant/applicant, Kakuzi PLC sought for the following orders:
  1. That this honourable court be pleased to grant an extension of time to the 2<sup>nd</sup> defendant/applicant to file its intended appeal against the ruling of this honourable court delivered on May 12, 2022;
  2. That the costs of and incidental to this application be costs in the intended appeal.



2. The application is premised on the grounds stated thereon and on the supporting affidavit of Denis Gitaka, the legal manager of the 2<sup>nd</sup> defendant/applicant, who averred that the ruling in this matter was delivered on May 12, 2022, wherein the court dismissed the applicant's application dated September 17, 2021, on the grounds of being *sub judice* and time barred. The said deponent averred that the said ruling was delivered without notice and after several changes to the date of the ruling and the court registry did not issue ruling notice prior to the delivery of the ruling. The applicant avers that it only learnt of the ruling delivered on May 12, 2022 on September 8, 2022, upon inquiry into a different matter in the court registry. ruling in the Court of Appeal and that the delay in issuing notice of the intended appeal was occasioned by the lack of service by the court registry of a ruling date. That upon gaining information of the ruling, the present application was filed without undue delay.
3. Despite the delay, the applicant avers that they are still desirous of appealing against the said
4. Further, the applicant avers that the grounds of appeal contained in the draft memorandum of appeal raise serious issues of law with a high chance of success, therefore necessitating this application to seek extension of time to file an appeal out of time.
5. The plaintiffs/respondents opposed the application through the replying affidavit of Isaac Njoroge Kariuki dated November 29, 2022, in response to the application dated October 21, 2022, which was later amended and filed on December 20, 2022. In the said replying affidavit, the deponent averred that he was a trustee of the 1<sup>st</sup> plaintiff/respondent with authority to swear the affidavit. It was the respondents contention that the 2<sup>nd</sup> defendant/applicant's request for the enlargement of time to file their intended appeal out of time has no basis in law and that the provisions are not clothed with the discretionary jurisdiction for such an application.
6. The respondents further averred that the applicant's notice of motion ought to fail, as it has not provided sufficient cause for not filing the appeal on time. The respondents raised numerous grounds on which the application ought to be dismissed, including that this court lacks discretionary jurisdiction to grant the orders sought; - that the application offends order 50 rule 6 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#). That the application was brought under the wrong provision of law; that the application is devoid of merit and that the claim that the applicant became aware of the ruling on September 8, 2022, was false. In summary, the plaintiffs/respondents averred that the application does not meet the threshold for grant of extension of time as required by law and prayed that the said application be dismissed, with costs.
7. The application was canvassed by way of written submissions.
8. The 2<sup>nd</sup> defendant/applicant through the law firm of Kaplan & Stratton Advocates, filed their written submissions in support of the application on February 6, 2023. The 2<sup>nd</sup> defendant/applicant submitted on its three main issues.
9. On the issue of whether the court has jurisdiction to extend the time for filing an appeal, the 2<sup>nd</sup> defendant/applicant submitted that section 7 of the [Appellant Jurisdiction Act](#) grants this court the power to extend time for filing an appeal. It states:
10. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:
11. Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”



12. The applicant placed further reliance on order 50 rule 6 of the *Civil Procedure Rules* which states:

Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.”

13. In light of the legislative provisions for the enlargement of time, the 2<sup>nd</sup> defendant/applicant relied on several cases touching on the same. The applicant relied on the case of *Kenya Port Authority & another v Timothy Nduvi Mutungi* (2014) eKLR, wherein the court held that an application to extend time for notice of intention to appeal pursuant to rule 7 of the *Appellate Jurisdiction Act*, from the High Court was competent. They further relied on the case of *R v County Land Adjudication & Settlement Officer- Laikipia & another, ex-parte Kabaiga Kirangu Kimiri* (2019) eKLR, where the court held:-

“It will be observed that the Court of Appeal did not hold that the application for extension of time to lodge a notice of appeal out of time had been properly filed in the High Court and the High Court ought to have determined it. I do not therefore agree with the argument that this court has no jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a notice of appeal out of time.”

14. The second issue was whether the 2<sup>nd</sup> defendant/applicant has satisfied the threshold for grant of leave to file an appeal out of time?

15. On this issue the applicant submitted that power to grant leave is discretionary and should therefore be exercised with the well settled principles. The applicant relied on the case of *Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Co Ltd* (2015) eKLR, wherein it was held that:

“The powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour.”

16. The applicant further submitted that the delay in filing the intended appeal was not deliberate, and was occasioned by acts beyond its control. That despite due diligence, the applicant only became aware of the ruling on September 8, 2022. Reliance was placed on the case of *Muri Mwaniki & Wamiti Advocates v Edward Mukundi Karanja & 2 others* (2019) eKLR where the court held; -

“That absence and information of the delivery of the ruling vitiated the applicant’s right to lodge an appeal on time. I hereby extend the period for lodging the appeal within 30 days from delivery of the instant ruling.”



17. Further, the applicant submitted that it has an arguable appeal that raises arguable point of law. It relied on the case of *Kenya Airports Authority v Mitubell Welfare Society Another* (2014) eKLR where the Court of Appeal held as follows:

An arguable appeal is no more than one that raises a legitimate point or points deserving judicial determination. An appeal need not raise a multiplicity or any number of such points; a single arguable point is sufficient to earn appeal such application”

18. On the final issue of whether the plaintiffs/respondents will suffer any prejudice if the application is granted, the 2<sup>nd</sup> defendant/applicant submitted that the plaintiffs/respondents have not adduced any evidence that the application herein is an afterthought or intended to prejudice the delay of the hearing of the matter. Reliance was placed on the case of *R v County Land Adjudication & Settlement Officer-Laikipia & another, Ex-Parte Kabaiga Kirangu Kimiri* (2019) eKLR wherein the court held as follows:

“other than arguing that this court lacks jurisdiction to grant the orders sought, the respondents have not demonstrated what prejudice, if any, they would suffer if the application is allowed.”

19. In conclusion, the 2<sup>nd</sup> defendant/applicant urged the court to exercise its jurisdiction and grant the prayers sought.

20. The plaintiffs/respondents through the Law of Owang’ & Associates Advocates filed their written submissions on February 1, 2023, and opposed the application. They submitted that the application has no basis in law and that the 2<sup>nd</sup> defendant/applicant has not provided any good and sufficient reasons for not filing the appeal on time. They relied on the case of *Nyateko v Fredrick Omondi Oketch* (2021) eKLR, wherein the court held:

The provisions of the law that clothes this court with the discretion to grant leave to file an appeal out of time lies with section 79G and 95 of the *Civil Procedure Act* and section 16A of the *Environment and Land Court Act*. It is trite that in order for a party to succeed in such a motion, an applicant must satisfy the court that it has a good and sufficient cause for not filing the appeal on time.”

21. The plaintiffs/respondents further submitted that the applicant failed to meet the criteria for the grant of leave to file an appeal out of time. They relied on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR wherein the principles were set out as follows:

22. We derive the following as the under-lying principles that a court should consider in exercise of such discretion:

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?”
23. The plaintiffs/respondents further submitted that there is no appeal on record for this court to exercise its discretionary jurisdiction;- that the application was brought under the wrong provisions of the law and that the applicants had not sufficiently explained the delay. They relied on the case of [Rufus Muriithi Nyaga v Juliet Wanja Ireri](#) (2018) eKLR, wherein Justice Muchemi held as follows:
- “When a court is considering delay, the length of delay is a relevant factor. The applicant was required to act within 21 days, but he took a whole one (1) year in slumber. It is not too harsh to refer the applicant as an indolent litigant. The limited time of filing the record was not fixed in vain, but to serve the purpose of expeditious disposal of case. Litigation must come to an end. The discretion of the court to extend time must be exercised judiciously.
- I find one (1) year delay inexcusable and contrary to the overriding objective in regard to expeditious disposal of cases and in regard to economic use of judicial resource.”
24. Lastly, the plaintiffs/respondents submitted that the claim that the 2<sup>nd</sup> defendant/applicant became aware of the ruling on September 8, 2022, is false and that therefore fails to satisfy this court’s criteria to hear and determine the application. Further, that the application is a mere afterthought, calculated to prejudice the plaintiffs/respondents and delay the conclusion of the matter. The plaintiffs/respondents prayed that the instant application should be dismissed with costs.
25. This court has considered the instant application, the rival written submissions and the authorities cited by the parties and finds the two issues for determination are:
1. Whether the time for lodging an appeal ought to be extended?
  2. Whether the appeal is arguable?
26. Section 66 of the [Civil Procedure Act](#) provides as follows:
- “Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.”
27. The period provided for lodging of appeal to the Court of Appeal is normally 14 days as provided for by order 43(3) of the [Civil Procedure Rules](#) and rule 75(2) of the [Court of Appeal Rules](#). Where time has lapsed, a party can move court for the extension of time.
28. This power is donated to this court by section 7 of the [Appellate Jurisdiction Act](#). Similarly, by order 50 rule 5 of the [Civil Procedure Rules](#) which is replicated under section 95 of the [Civil Procedure Act](#) which states:
- “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



29. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – civil application No Nai 251 of 1997, the court stated as follows;

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

30. As submitted by both parties, the principles that guide the court in exercising its discretion to grant leave to file an appeal out of time were well settled in Supreme Court application No 16 of 2014 *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Supra). The principles include:

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

31. Further, the principles to be considered in exercising the discretion whether or not to enlarge time were also elucidated in case of *First American Bank of Kenya Ltd v Gulab P Shah & 2 other* Nairobi (Milimani) HCCC No 2255 of 2000 [2002] 1 EA 65, where the court set out the factors to be considered in deciding whether or not to grant such an application and these are:

- i. The explanation if any for the delay;
- ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and
- iii. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant?"

32. Having considered the above principles for the grant of leave to file an appeal out of time, this court will examine and analyse the said principles as set out and juxtapose them with the present case, to make a conclusion on whether the applicant is deserving of the orders sought.

33. The first issue for consideration is the explanation for the delay. The 2<sup>nd</sup> defendant/applicant has alleged in its application that it only found out about the impugned ruling on September 8, 2022, despite the ruling having been delivered on May 12, 2022. This is a period of 3 months and 27 days.



34. It is trite that a delay is delay, even after one day and a party seeking the indulgence of court must endeavour to give reasons for the said delay. The applicant herein submitted that the ruling was delivered without notice to the parties after the ruling dates changed on several occasion. That the applicant happened to find out that the ruling was delivered while checking something else in the registry or while following up on another matter.
35. The plaintiffs/respondents opposed the application. It was the plaintiffs/respondents contention that they were notified of the ruling date by the court registry and it denounce the 2<sup>nd</sup> defendant/applicant's claim that the parties were not notified of the said ruling date.
36. The applicant is required to give sufficient reasons for the delay in filing the application so that the orders sought can be granted. The applicant herein has blamed the delay on the change of the ruling date due to the court not sitting on the stated days. As a consequence, the 2<sup>nd</sup> defendant/applicant averred that it was not aware when the ruling was finally delivered. The applicant attached ruling notice dated April 5, 2022. The court notes that the ruling date did indeed change, though a notice was issued.
37. The other issue for consideration is whether the intended appeal is an arguable one deserving a day in court, or whether it is a frivolous one which would only result in the delay of the course of justice?
38. The applicant has annexed a draft memorandum of appeal, in which it has raised eight grounds of appeal. As was held in the *Mitubell Case* (supra) an arguable appeal is no more than one that raises a legitimate point or points deserving judicial determination. An appeal need not raise a multiplicity or any number of such points; a single arguable point is sufficient to earn appeal such application.
39. This court having reviewed the draft memorandum of appeal, and it finds and holds that the 2<sup>nd</sup> defendant/applicant has raised arguable points of law. It would not be just for the court to dismiss the 2<sup>nd</sup> defendant/applicant out of court or seat of justice and deny them the right to appeal. The applicant should be given its day in court by allowing extension of time to file its appeal.
40. The final issue for consideration is whether or not the plaintiffs/respondents can adequately be compensated by costs for any prejudice that they may suffer, as a result of a favourable exercise of discretion in favour of the 2<sup>nd</sup> defendant/applicant.
41. The court having found that the ruling date did indeed change and that the 2<sup>nd</sup> defendant/applicant has an arguable appeal, it cannot be said that the plaintiffs/respondents will be prejudiced by the wheels of justice turning to ensure that all parties are given their day in court.
42. Having considered the application and the pleadings by the parties herein, this court find the instant amended notice of motion application dated December 19, 2022, is merited and the said application is allowed in the following terms;
  1. Leave be and is hereby granted to the 2<sup>nd</sup> defendant/applicant to file appeal out of time against the ruling delivered on May 12, 2022, within the next 14 days from the date hereof.
  2. The applicant is granted extension of time to file its intended appeal within fourteen (14) days from the date hereof.
  3. In default, the instant leave or orders granted herein will lapse automatically.
  4. The plaintiffs/respondents are entitled to costs of the application.

It is so ordered.



**DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of;

Joel Njonjo/Mwende - Court Assistants

Mr Owang for the 1<sup>st</sup> Plaintiff/Respondent

1<sup>st</sup> Defendant/Respondent – Absent

Ms Kithinzi for the 2<sup>nd</sup> Defendant/Applicant

3<sup>rd</sup> Defendant/Respondent – Absent

4<sup>th</sup> Defendant/Respondent – Absent

Interested Party – Absent

**L. GACHERU**

**JUDGE**

**28/3/2023**

