



REPUBLIC OF KENYA



Mulika Wote Security Services Limited v Trans-Nzoia County Service Board & another (Miscellaneous Civil Application 24 of 2023) [2024] KEHC 11307 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION 24 OF 2023
AC MRIMA, J
SEPTEMBER 27, 2024**

BETWEEN

MULIKA WOTE SECURITY SERVICES LIMITED APPLICANT

AND

TRANS-NZOIA COUNTY SERVICE BOARD 1ST RESPONDENT

TRANS-NZOIA COUNTY ASSEMBLY 2ND RESPONDENT

RULING

Background:

1. The application by way of Notice of Motion, subject of this ruling, is dated 22nd June 2023. It was supported by the Affidavit of Cassim Felix Wekesa, deposed to on a similar date.
2. The application sought the following reliefs;
 1. Spent
 2. That the time within which an appeal can be preferred against the Judgment of 24/1/2023 by Honourable V. Karanja Principal Magistrate in Kitale CMCCC No. 29 of 2018 be extended by such a period as this honourable court may Order.
 3. That costs do abide in the result of the intended Appeal.
4. As discerned from the supporting Affidavit of Mr. Wekesa, the Applicant's Director and the grounds in support of the application, it was the Applicant's case that judgment in the trial Court was delivered on 24th January 2023. That through its Counsel on record, M/s Ndegwa Waweru & Co. Advocates, the Applicant applied for certified copies of proceedings and Judgment for purposes of appeal. That was vide a letter filed on 2nd February 2023.



5. It was the Applicant's further case that the proceedings were supplied on 16th May 2023 and a certificate of delay issued.
6. He asserted that upon submitting the said documents to its Advocates for purposes of lodging of an appeal, it learnt that Mr. Ndegwa Waweru was no longer in Kitale. It, thus, instructed the firm of Messrs. Kiarie & Company Advocates to take up the case.
7. The Applicant contended that the draft Memorandum of Appeal disclosed arguable grounds of Appeal and that it had lodged the application without prolonged delay.
8. The Applicant did not file written submissions.
9. The Respondents challenged the application through Grounds of Opposition dated 10th July 2023. They asserted that;
 1. That the Application had been brought after a long and undue delay given that the Judgment was delivered on 24.1.2023 and typed proceedings applied for on the same date.
 2. That the delay in filing the Application has not been explained to the required standard and the excuses for the delay are baseless, unsatisfactory and find no support in law and in the eyes of equity.
 3. That the grant of the prayers sought would gravely prejudice the Respondent who has been enjoying closure of the mater and re-opening it would have immense financial and budgetary implications.
 4. That the Applicant has not demonstrated that a prima-facie it had an arguable and meritorious appeal that raises credible issue that deserving (sic) audience and determination by the Court.
 5. That the Application is defective an abuse of the due process, an afterthought and lacks merit.
10. In its written submissions dated 5th May 2023, the Respondents asserted that an extension to time to lodge an appeal is not an automatic right to a party but an equitable remedy to a deserving party. It, therefore, was its case that the Applicant was guilty of laches and delay since the judgement subject of the appeal was rendered 9 months ago.
11. It was submitted that the judgment was cause listed, delivered in open Court when the Applicants were present in Court. It submitted that that the argument that its Counsel had relocated is an afterthought and had no proof.
12. It urged this Court to find that the delay was deliberate and that there was no sufficient reason for exertion of time. The decision in *Habo Agencies Limited -vs- Wilfred Odhiambo Musingo* (2015) eKLR was referred to where the Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigations.
13. The Respondents further relied on of the Supreme Court decision in *County Executive of Kisumu -vs- County Government of Kisumu & 8 Others* where it was observed;

..... Each case has to be determined on its own merit and all relevant circumstances considered it is worth considering that whether or not to extend time the whole period of delay should be stated and explained to the satisfaction of the Court.
14. Further, the Respondents relied on decision in Misc. App. No. 401 of 2018, *Nyagaka Kavole -vs- Mailu Gideon* where it was observed that the delay of five months was an afterthought and the Applicant is under duty to satisfactorily explain such delay.



15. In conclusion, the Respondents submitted that the it would be gravely prejudiced if the application is granted since it has been enjoying closure of the matter. It reiterated that the delay is unreasonable.

Analysis:

16. From the foregoing discourse, the only issue that arises for determination is whether the application satisfies the threshold for extension of tome to lodge an appeal.
17. Section 79G of the [Civil Procedure Act](#) regulates the timelines within which appeals can be lodged to the High Court. It provides as follows: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

18. The judgment sought to be appealed from was delivered on 24th January 2023. As per Section 79G of the [Civil Procedure Act](#), the Applicant had until 22nd February 2023 to lodge his appeal.
19. From the record, the Applicant requested for copies of proceedings from the trial Court through its letter dated 26th January 2026. It was received in Court on 2nd February 2023, 10 days after the judgment was rendered.
20. The Court prepared a Certificate of Delay dated 22nd May 2023. It indicated that the period beginning 2nd February 2023 to 16th May 2023, when the Applicant was eventually availed the judgment and typed proceedings ought to be excluded from computation of time.
21. From the foregoing, time stopped running on 2nd February 2023. As of 16th May 2023, when the Applicant was in receipt of the typed proceedings, it had twenty days left within which to lodge an appeal. Accordingly, it had until 4th June 2024 to lodge its appeal.
22. The Applicant did not institute its appeal inside the foregoing time, hence, the current application which was filed in Court on 22nd June 2023, a period of 18 days outside the permissible time of lodging an appeal.
23. The question before this Court is, therefore, whether the reasons advanced for the 18 days of delay is excusable as to warrant extension of time.
24. The principles on which this Court will exercise its discretion on this matter are well established. In Supreme Court Application *No. 16 of 2014, Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Apex Court observed as follows;

... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a Court should consider in exercising 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 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. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents, if 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 [emphasis supplied]
25. This Court will, hence, sequentially pit the foregoing principles against the circumstances of the case.
 26. Right off the bat, the decision to extend time is unfettered discretion, meaning, it is unrestrained or uninhibited. The Court has a wide latitude in making such a decision. However, the party applying for such extension must know that is not a matter of right, rather, it is an equitable remedy.
 27. The question as to whether the Applicant laid a basis for the delay to the satisfaction of the Court turns on validity and reasonableness of the explanation that, despite availing the judgment and typed proceedings to the office of Messrs. Ndegwa Waweru & Co. Advocates, Learned Counsel, Mr. Ndegwa Waweru was no longer practising in Kitale.
 28. The Applicant stated that immediately upon learning of his Counsel's absence, he instructed the firm of Messrs. Kiarie & Co. Advocates who lodged the instant application.
 29. It is, in this Court's view that, cumulatively, the 18 days the Applicant took to look for another firm of Advocates and to institute the instant application was not inordinate delay. In all circumstances of the case, the delay was reasonably explained to the satisfaction of this Court.
 30. In respect to the question whether the Respondents will suffer any prejudice, this Court notes that no substantial reason has been advanced to that end. The claim that re-opening the case will greatly affect public funds and resources and that it will have immense budgetary implications is unfounded. The suit at the trial Court was dismissed in its favour and as such there is no demonstrable prejudice it will suffer fs the application is allowed.
 31. Finally, this Court had the occasion to appreciate the grounds set out in the Draft Memorandum of Appeal. Key among the issues raised is the contention as to whether the trial Court rightly found that there was no contract between the Applicant and the Respondents.
 32. There is also the pertinent question as to whether the trial Court erred in making the assessment that both parties flawed procurement laws. That was a matter, which in this Court's assessment, generates immense public interest and ought to be re-looked by an appellate Court.



33. In *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR, the Court of Appeal, while considering the circumstances for extension of time and leave to file the Notice of Appeal out of time made the following remarks: -

...it is now settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the Court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.

34. This Court is persuaded that discretion ought to be exercised in favour of the Applicant.

Disposition:

35. Having paid regard to the entirety of the principles for extension of time vis-à-vis the circumstances of the suit, it is this Court's finding that the application is merited and the following final orders hereby issue: -

- a. The Notice of Motion dated 22nd June 2023 is merited.
- b. The Applicant is hereby granted leave to file and serve its Memorandum of Appeal within 21 days hereof.
- c. The costs of the application to abide by the outcome of the intended appeal.

36. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Kiarie, Learned Counsel for the Applicant.

No appearance for Mr. Songole, Learned Counsel for the Respondents.

Chemosop/Duke – Court Assistants.

