



REPUBLIC OF KENYA



**Kariuki v Mirio (Miscellaneous Civil Application E002 of 2022)
[2024] KEHC 11319 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E002 OF 2022
DKN MAGARE, J
SEPTEMBER 25, 2024**

BETWEEN

VERONICAH TIOKO KARIUKI APPLICANT

AND

EUNICE NJOKI MIRIO RESPONDENT

RULING

1. This is a ruling over an application dated 18/1/2022. The prayers sought are as follows: -
 - a. This Honourable court be pleased to grant the Applicant leave to lodge an appeal out of time.
 - b. Costs to abide outcome of Appeal.
2. The grounds upon which the application is made is that the Applicant intends to appeal against the judgment of the trial court dated 16/6/2021 dismissing the suit. Further, it was stated that the time for appeal lapsed on 15/7/2021 and the Applicant as a lay woman did not know of the time within which to appeal.
3. There is no response to the Application.

Analysis

4. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained.
5. Waki, JA in *Seventh Day Adventist Church East Africa Ltd & another v M/S Masosa Construction Company* Civil Application No Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the



chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

6. I have perused the application and the Supporting Affidavit. The Applicant does not give reasons for the delay that should guide this court to exercise discretion in her favour. What appears to be the only reason the Applicant delayed is that she is a lay woman who did not know of the time limitation for appeal. However, there is evidence that the Applicant was represented by an advocate in the proceedings leading to the impugned judgment.
7. It is imperative to note the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014]eKLR where the learned Judges held as follows:-
 - “(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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
8. It is important to remember that extension of time is discretionary. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-

In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.
9. It follows therefore that the Applicant's explanation for the delay is key in guiding the court's exercise of discretion on the issue of leave to appeal out of time.



10. It is self-evident that the Judgment was delivered on 16/6/2021 and this application was filed on 21/1/2022, seven months later. The Memorandum of Appeal ought to have been filed after 30 days of the delivery of judgment, which is by 15/7/2021. Notwithstanding, the Applicant was under duty to show the reasons for delay of one day. However short the period of delay, it must be explained. The court has not been given a satisfactory explanation for the delay.

11. Section 79(g) of the *Civil Procedure Act* provides as doth: -

“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 to the appellant 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.”

12. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an application is considered.

13. The Applicant delayed for about 7 months. The reason given is not genuine and has not been explained. I note that the Court in Asike-Makhandia J in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR stated that:-

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

14. This is a proper application to dismiss.

Determination

15. In the circumstances I make the following orders: -

- a. The Application dated 18/1/2022 lacks merit and is accordingly dismissed in limine.
- b. There is no order as to costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF SEPTEMBER, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by:-



Wanjiru Gitahi & Co. Advocates for the Applicant
Bryan Moturi & Co. Advocates for the Respondent
Court Assistant – Jedidah

