



**AOO v EAO (Civil Appeal E016 of 2023)  
[2023] KEHC 23301 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E016 OF 2023**

**G MUTAI, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**AOO ..... APPLICANT**

**AND**

**EAO ..... RESPONDENT**

**RULING**

1. On 15<sup>th</sup> December 2022, Hon M. Nabibya, PM, delivered a judgment in Chief Magistrate’s Court Divorce Cause No. E26 of 2020; EO v AOO. In the said judgment, the Court found that the respondent and the applicant had cohabitated together and that “at least 1<sup>1/2</sup> years was long enough for this Court to make a presumption that the two were married”. Having found that the two were married, the Court found that the appellant had deserted the respondent. In the Court’s view, “desertion and irreconcilable difference are grounds for divorce. The defendant didn’t controvert this”.
2. The appellant/applicant is aggrieved by the said decision. However, having not filed the appeal on time, the applicant filed the Notice of Motion application dated 27<sup>th</sup> June 2023, vide which he sought the following orders: -
  1. Spent;
  2. The honourable court be pleased to grant leave to the applicant to file the appeal out of time against the judgment/decision in Mombasa Chief Magistrate’s Court Divorce Cause No. E26 of 2020 delivered on 15<sup>th</sup> December 2023;
  3. The Memorandum of Appeal dated 27<sup>th</sup> June 2023 be deemed to have been properly filed; and
  4. Costs.
3. The application is based on the averments that the applicant received typed & certified copies of the judgment and proceedings late despite having promptly applied and paid for the same. He is



apprehensive that unless the orders he seeks are issued, his access to justice will be curtailed. In his view, the proposed appeal has merits and has very high chance of success. The application was supported by the annexed affidavit of the appellant/applicant and the annexure thereto.

4. The application is opposed. The respondent filed a replying affidavit sworn on 30<sup>th</sup> June 2023. In the said affidavit, she denied that she had ever been served with a letter requesting typed proceedings. She deposed that the application was made seven months after the fact, which in her opinion, is an inordinate delay. The respondent urged that the appellant/applicant could have filed a Memorandum of Appeal as he awaited the typed proceedings and that no explanation was given as to why he had filed to do so. In the circumstance, the respondent averred that the application before the Court is an afterthought, intended to abstract justice and is an abuse of the Court process and should be dismissed with costs.
5. The applicant filed a Supplementary Affidavit vide which he reiterated his previous averments. In addition, he deposed that this Court has the discretion to extend the time to file an appeal.

### **Submissions of the Parties' Counsels**

6. When the matter came before me on 5<sup>th</sup> July 2023, I directed that the application be canvassed through Written submissions.

### **Submissions of the Applicant**

7. The applicant contends that this honourable Court has the discretion to extend the time for filing an appeal out of time. The applicant identified two issues as coming up for determination, being whether the application has merits and who should bear the costs of this application.
8. The applicant submitted that the principles to be considered by the Court when exercising its discretion on whether or not to enlarge time was set out by the Court of Appeal in *Leo Sila Mutiso v Hellen Wangari Mwangi*; Civil Appeal No 255 of 1997 (unreported). It was submitted that the Court, when considering such applications, looks at the length and reason for the delay, the chances of success of the appeal and the degree of prejudice the respondent will suffer if the application is granted.
9. Regarding delay, the applicant submitted that he applied for certified copies of documents on 20<sup>th</sup> December 2022 and that it was only on 15<sup>th</sup> June 2023 that they were availed. The applicant urged that the 5-month delay in this case was not inordinate. In support of his submissions, he referred the Court to the decision of the Court of Appeal in *George Kiptabut Lelei & another v Fanikiwa Ltd* [2019] eKLR, where it was held that a delay of 7 months did not amount to an inordinate delay.
10. The applicant submitted that he could not file the appeal earlier as the decree was only certified on 15<sup>th</sup> June 2023. He urged that it would be draconian to strike out the appeal herein without giving the applicant his day in Court to prosecute his case, more so when the complete Record of Appeal has been filed. The applicant referred me to a number of authorities among which was that by the Supreme Court in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014]eKLR.
11. The applicant stated that he had arguable appeal as no marriage between him and the respondent was proved. In any case, the alleged marriage had not produced issues.
12. The applicant submitted that the Respondent would not be prejudiced if the application was granted. It was also urged that allowing the instant application would serve the overriding objective of the Court as it would obviate hardship, expense and delay. I was thus urged to allow the application with costs to the applicant.



## Submissions of the Respondent

13. The Respondent submitted that this Court has discretion under order 42 Rule 2 (a) of the *Civil Procedure Rules* to grant a stay of execution and to extend time based on sound reasons. The Court was urged to consider the length of the delay, explanations given for such delay, whether the appeal is arguable, and the interests of justice.
14. This Court was referred to the Court of Appeal decision in the *County Government of Mombasa v Kooba Kenya Ltd*; Court of Appeal case No. 130 of 2018, where, in dismissing an application seeking to extend the time to file a Notice and Record of Appeal, the referred to the decision of the Court in the case of *Abdul Aziz Ngoma v Mungai Mathayo* [1976]eKLR 61 where the Court stated:-

“We would like to state that once again that this Court’s discretion to extend time under Rule 4 only comes into existence after “sufficient reason” for extending time has been established, and it is then that other considerations, such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered”.
15. The respondent relying on the Court of Appeal cases of *Motorway Kenya Ltd v Kenya Engineering Workers Union*; Civil Appeal No. 111 of 2018 and *Mohamed & Mungai Advocates v Kangethe & Co Advocates*; Court of Appeal Civil Appeal No 19 of 2004. Submitted that there had been an inordinate delay which had not been sufficiently explained.
16. The respondent submitted that the applicant’s right of appeal should be weighed against the respondent’s interest, who should not be denied the fruits of a judgment in her favour.
17. The Respondent thus prayed that I should dismiss the application.

## Analysis and Determination

18. I note that the judgment was delivered on 15<sup>th</sup> December 2022. The applicant applied for copies of the judgment and the proceedings on 20<sup>th</sup> December 2023. From the record, I note that these were only availed on 15<sup>th</sup> June 2023, thereafter, this application was filed.
19. I am called upon to exercise my undoubted discretionary power to extend time. Like all exercises of discretionary power, I must do so on sound legal principles and not whimsically.

## The Length and Reason for the Delay

20. I agree with the respondent that the delay in this matter is a cause for concern. I, however, note that the Court processes caused the delay. Given the role of the Court, I am of the view that the applicant shouldn’t be made to suffer for circumstances which were beyond his control. In my opinion, the Courts should strive as much as possible to allow parties to be heard or to exhaust the avenue of appeal. I am guided by the decisions of the Court of Appeal in *Joseph Kiangoi v Wachira Waruru & 2 others* [2010]eKLR, where the Court stated:-

“... the Court should, in our view, lean more towards sustaining appeal rather than striking them out as far as is practicable and fair. As a tool of justice, the overriding objective principle is both procedural and substantive. In this case, the substantive aspect of sustaining the appeal must, in the interest of justice, override the procedural rule requiring the striking out of the Notice of Appeal and the Record...”



**Chance of Appeal Succeeding**

21. At this point, the only consideration I can make is whether the appeal is arguable. As is often stated, an arguable appeal is not one that is destined to succeed, it is one that raises points that deserve further review. The applicant has submitted that there was no marriage and that the Court below was wrong to presume that there was one. In my view, an arguable appeal exists.

**Prejudice to the Respondent**

22. I do not see how the Respondent would be prejudiced if the appeal is allowed. Appeals in our Court no longer take as long as they used to. It would serve the greater cause of justice if the points raised by the applicant were heard and determined on merits.

23. It is clear from the foregoing that I am inclined to allow the application. There is, however, the issue of costs. The applicant has sought costs. Should this Court grant his prayer? I think not. The applicant is, in part, the author of his own travails. It should also be noted that the Family Court rarely condemns unsuccessful parties to pay costs unless there has been abuse of the Court process. This is not the case here.

**Disposition**

- 24. The orders that therefore commend themselves to me are these: -
  - 1. Leave to the Applicant herein to file the appeal out of time against the judgment of the learned Principal Magistrate in Mombasa Chief Magistrate’s Court Divorce Cause No. E026 of 2020 is issued;
  - 2. The Memorandum of Appeal dated 27<sup>th</sup> June 2023 is deemed as having been properly filed subject to the payment of the requisite Court fees; and
  - 3. Each party is to bear his/her costs.

Orders accordingly.

**DELIVERED AND DATED THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023 AT MOMBASA VIA MICROSOFT TEAMS**

.....

**GREGORY MUTAI  
JUDGE**

**In the presence of: -**

- Mr. Midenga for the applicant;
- Ms. Okumu for the respondent;

