



**Wepukhulu v Wepukhulu; Mongeni (Applicant); Wasike (Respondent) (Environment & Land Case 36 of 1998) [2023] KEELC 17559 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17559 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 36 OF 1998  
FO NYAGAKA, J  
MAY 25, 2023**

**BETWEEN**

**MONGENI WEPUKHULU ..... PLAINTIFF**

**AND**

**THOMAS WASIKE WEPUKHULU ..... DEFENDANT**

**AND**

**PATRICK SIMIYU MONGENI ..... APPLICANT**

**AND**

**ROBERT BARASA WASIKE ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated February 21, 2022 the Plaintiff herein moved this Court under Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#), Order 42 Rule 6(4) of the [Civil Procedure Rules](#) and Section 7 of the [Court of Appeal Rules](#) and Article 159 of the [Constitution](#) of Kenya. He sought the following orders:
  1. ...spent
  2. That this Court be pleased to extend time for filing notice of Appeal against the Ruling of Honourable Court made on January 17, 2022 (sic).
  3. ...spent
  4. Any other orders of the Court shall deem fit to grant
  5. Cost be provided (sic).



2. The Application was based on five grounds which were straight forward. These were that the applicant was dissatisfied with the impugned Ruling; he was unable to appeal immediately due to the time it took to read the ruling which was lengthy and due to lack of funds; he requires leave to appeal and serve the Notice of Appeal; he was desirous of seeking an opinion from the Court of Appeal; and the Court had powers to extend the time.
3. The Application was supported by the Affidavit of one Patrick Simiyu Mongeni, the applicant. It was sworn by him on February 21, 2022. It reiterated the contents of the grounds, but in deposition form. He annexed and marked as PM1 a copy of a letter dated February 16, 2022 requesting for proceedings in respect of the ruling, and as PM2 a copy of a draft Notice of Appeal. He deponed that the ruling was delivered in his absence and when the advocate gave it to him after a week of delivery, he noted that it was 31 pages long hence it took him time to peruse it. His further deposition was that due to his age and eyesight problem he was assisted by his grandchild to read it to him and make him understand it. After that he came back to his advocate to discuss the possibility of filing an appeal and the Advocate confirmed to him that it was possible to do so upon him making a deposit. He deponed further that he managed to raise the deposit by February 16, 2022 and his advocate promised to file the appeal. He deponed further that the Respondent had filed his Bill of Costs what was due for taxation on March 8, 2022. He deponed that the application was made in good faith and no prejudice could be suffered by the Respondent. He prayed that the application be allowed.
4. The Respondent, one Robert Barasa Wasike, opposed the Application strongly. He swore an Affidavit on the March 14, 2022 and filed it on the same date. He deponed that the Application was misconceived, bad in law and amounted to an abuse of the process of the Court. He repeated the date of delivery of the ruling, and that it was specific and elaborate on the suit. He deponed that the Applicant had not given valid reasons for extension of time.
5. Regarding his prayer for stay of execution (which is now spent), he swore that the Applicant had not met the conditions grant of such an order as provided by Order 42 of the *Civil Procedure Rules* 2010. He deponed that an Appeal was not an automatic stay of execution. Lastly, he prayed that the Application be dismissed with costs.
6. The application was canvassed by way of written submissions. Starting with the summary of the prayers he made, the Applicant submitted on a number of issues sequentially. The first one was whether or not the Court had power to extend time. He cited Section 7 of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya. The provision is to the effect that the High Court may extend time for notice of intention to appeal from a judgment of the Court, or for making application for leave to appeal or for a certificate that the case is fit for appeal, after the time has expired. He relied on the case of *Clemensia Nyanchoka Kinaro v Joyce Nyansiaboka Ochomba* [2021] eKLR.
7. On the issue of the extension he relied on the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* as cited in *Vishva Stone Suppliers Company v. RSR Stone [2006] Limited* [2020] eKLR. The Applicant then submitted that the ruling having been delivered in his absence and after his advocate gave him a thirty-one-page ruling together with his old age and eye problems the delay in the filing of the appeal was not deliberate but that the 31 pages were many and he had no funds for deposit. About the chances of success of the appeal he argued that he wished to have the opinion of the Court about the ruling, it having concerned a protracted land matter. Regarding prejudice to the respondent he submitted that none would be.
8. The rest of the submissions were in relation to the prayer for stay of execution, which was overtaken by events because the Court gave a temporary one pending the determination of the appeal, and at the hearing of the application it was admitted by the applicant that the second part of the limb, being a



stay of proceedings pending the intended appeal, was premature and could only be made if and when it was determined that the intended appeal had been filed.

9. The Respondent also started his submissions by summarizing the prayers made, the facts deposed to in the Supporting and Replying Affidavit, and then gave two issues for determination. These were whether the Applicant was entitled to the orders sought, and who to bear the costs of the Application.
10. About the extension of time he submitted that about two months had passed since the ruling was delivered and no appeal has been preferred. He submitted that the Applicant had not given any or no sufficient and/or convincing reasons why time should be extended.
11. The rest of the submissions were about the prayer for stay of proceedings. I need not repeat them here for reasons given for not considering them when looking at the submissions by the applicant.
12. On costs, he submitted that it was common practice that costs follow events and urged that the circumstances of the Application were that the Applicant should be condemned to pay its costs.
13. I have considered the facts in support of the Application, the opposition thereto, the law and the rival submissions of the parties. Two issues lie before me for determination. The first one whether the application is merited or not and the second one is who to bear costs.
14. It is correct for the Applicant to cite and argue that Section 7 of the [Appellate Jurisdiction Act](#) provides for the power of the superior court to extent time for the filing of a Notice of Appeal or to grant leave to appeal against the decision of the Court. When an issue of extension of time is raised in an application for determination, the Court is obligated to exercise discretion on it judiciously. The discretion is wide. However, the Applicant has the onus of explaining to the satisfaction of the Court why he delayed in moving it. To be successful, the Applicant has to fulfil a number of conditions. These were summarized by the Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] eKLR, which the applicant relied on.
15. In the case, the Court stated that the following are “under-lying principles that a Court should consider in exercise of such discretion:
  - 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.”
16. Applying the principles above-stated to the present application, it is clear that extension of time is not a right for a party. He has to demonstrate that he/she deserves such an equitable remedy. In so doing, many factors come into play. For instance, he ought to show vigilance, good faith, clean hands, absence



of indolence, and many others. To grant the order the Court must ask itself first whether the Applicant was willful in the delay. Where it is clear that the Applicant did not occasion the delay, for instance, it is as a result of the Court delaying in giving the Applicant typed proceedings or judgment or ruling or a certified decree, it cannot be visited on the Applicant. Thus, a reasonable excuse for the delay which must afford the Applicant an opportunity to proceed to the next stage, that is to say, being permitted to prosecuting his intended Appeal by being granted an extension of time.

17. In the instant case, the Applicant has endeavored to bring himself within the parameters of the in the Nicholas Salat case (*supra*). First, he tried to lay blame for the delay on the delivery of the ruling in his absence. That was far from the truth because, the ruling was due for delivery on January 17, 2023, and there was a clear notice to that effect. He was represented by an advocate, who is still on record, and who was duly informed of the ruling which was, aside from the delivery, emailed to him. The manner of the delivery, that is to say, via electronic mail, was the ruling was communicated to the parties at the time of taking the ruling date. Therefore, his argument on his absence was neither here nor there.
18. The Applicant contended that the reason for the delay in lodging the Appeal in time was that the ruling was long, a thirty-one (31) page one, and that he did not have funds to deposit with the advocate to proceed with the appeal. Therefore, it shows that he knew well that he needed to move the Court within the time permitted by law but did not do so for the above reasons. The question is, do the two reasons fall within the principles recognized by the Supreme Court in the Nicholas Salat case (*supra*)?
19. The first reason given by the Applicant is, to say the least, the most laughable I have come across as the basis for seeking an extension. May no party or person ever attempt to join this Applicant in a future argument that the reason for extension of time is length of a decision of a judge. To do so would be trivialize decisions of courts as to try and limit them to how much they need to write as they deliver justice is to abuse the reasoning of and jurisprudence expected from a judge or judicial officer. It would be a sad day to rely on that as a reason to extend time for filing an appeal.
20. The second one was that the Applicant did not have money to deposit with the advocate in order for him to take instructions to appeal. One thing that the Applicant forgot to note is that courts will never step in to regulate the private employment contracts between clients and their learned counsel. To agree with the applicant that the requirements of procedure ought to be held in abeyance until a client and his advocate sought out the issue of fees or deposits between themselves and they be made to run or resume after that is sorted out would amount to making the courts 'tax' or fees collectors of lawyers or learned counsel. Whereas the Bar and the Bench are conjoined twins in the field of legal practice, they pay totally different leagues when it comes to how parties employ learned counsel to act for them. The only time courts come in is when there is contention as to whether the agreement entered into between learned counsel and the client was legal or void, as contemplated under Section 45 of the [Advocates Act](#), Chapter 16 of the Laws of Kenya, or when the issue of whether or not the fees charged is high or low, and the Court is called upon to tax the same, or where there is an issue as to whether an advocate was or was not employed by a party. Aside from that, courts do not and should never regulate the private employment contracts between lawyers and clients. For this reason, I do not find the reason given by the applicant as one that would entitle this Court to extend the time for his to file a Notice of Appeal from the ruling impugned.
21. Lastly, the Applicant contended that he needed time so that he could seek the opinion of the Court of Appeal on the findings of this Court hence the instant application. Interpreted holistically, the contention is the applicant is that he has no ground of appeal in the intended appeal. He intends to appeal for the sake of it, and possibly keep the Court of Appeal 'busy'. I find the applicant's reason for intending to go to the Court of Appeal flimsy and untenable. While this finding is not the reason for not finding the instant application lacking in merit, this Court thought it wise to comment on the



reason the applicant stated he wished to move the Court of Appeal: it could not be a basis for appealing even if he moved the Court in time.

22. The upshot is that I do not find any merit in the application herein and I dismiss it with costs to the Respondent.

23. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 25<sup>TH</sup> DAY OF MAY, 2023**

**HON. DR. IURFRED NYAGAKA**

**JUDGE, ELC KITALE**

