



REPUBLIC OF KENYA



**Nguma v Ndalo & 19 others (Environment & Land Case 276 of 2016)
[2023] KEELC 19940 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19940 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 276 OF 2016
EK MAKORI, J
SEPTEMBER 22, 2023**

BETWEEN

AWADH YISLAM NGUMA APPLICANT

AND

MANTANO NDALO 1ST RESPONDENT
CHRISTINE TSIMBA 2ND RESPONDENT
PHILIP GENYA 3RD RESPONDENT
GRACE NGUMBAO 4TH RESPONDENT
GARAMA POLA 5TH RESPONDENT
KARISA KAPITAO 6TH RESPONDENT
JULIUS K. MNGOJA 7TH RESPONDENT
SAMMY ABDULLA 8TH RESPONDENT
FONDO KAHINDI 9TH RESPONDENT
FIKIRANI CHARO 10TH RESPONDENT
CHIRO GRACE NGUMBAO 11TH RESPONDENT
KATOZI KAINGU CHARO 12TH RESPONDENT
ANTHONY FOLOMIA DZOMBO 13TH RESPONDENT
BENJAMIN CHARO 14TH RESPONDENT
PENDO KATANA 15TH RESPONDENT
TEMBO FOLO 16TH RESPONDENT
EDISON MWACHIRO 17TH RESPONDENT



MWARINGA MWAMBALE 18TH RESPONDENT
NATIONAL LAND COMMISSION 19TH RESPONDENT
REGISTRAR OF TITLES, MOMBASA COUNTY 20TH RESPONDENT

RULING

1. The applicant seeks to appeal the decision of this court – Olola J. delivered on October 19, 2022. The application dated December 29, 2022, therefore, seeks the extension of time within which to appeal to the Court of Appeal.
2. The applicant contended that the delay in filing an appeal on time was occasioned by the failure of the court to inform counsel of the delivery date of the judgment. By the time counsel came to realize that the judgment had been delivered sometime in December 2022, time had lapsed for filing the Notice of Appeal, which ought to have been filed by December 18, 2022. Certified copies of the proceedings were applied for and supplied for the filing of this application on February 6, 2023. The delay was about 1 month and 22 days excluding the December period, which is not reckoned in computation of time.
3. The applicant averred that there will be no prejudice which will be occasioned by the enlargement of time because the respondents are in occupation of the suit property and there is no imminent eviction on the offing.
4. The applicant contended that section 7 of the *Appellate Jurisdiction Act* gives powers to the High Court to extend the time within which to lodge a notice of appeal from its orders and judgment
5. The applicant stated that the power to extend time is unfettered as long as it is shown that a) there is merit in the appeal; b) that the extension of the time within which to institute and file the appeal will not cause any prejudice to the respondent; c) that the delay has not been inordinate; and d) the reasons for the delay.
6. The applicant further stated that the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014]eKLR and *James Muchene Ngei v Joseph Kibe & another* [2019] eKLR guides on the consideration the court should give in dealing with matters of this nature.
7. On the merits of the appeal the applicant averred that this court misapprehended the law on the issue of survey where a party has surveyed in accordance with a sale agreement, obtained a deed plan which is presented to the Registrar of titles then he is entitled to be registered as the owner and the Registrar of Titles can be compelled to issue Title Deed to him or when he dies to his estate – section 2 of the *Land Registration Act*, section 22(2) of the *Land Registration Act* and Regulation (6) of the Survey Regulations provides a road map on subdivision and the role of the Land Registrar to effect transfers. The applicant submitted, “Equity regards as done that which ought to be done”.
8. The respondents submitted that under rule 77(1) of the *Court of Appeal Rules*, a notice of appeal against the judgment of Olola J. ought to have been filed by the October 26, 2022 and served within seven days thereafter. The application seeking to extend the time to file a notice of appeal out of time was filed on January 27, 2023 and served upon the respondents on February 27, 2023. The application was filed approximately fifty-four (54) days from the date of the decision and forty-seven (47) days outside the limit set by the Statute. That the period between October 20, 2022 and January 26, 2023 must be explained to the satisfaction of the Court. The delay must be explained sufficiently and the basis laid for the court to grant orders for filing an appeal out of time.



9. The respondent submitted that the applicant and his advocates failed to attend court for the judgment and file a notice of appeal within time. No efforts have been demonstrated by the applicant to show that they made queries relating to when judgment would have been rendered in this matter. In their replying affidavit, the respondents have displayed email communication from the court registry containing notice of judgment which was circulated amongst all lawyers in Mombasa including the applicant's lawyer. The communication has not been denied as received by the applicant. The delay between October 20, 2022 and January 26, 2023 has not been explained at all as there is no proof whatsoever that there was communication between the applicant and the court Registry enquiring on when judgment would be delivered. The reason for failing to file an appeal is not a sound reason, the respondent cited the case of *Kenya Power & Lighting Co. Limited v Noorlands Limited* [2021] eKLR, on the need to mitigate the loss of more time when seeking enlargement of time.
10. The respondent submitted that while a delay of less than one month may not be inordinate, the applicant must have good reasons why the appeal was not filed in time. The basis for the grant of the orders sought must be laid and the applicant is required to satisfy the court why it should exercise its discretion in his favour. That the applicant ought to meet the criteria set for filing an appeal out of time as brought out in the case of *Samuel Ngugi Njenga v Coastal Kenya Enterprises Ltd* [2019] eKLR.
11. The respondent submitted that no plausible explanation was given to show why an appeal was not lodged in time despite knowledge of the date of judgment. No material was placed before the Court to warrant the exercise of discretion to allow for the filing of an appeal out of time. The applicant has also not led evidence to prove that they were not aware of the delivery of the judgment herein. The only conclusion drawn is that no plausible reasons exist and the excuse given by the applicant for failure to file an appeal in time cannot be substantiated.
12. The respondent submitted that the merits of the application could be gleaned without sufficient explanation of the entire period of delay. The applicant failed to focus his attention on the due and required explanation. Reliance was placed on the case of *John Mathenge Gaita v Beth Wabito Wambugu* [2021] eKLR, where the court held that even a single-day delay must be explained.
13. The only issues for the determination of this court are whether this court should extend the time within which the applicant ought to file an appeal and costs.
14. The parties to this suit have aptly quoted the law and principles applicable for consideration before the extension of time is allowed. This is summarized by the decision in *Samuel Ngugi Njenga v Coastal Kenya Enterprises Ltd* [2019] eKLR. Where Odunga J (as he then was) held as follows:-

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The court delineated the following as:-

“the underlying 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.”
15. I need not regurgitate the law but will proceed on the premises as laid by the authorities quoted before me.
16. The issue of the jurisdiction of this court to issue the orders sought is not disputed, it is found in section 7 of the *Appellate Jurisdiction Act*:
- “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.”
17. Section 79G of the *Civil Procedure Act* provides that:
- “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.”
18. The judgment in this case was delivered on October 19, 2022. On the 27th of January 2023, the application dated December 29, 2022, was filed in this court under a certificate of urgency and was certified as not urgent. The applicant claimed that the delay in filing suit was occasioned by a failure to notify counsel of the delivery date of judgment. Sometime in December 2022, counsel realized the judgment had been delivered; it was too late to file the Notice of Appeal, which should have been filed by December 18th, 2022. Certified copies of the proceedings were requested and provided for the filing of this application on February 6th, 2023. The delay was approximately one month and 22 days.
19. In *John Mathenge Gaita v Beth Wabito Wambugu* [2021] eKLR, the Court held that even a single-day delay must be explained. The Court held as follows:-
- “By requiring the filing of the appeal within sixty days, rule 82 lays emphasis on efficiency in the conduct of litigation by limiting the period within which certain steps must be taken towards an appeal. If satisfactory and acceptable explanation for delay is shown, the Court, in exercise of its absolute discretion under Rule 4 may excuse the delay and admit the appeal out of time. It however must be emphasized that delay of even a single day, has to be accounted for otherwise there would be no purpose of having rules prescribing periods within which certain steps have to be taken. Additionally, there must be some material on which the court can exercise its discretion.”
20. It is admitted that the applicant became aware (sic) of the delivery of this judgment sometime on December 13, 2022. The present application itself was drawn on December 29, 2022 but filed in court on January 27, 2023. The Notice of Appeal is also dated 27th January 2023, but drawn on December 29, 2022, The explanation given is that the proceedings in this matter had not been procured for



purposes of lodging the current application and appeal. Whereas a request for proceedings was made on December 13, 2022, there is no evidence on record to show that proceedings were never issued in good time. The record shows that one Awadh Yislam had applied to this court, paid for, and obtained a duly signed Notice of Appeal dated 3rd November 2023 and signed by the Deputy Registrar of this court on November 8, 2022. I presume that Awadh Yislam is the applicant in this matter. If that notice is anything to go by, then it follows that the delivery of judgment was well within the knowledge of the applicant. No explanation has been given as to why the current application had to wait until January 27, 2023, because as can be seen from the available record, by November 8, 2023, the Plaintiff was aware of the judgment. In *Kenya Power & Lighting Co. Limited v Noorlands Limited* [2021] eKLR the Court held as follows:-

“ Even if I was prepared to give the applicant the benefit of doubt that its advocates failed to follow up on the filing of the intended appeal while their offices were closed, there was still the period after the said advocates opened their offices on 14th January 2019. There was no explanation as to when the said advocates or the applicant learnt of the failure to lodge the appeal or at the very least the steps taken to verify the institution of the appeal.....I find that the explanation given as unsatisfactory in the circumstances of this case.”

21. It's my humble view that the explanation for the delay albeit not so quite inordinate has not been brought out particularly clearly on the change of goalposts as to when the applicant became aware of the judgment and the steps taken to mitigate on lapse of time.
22. I won't go into details about the other criteria, such as whether the appeal is meritorious (better left to the Appellate Court to decide) or whether the respondents will suffer harm if an appeal is allowed to proceed, but I will hasten to add that from the record, this is a case whose origins date back to an unfinished land sale transaction that took place on August 12, 1968. It was a while ago.
23. I find no merit in the extension of time to file an appeal out of time. application dated December 29, 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 22ND DAY OF SEPTEMBER, 2023

E.K. MAKORI

JUDGE

In the presence of:

Mr. M/s Sindiyu for Malombo for the respondents

Court Clerk: Happy

In the absence of:

Mr. Aboubakar Mwanakitina for Plaintiffs

