



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Jumbe & another v Preston Mwakio Jumbe (Environment & Land Case
306 of 2015) [2023] KEELC 20944 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 306 OF 2015
NA MATHEKA, J
OCTOBER 26, 2023**

BETWEEN

ADAM SAID JUMBE 1ST PLAINTIFF

MERCELENE KISHAGHA BULUMA 2ND PLAINTIFF

AND

PRESTON MWAKIO JUMBE DEFENDANT

RULING

1. The application is dated 23rd August 2023 and is brought under Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule I of the *Civil Procedure Rules* 2010 and Sections 3A & 63 (e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya and under Sections 3, 13(7) and 19 of the *Environment and Land Court Act* No. 19 of 2010, Article 40, 50 (1) and 159 of *the Constitution* of Kenya 2010 seeking the following orders;
 1. That this application be certified as urgent and service hereof be dispensed with in the first instance.
 2. That pending the hearing and determination of this application inter-parties, the Honourable Court be pleased to issue order for stay execution of the judgment dated 27th July 2023. decree and any other consequential orders.
 3. That the Honourable Court be pleased to issue orders of stay of execution of the judgement dated 27th July 2023 and the decree pending the hearing and determination of the intended appeal.
 4. That the Honourable Court be pleased issue orders enlarging time to file and serve the notice of appeal.
 5. That the notice of Appeal dated 16th August 2023 and filed in Court on 16th August 2023 be deemed as timeously filed and properly on record.



6. That costs of this application be provided for.
2. It is based on the grounds that the judgement in this matter was made on the 27th July 2023. That being dissatisfied with the said judgment, the Applicant has lodged a notice of appeal on the 16th August 2023. That the six days delay in lodging the notice of appeal was occasioned by the change of proprietorship of the advocates law firm from M.S.Shariff and Company Advocates to Shariff Ramadhan & Company Advocates. That the respondent has already forwarded a draft decree to the applicant's advocates and once the decree is issued execution will commence hence the need for grant of orders of stay of execution pending appeal, otherwise the applicant's intended appeal be rendered nugatory. That applicant has an arguable appeal as evident from the draft memorandum of appeal.
3. The Respondent submitted that sufficient reason has not been given by the Applicant explaining the delay in filing the Notice of Appeal. That the firm of M.S Shariff & Co. Advocates continued representing the Defendant long after Lady Justice Shariff had joined the bench. The firm of M.S Shariff & Co. Advocates had more than sufficient time to effect the change of proprietorship and business name and the same should not be an excuse for the delay in lodging the Notice of Appeal.
4. This Court has considered the application and submissions therein. The said application in my opinion is anchored under Order 45 Rule 1(b) of the [Civil Procedure Rules](#) which provides;

Any person considering himself aggrieved—

- (a)
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.
5. It is apparent from the above provisions of law that for an Applicant to succeed in an application for review, he needs to establish;
 - a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant or could not be produced by him at the time when the Decree was passed or the Order made.
 - b) Existence of some mistake or error apparent on the face of record.
 - c) Any other sufficient reason.
 - d) Application be made without unreasonable delay.
 6. Section 79G of the [Civil Procedure Act](#) is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. 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.”

7. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* (1970) EA 482 the court stated as follows;

Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

8. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by *Odek JJA in Edith Gichungu Koine vs Stephen Njagi Thoitbi* (2014) eKLR thus:

Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

9. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. This application is for the extension of time to appeal against the judgement of this court delivered on the 27th July 2023.

10. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* (2013) eKLR the court 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.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”



10. I have given due consideration of the record in light of the rival pleading, submissions, and principles that guide the court I find that the reason given for the delay in filing the appeal was occasioned by the change of proprietorship of the advocates law firm from M.S.Shariff and Company Advocates to Shariff Ramadhan & Company Advocates. I find that the reason given is not sufficient to warrant an extension of time. Indeed, the advocate for the Applicant was present during the delivery of the judgement and they had sufficient time to put their house in order. There is no draft memorandum of appeal attached to determine whether the applicant has an arguable appeal or not. I find this application is not merited and I dismiss it with costs to the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

