



REPUBLIC OF KENYA



**Kimemia & another v Munazaa & 2 others (Miscellaneous Application
21 of 2023) [2023] KEELC 20948 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20948 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION 21 OF 2023
NA MATHEKA, J
OCTOBER 25, 2023**

BETWEEN

STANLEY KIMEMIA 1ST APPLICANT

DICKSON E. NGUMI WAICHUHI 2ND APPLICANT

AND

GEOFFREY MWAKAVI MUNAZAA 1ST RESPONDENT

FONDO KIRIMO MWAKOMBEA 2ND RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA 3RD RESPONDENT

RULING

1. The application is dated 8th March 2023 and brought under Section 3A and 79G of the *Civil Procedure Act* seeking the following orders;
 1. The Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the judgement of the Honourable M. Nabibya, RM delivered in Mombasa CMCC No. 2002 of 2009 on the 7th June 2022.
 2. The costs of the application be provided for.
2. It is based on the grounds that Judgment was delivered on 7th June 2022 in Mombasa CMCC No. 2002 of 2009 without notice to the parties. The Applicant was along waiting for judgment to be delivered in the primary suit following the passing of the original judgement date. The Applicant has only now learnt of the judgement after persistent follow ups on the matter. The Applicant has filed the application without any delay after learning of the existence of the judgement. The Applicant has an arguable appeal with good chance of success, which appeal should be determined on merit. The Respondents shall not be prejudiced in any way if the application were allowed. It is in the interest of justice that the orders sought herein be granted. *



3. The 3rd Respondent submitted that the Applicant has neither annexed a copy of the typed Judgment nor has he annexed any letter applying for the same and the proceedings. That the allegation by the Applicants that they were all along been waiting for the notice of delivery judgment is not true in that the Applicants have not annexed any document to show that they were following up on the matter. That the Applicants have not shown when they came to know that judgment was delivered hence the Application has been brought with inordinate delay. That indeed no arguable appeal has been demonstrated. That it is therefore in the interest of Justice, Fairness and Equity that the Applicants' Application be dismissed with costs to the 3rd Respondent.
4. This court has considered the application and submissions therein. 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."
5. 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."
6. 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."
7. 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 is application is for the extension of time to appeal against the judgement of Hon M. Nabibya RM in Mombasa CMCC No. 2002 of 2009 delivered on the 7th June 2022. This application was filed on the 4th April 2023 over 9 months later.
8. 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.”
9. I have given due consideration of the record in light of the rival pleading, submissions, and principles that guide the court the Applicant stated that the reason for the delay in filing the appeal is that Judgment was delivered on 7th June 2022 in Mombasa CMCC No. 2002 of 2009 without notice to the parties. The Applicant was along waiting for judgment to be delivered in the primary suit following the passing of the original judgement date. The Applicant has only now learnt of the judgement after persistent follow ups on the matter. The Applicant has filed the application without any delay after learning of the existence of the judgement. It is not indicated when this discovery came about. No evidence of the persistent follow ups was given. The draft memorandum of appeal states that the trial magistrate erred in fact and law by failing to consider the import of section 17 of the *Rating Act*. I find that the Applicant does not have an arguable appeal. I also that find that the Applicant is guilty of inordinate delay and this application is an afterthought. 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 25TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

