



**Ali v Mwabili & 3 others (Miscellaneous Application E068 of 2022)
[2023] KEELC 21855 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION E068 OF 2022
NA MATHEKA, J
NOVEMBER 28, 2023**

BETWEEN

ISAAK MAALIM ALI APPELLANT

AND

BENEDICT MWABILI 1ST RESPONDENT

LITTLEONE MAGANGA 2ND RESPONDENT

KISHUSHE BRANCHING CO-OPERATIVE SOCIETY 3RD RESPONDENT

COUNTY GOVERNMENT OF TAITA TAVETA 4TH RESPONDENT

RULING

1. The application is dated 25th October 2022 and is brought under sections 79G and 95 of the [Civil Procedure Act](#) and Order 50 Rule 5 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That the proposed appellant be granted leave to appeal out of time against the whole ruling of the Hon. D Wangeci delivered on 6th July, 2022 at Wundanyi.
 2. That the notice of appeal and memorandum of appeal annexed hereto be deemed as duly filed and served.
 3. That the costs of this application be provided for.
2. It is based on the grounds that the ruling herein was delivered on 6th July, 2022 and immediately thereafter on 7th July 2022, they requested for a typed copy of the ruling so as to appreciate the reasoning of the magistrate and thereby make an informed decision on whether or not to lodge an appeal. The signed ruling was not received on time. By the time the court supplied the proposed appellant with a certified copy of the said ruling, the time allowed to file an appeal had run out. That the proposed



respondents are unlikely to suffer any prejudice. The delay occasioned herein is not so inordinate or so great as to be inexcusable. Hereof.

3. The respondent stated that on the 6th of July 2022 the trial magistrate delivered a ruling which was typed and not hand written in an open court. That the applicant by then did not show any signs or traces of appearing against the ruling of the trial court as was absent during delivery of the ruling. That the applicant claims that on 7th September 2022 requested for a copy of the ruling but has not shown to this court how the letter was sent to court and it bears no stamp from the court. That the applicant is indolent and is meant to delay the prosecution of the case as at some point he informed the court that parties are negotiating to settle the matter yet it was not true.
4. That subsequently, this suit in Wundanyi ELC case no E004 of 2021 which is subject of this application has since been dismissed with costs. Attached and marked MM-I is a copy of the dismissal order. That this application is then overtaken by client since there is no suit at the trial court.
5. 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.”

6. 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 v 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.”

7. 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 v Stephen Njagi Thoitih](#) (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.”

8. 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 ruling herein was delivered on 06th July, 2022 by Hon D. Wangeci. This application was filed on the 31st October 2022.

9. In *Nicholas Kiptoo Arap Korir Salat v 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 is that, the ruling herein was delivered on 6th July, 2022 and immediately thereafter on 7th July 2022, they requested for a typed copy of the ruling so as to appreciate the reasoning of the magistrate and thereby make an informed decision on whether or not to lodge an appeal. The signed ruling was not received on time. By the time the court supplied the proposed appellant with a certified copy of the said ruling, the time allowed to file an appeal had run out. No evidence of the follow up was given. The letter to the Executive Officer has not been acknowledged and one wonders if it was ever sent. Besides, the respondent confirms that the ruling delivered on the 6th July 2022 was typed and not hand written. The draft memorandum of appeal states that the trial magistrate erred in fact and law by failing to understand the import of the principles of *Giella v Cassman Brown*. 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. The respondent stated that this suit i.e Wundanyi ELC case no E004 of 2021 which is subject of this application has since been dismissed with costs yet the Applicant is still persisting with this application. I find that the suit does not even exists and this application is an abuse of the court process. 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 28TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

