



**Kalume v Barasa (Environment and Land Appeal 2 of 2018)
[2023] KEELC 22210 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 2 OF 2018
FM NJOROGE, J
DECEMBER 14, 2023**

BETWEEN

EVANS TUMA KALUME APPELLANT

AND

MOSES MASIVAI BARASA RESPONDENT

RULING

1. For determination is the Applicant's Notice of Motion dated 22nd March 2023 seeking the following orders:
 1. That this honourable court be pleased to grant the Applicant leave to extend the time limited to file a Notice of Appeal.
 2. That costs be in the cause.
2. The application is premised on the grounds set out on its face and the supporting affidavit of Moses Masivai Barasa who averred that on 1st February 2023, the Honourable M.A. Odeny issued a ruling dismissing the Applicant's Notice of Motion dated 21st January 2022 which ruling was delivered electronically. He stated that upon receipt of the ruling, his advocates on record tried to reach him on his mobile phone but he was in upcountry and unreachable. He further stated that on 6th March 2023, he called his advocates to enquire regarding the status of the suit and was informed of the ruling. He added that lack of communication from him led to the delay in filing a Notice of Appeal.
3. In response, the Appellant filed a Replying affidavit stating that the Applicant's delay of 34 days is inexcusable. In addition, that the Applicant is merely trying to delay this matter as the appeal has no chances of success.



Submissions of The Parties.

4. Despite having been granted 7 days with effect from 18/10/2023, the Applicant did not file his submissions on the application.
5. The Appellant filed his submissions which reiterate the averments in his replying affidavit. Counsel relied on the following authorities: *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, *Abdul Azizi Ngoma V Mungai Mathayo-* [1976] KLR, *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR and *Ngunjiri V Mbugua & Another*. He urged the court to dismiss the Application.

Disposition.

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” means that the court has discretion to admit an appeal out of time.
8. I have perused the file and noted that the applicant did not file his notice of appeal together with the instant application. The ideal is that the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal though default does not deprive this court of jurisdiction. In *Mugo & others Vs. Wanjiru & anor*[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.”

9. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors to aid courts in exercising the discretion whether to extend time to file an appeal out of time were set out by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR and they include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and



- vi) The effect if any on the administration of justice or public interest if any is involved.
10. The ruling intended to be appealed from was delivered on 1st February 2023 while the present application was filed on 23rd March 2023, 7 weeks later. The Applicant has stated that the delay was occasioned by lack of communication between him and his advocate. There is however no evidence on record to show that the applicant was not indolent. He has not demonstrated why when he he learned of the ruling on 6th March 2023 he did not immediately issue instructions to his advocates to file an appeal.
11. In the circumstances, I find that the applicant has not justified the delay and therefore the application dated 22nd March 2023 lacks merit and it is hereby dismissed with costs to the respondent. The matter shall be mentioned on 21/2/24.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 14TH DAY OF DECEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

