



REPUBLIC OF KENYA



**Mwathe v Mwambogo (Miscellaneous Application 43 of 2022)
[2023] KEELC 22523 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 43 OF 2022
EK MAKORI, J
DECEMBER 14, 2023**

BETWEEN

RAPHAEL KAMENYI MWATHE APPLICANT

AND

JOHN CHONGA MWAMBOGO RESPONDENT

RULING

1. The Notice of Motion dated 19th September 2022 seeks an extension of time within which to appeal against the judgment of Hon J.M Kituku (SPM Kilifi) delivered on 9th March 2022 in Kilifi ELC No. 116 of 2018. The application further seeks that the Court grant a stay of further execution of the judgment of the Lower Court with attendant costs.
2. The application is supported by the annexed affidavit deposed by one Raphael Kaimenyi Mwathe on 19th September 2022 and a further supplementary affidavit (with the leave of the Court) deposed on 10th November 2022. The application is opposed. The respondent John Chonga Mwambogo has deposed a replying affidavit dated 25th October 2022.
3. On 26th October 2022 the Court directed that the present application be canvassed by way of written submissions. There was compliance.
4. The reasons for the delay are stated by the applicant as failure by the Subordinate Court to issue proceedings and judgment for the period running from 26th May 2022 to 26th June 2022. This is admitted across the board.



5. Failure to file the current application from 26th June 2022 to 22nd September 2022 about two months and 26 days is said to have been due to lack of funds to hire an advocate. I quote the applicant verbatim as per paragraph 4 of the supplementary affidavit:

“That, however, vide paragraphs 8 to 17 of the respondent’s replying affidavit. The respondent questions why copies of the certified proceedings and judgment were made available from 26th June 2022 but the present application was filed on 22nd September 2022, about 2 months and 26 days after the said proceedings and judgment were ready for collection. To answer the said question, I was in the process of looking for money to pay my advocates for them to move the Court for the current proceedings”

6. The applicant averred that this delay was not inordinate and the Court has jurisdiction to extend the time within which to appeal. The applicant stated that to persuade the Court for a grant of leave to file an appeal out of time, a successful applicant must prove the following:

- i. Be deserving the discretion of the Court.
- ii. Discharge the burden of proving why there was a delay through an explanation, which is satisfactory to the Court.
- iii. The application was filed without undue delay.
- iv. That there would be no prejudice to the opposing party if the extension is granted.
- v. Whether the applicant has an arguable and/or meritorious appeal with high chances of success.

7. On the issue of discretion, the applicant contended that the Courts have unfettered powers to grant leave to an applicant to file an appeal out of time for as long as sufficient cause has been shown or proved. The applicant has argued that he was prevented from filing an appeal within the 30 days provided in law because the Subordinate Court took almost 3 months to make known to him the existence of the judgment. That alone is a sufficient ground for extension of time. The applicant cited the case of *Elizabeth Wangui Njenga and 4 others v Peter Chelule & another* [2021] eKLR, where the learned judge of the Court of Appeal when faced with a similar application stated that a party who was unaware of the delivery of judgment and was late to appeal, on that reason alone an application to have the time enlarged within which to appeal ought to be allowed.

8. On the issue of the delay in filling the present application, the applicant stated that the reasons have been tendered and explained to be the court’s failure to deliver judgment without notification to parties and also the Applicant’s inability to raise funds for purposes of filling the current proceedings. Therefore, the delay of 2 months and 26 days upon being supplied with the typed certified copies of the proceedings and judgment was excusable and, in any event, a delay of less than 3 months has been held not to be inordinate if well explained, this were the findings by the Court in the case of *Veronica Gathoni Mwangi v Samuel Kagwi Ngure & Another* [2016]eKLR where the learned judge in dealing with a similar issue stated that 3 months delay in bringing up an appeal was not inordinate.

9. The applicant further asserted that if the opposing party does not show the kind of prejudice which he or she may suffer upon grant of the sought for leave, then the Court should proceed to allow the application. This was the position held and/or taken by the aforementioned authorities on the issue of prejudice.



10. Finally, on the issue of an arguable and/or meritorious appeal, sufficient evidence has been tendered through the draft Memorandum of Appeal attached to the supplementary affidavit that the applicant has an appeal with very high chances of success.
11. In the case of *Veronica Gathoni Mwangi (Supra)*, the learned judge, upon perusal of the draft Memorandum of Appeal therein faulted the proceedings of the trial Court at paragraph 14, thereof and consequently granted leave upon conviction that the appeal therein had high chances of success. Again, in the case of *Bintomari Jumaa Gogo & another v Matano Mwasina & 6 others*, Civil Application No. 35 of 2021 (Mombasa), the learned Court of Appeal Judge granted leave to the applicants therein, yet they had taken 5 months upon grant of letters of administration to file the application. In the said authority, the ruling sought to be appealed against was delivered on 16th July 2020 but still the application for leave, though filed on 18th May 2021 was allowed, which was almost one year. The learned judge in the said authority found that the reasons or explanation offered in the matter was not satisfactory but upon perusal of the draft Memorandum of Appeal, he exercised his judicial discretion in favour of the applicants.
12. On the other hand, the respondent stated that there is no plausible reason(s) as to why there was a delay in filing the intended appeal on time. The judgment in the lower Court was delivered 7 months before the current application was filed. The respondent argued that the applicant is guilty of laches and delays. The application for an extension of time within which to appeal ought to be declined. The respondent has cited the case of *Edith Gichungu Koine v Stephen Njagi Thoitbi* [2014] eKLR, elucidating that the applicant has to advance reasons for the delay, the period of the delay. The degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.
13. The issues that fall for the determination of this Court are whether to grant an extension of time within which to file an appeal and whether the Court should order for stay of execution of the judgment and decree emanating from the decision of the Lower Court subject of the intended appeal. Who should bear the costs of the current motion?
14. Parties correctly submitted before me the factors this Court ought to consider before granting an extension of time within which to appeal for example in the case of *Edith Gichungu Koine v Stephen Njagi Thoitbi* [2014] eKLR, Otieno-Odek JA had this to say on what to consider before allowing an extension of time within which to appeal:

“I have anxiously considered the application, the affidavits on record, and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See *Fakir Mohamed v Joseph Mugambi & 2 Others*, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate, and affordable resolution of disputes before the Court.”
15. Two reasons have been cited on why there was a delay in bringing up the intended appeal that is, that the court delayed in supplying proceedings and judgment from 26th May 2022 to 26th June 2022. And that from 26th June 2022 to 22nd September 2022 about two months and 26 days the delay was said to



have been occasioned by lack of funds to hire an advocate. The reason that the Court delayed in the supply of proceedings and judgment is plausible. However, the reason that there was lack of funds to hire an advocate is not excusable.

16. On the merits of the appeal the applicant contended in the Memorandum of Appeal that there is a pending adverse possession claim in Mombasa ELC No. 225 of 2018 (O.S) which has high chances of success. In my view that is the appropriate suit to pursue and this was the findings made by the trial Court because ownership of the disputed or undisputed parcels remains to be resolved in the Mombasa suit.
17. Application dated 19th September 2022 is hereby dismissed with costs.

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

E. K. MAKORI

JUDGE

In the absence of:

All Parties though aware of the ruling. The same be electronically supplied.

