



Birithia v M’Erugura & another (Environment and Land Miscellaneous Application E040 of 2024) [2025] KEELC 129 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELC 129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E040 OF 2024
JO MBOYA, J
JANUARY 23, 2025**

BETWEEN

JOSEPH MICHUBU BIRITHIA APPLICANT

AND

CHARLES NKUNJA M’ERUGURA 1ST RESPONDENT

CHRISTOPHER MICENA MITHEU 2ND RESPONDENT

RULING

1. The Applicant herein approached the Honourable Court vide the Application dated the 15.10.2024 and wherein the Applicant has sought for the following relief[s]:
 - i. That the Applicant be granted Leave to file appeal out of time against the Judgment and/or decree of Hon. Felix Kombo, CM dated 5th September 2024 in Maua CM ELC NO. 158 of 2019.
 - ii. That the Honourable court be pleased to issue an order to allow the firm of M/s C.K Thiruaine & Company Advocates to act alongside the firm M/s Maitai Rimita & Company advocates.
2. The instant application is premised on the various grounds which has been enumerated in the body there. In addition, the application has been supported by the affidavit of Joseph Michubu Birithia, who is the applicant herein. Suffice to state that the supporting affidavit is sworn on the 15.10.2024.
3. On the other hand, the respondent filed a replying affidavit sworn on the 2.12.2024 and wherein the respondent has contended that the subject application is not only premature and misconceived, but same {application} constitutes an abuse of the due process of the court.
4. In any event, the respondent has averred that the applicant has failed to espouse any plausible or cogent reason to warrant the grant of the orders sought.



5. The application came up for hearing on 20.1.2025 whereupon the advocate for the respective parties confirmed that same had filed and exchanged written submissions.
6. In this regard, the advocates for the respective parties sought to adopt and rely on the written submissions which are since been filed.
7. Premised on the position taken by the advocates for the respective parties, the court directed that the ruling shall be crafted and delivered on the basis of the written submissions filed.

PARTIES SUBMISSIONS

Applicants submissions

8. The applicants filed written submissions dated 20.11.2024 and where in the applicant has adopted the grounds contained in the body of the application. In addition, the applicant has reiterated the averments contained in the body of the supporting affidavit.
9. Furthermore, learned counsel for the applicant has proceeded and highlighted two salient issues for consideration and determination by the court. Firstly, learned counsel for the applicant has submitted that the judgment in respect of the instant matter was delivered on the 5.9.2024. in this regard it has contended that the applicant herein ought ot have filed and served the memorandum of appeal on or before the 5.10.2024.
10. Nevertheless, it has been submitted that the applicant herein was unable to file and serve the memorandum of appeal within the prescribed timelines because same {applicant} had financial constraints/difficulties. To this end, it has been submitted that as a result of the applicant's financial constraints, the timelines for filing of the memorandum of appeal lapsed/expired.
11. Secondly, learned counsel for the applicant has submitted that the delay attendant to the matter herein constitutes 10 days only. In this regard, it has been submitted that the application beforehand has been filed timeously and without unreasonable delay.
12. Finally learned counsel for the applicant has submitted that the applicant has an arguable appeal and thus the applicant should be afforded an opportunity to pursue his intended appeal. In any event, it has been submitted that the intended appeal has high chances of success.
13. In support of the foregoing submissions learned counsel for the applicant has sighted and referenced various decisions including Kiu and another vs Khaemba and 3 others 2021 KECA 318 (KLR) and Ngei vs Kibe & another (2021) KECA 243 (KLR), respectively.
14. Arising from the foregoing, learned counsel for the applicant has implored the court to find and hold that the application beforehand is meritorious and thus same ought to be allowed. In particular, the applicant has invited the court to extend time within which to file and serve the intended memorandum of appeal.

Respondents submissions

15. The respondent filed written submissions dated 15.1.2025 and wherein the respondent has adopted and reiterated the averments at the foot of the replying affidavit sworn on 2.12.2024. Furthermore, the respondent has ventured forward and highlighted 3 salient issues for consideration by the court.
16. First and foremost, learned counsel for the respondent has submitted that the applicant herein was at liberty to file and serve the intended memorandum of appeal within 30 days from the delivery of the



judgment. Nevertheless, learned counsel for the respondent has submitted that the applicant failed to file the appeal within the statutory timelines.

17. Having failed to file the appeal within the statutory timelines, learned counsel for the respondents has therefore submitted that it is opportune for the respondent to be allowed to enjoy the fruits of the successful litigation.
18. Learned counsel for the respondent has submitted that the applicant herein has failed to explain the reason why same {applicant} failed to file the intended appeal within the statutory timelines. Furthermore, it has been submitted that the allegation of financial constraints which has been alluded to by the applicant, does not constitute sufficient basis/cause.
19. Thirdly. Learned counsel for the respondent has submitted that the application before the court has been filed with inordinate and unreasonable delay. In particular, it has been contended that the judgment that is sought to be appealed against was delivered more than 4 months prior to the date of the current application. In this regard, learned counsel for the respondent has posited that the more than 4 months constitute an inordinate delay and hence the applicant should not be allowed to benefit from the discretion of the court.
20. In support of the foregoing submissions, learned counsel for the respondent has invoked and relied upon the decision in the case of Edith Gichungu Koine vs Stephen Njagi Thoithi (2014) eKLR and Thuita Mwangi vs Kenya Airways Ltd (2003) eKLR respectively.
21. Based on the foregoing submissions, learned counsel for the respondent has invited the court to find and hold that the applicant has failed to establish sufficient cause to warrant the grant of the orders sought. In this regard, it has been contended that the application is therefore devoid of merits and thus ought to be dismissed with costs.

Issues For Determination

22. Having reviewed the application beforehand; the response thereto and the written submissions filed on the behalf of the parties the following issues do arise and are thus worthy of determination:
 - i. Whether the application beforehand has been filed timeously and with due promptitude or otherwise.
 - ii. Whether the applicant has established sufficient cause/basis to warrant the exercise of discretion in his favour.

Analysis And Determination

Issue No. 1 Whether the application beforehand has been filed timeously and with due promptitude or otherwise.

23. The application beforehand seeks for extension of time within which to file and serve a memorandum of appeal against the decision of the learned chief magistrate which was rendered on the 5.9.2024. To the extent that the application seeks for extension of time, it was incumbent upon the applicant to ensure that the application is filed timeously and with due promptitude.
24. Put differently, an applicant who is desirous to benefit from the discretion of the court, the current applicant not excepted is called upon to file the application for extension of time without unreasonable and or inordinate delay. Instructively, an applicant is under an obligation to isolate the duration of delay and where the duration is inordinate, to explain/account the reasons underpinning the delay.



25. Arising from the foregoing, it is therefore, apparent that the timeline taken by an applicant before filing an application for extension of time is paramount and critical in ascertaining whether the court would exercise discretion in favour of an applicant.

26. To this end, it suffices to reference the decision in the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet (2018) eKLR, the Court of Appeal, stated thus;

“...The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

27. The importance of filing an application seeking for enlargement/extension of time without unreasonable or undue delay was highlighted by the Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 others (2014) eKLR, the Supreme Court of Kenya distilled various factors to be taken into account. For coherence, the court stated as hereunder:

From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 a 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 respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

28. Guided by the principals outlined in the foregoing decisions, it is imperative to state and underscore that the timeline taken by an applicant before approaching a court of law with an application for exercise of discretion is critical and paramount in determining whether the applicant should benefit from equitable discretion. Notably, dilatory filing may disentitle an applicant of the right to partake of equitable discretion. With the foregoing in mind I beg to revert to the matter beforehand and to discern whether the application beforehand has been filed timeously and with due promptitude or otherwise. Suffice to state that the judgment and reference was delivered on 5.9.2024.



29. It is also instructive to note that any litigant, the applicant not excepted, who is desirous to appeal against the decision of the chief magistrate court is at liberty to lodge the memorandum of appeal within 30 days from the date of delivering of the judgment/ruling in question. See Section 79G of the [Civil Procedure Act](#).
30. In the circumstances, there is no gainsaying that the applicant herein ought to have filed and served the memorandum of appeal, if any, on or before the 5.10.2024. However, it is evident that no appeal was filed within the prescribed timelines.
31. Having realized that time for filing the appeal had lapsed, the applicant filed the current application. It is imperative to point out that the application before the court was filed barely 10 days from the date when the time for filing the appeal had expired.
32. The question that the court must grapple with touches on and concerns whether the delay of 10 days is unreasonable and inordinate. However, in my humble view, the 10 days delay is neither unreasonable nor inordinate taking into account the circumstances highlighted at the foot of the supporting affidavit.
33. For the reasons stated herein before, I come to the conclusion that the application before the court was mounted/lodged without unreasonable and/or inordinate delay. Simply put, the application was filed with due promptitude following the expiration of the timeline for lodging the memorandum of appeal.

Issue No. 2 Whether the applicant has established sufficient cause/basis to warrant the exercise of discretion in his favour.

34. Having found and held that the application beforehand was filed timeously and without unreasonable delay, the next critical question to address is whether the applicant has explained the reasons why the appeal was not filed timeously or better still the reasons underpinning the delay.
35. To start with the applicant herein has contended that same was unable to give sufficient instructions to his advocate to file the appeal because of financial constraints. In this respect, what I hear the applicant to be saying is that same {applicant} was financially incapacitated.
36. Even though the applicant has neither nor produced a copy of his bank statement or sources of income, there is no gainsaying that the economy of the republic has suffered financial difficulties and taken a downward trend. In this respect, there is no gainsaying that the economic situation has impacted upon various citizens the applicant not excepted.
37. Whereas I am not saying that financial incapacitation and constraints should be thrown on the face of the court and be used to underpin delay in complying with the statutory timelines, but in my mind such financial constraints ought to be referenced and where apposite taken into account while dealing with an application for extension of time.
38. I have looked at the supporting affidavit sworn by the applicant and in my humble view, the reason, namely financial incapacitated/constrain, which has been espoused by the applicant constitutes sufficient cause.
39. Notwithstanding the foregoing, it is imperative to state that the respondent herein has neither challenged nor controverted the deposition by the applicant. In this respect, the court is entitled to proceed on the belief that the averment in question is correct and valid.
40. At any rate, it is important to take into account the import and tenure of articles 48 and 159 (1) of [the constitution](#) of Kenya, while endeavouring to discern the existence of sufficient cause. In an application for extension of time to file an appeal out of time.



41. Notably, a court of law should adopt a liberal approach in interpreting what constitutes sufficient cause and to ensure that any interpretation that is adopted is one that promotes the right of access to justice. In addition, the approach adopted and deployed should be one that fosters the realization of the constitutional objectives underpinned by Article 259 (1) of *the Constitution* 2010.
42. To my mind, the applicant herein has accounted for and availed a plausible reason, capable of attracting the exercise of judicial discretion. In any event, it is not lost in this court that where a party seeks to exercise his/her undoubted right of appeal, then such a party ought to be facilitated unless there is an overwhelming hindrance that militates against the enjoyment of that right. In addition, it is not lost on this court that the undoubted right of appeal can only be denied if the respondent demonstrates a likelihood of suffering a due prejudice or grave injustice.
43. However, in respect of the instant matter, it is apposite to state and underscore that the respondent herein has neither highlighted nor canvassed any prejudice that same is likely to suffer.
44. The court of appeal had occasioned to address the necessity to afford an opportunity to an applicant desirous his/her undoubted right of appeal in the case of *Ngei vs Kibe & another (Civil Appeal (Application) E359 of 2021* {2021} KECA 243

On the authority of *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, I am of the considered view that allowing time for the Applicant to pursue his desire to pursue the intended appeal would not unduly prejudice the Respondents. In *Muchungi's* case, the Court had this to say:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”

45. Finally, and before departing from this issue, it is imperative to cite and reference the decision of the court of appeal in the case of *The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011*; wherein the Court of Appeal observed and stated as follows:

“Sufficient cause or good cause in law means:-

‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See *Black’s Law Dictionary*, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

46. In a nutshell, my answer to issue no. 2 is to the effect that the applicant has indeed established a sufficient cause/basis to warrant the intervention of the court. In any event, the court ought to facilitate the applicant’s endeavour to pursue the undoubted right of appeal unless there exists a serious obstacle or unless the adverse party is disposed to suffer grave injustice.

Final Disposition

47. From the analysis {details highlighted in the body of the ruling} it must have become apparent that the application beforehand is meritorious.
48. Flowing from the foregoing the final orders that commend themselves to the court are as hereunder:



- i. The application dated 15.10.2024 be and is hereby allowed.
- ii. The applicant herein be and is hereby granted leave to file an appeal out of time and the memorandum of appeal shall be filed and served within 7 days from the date hereof.
- iii. In default to file and serve the memorandum of appeal in accordance in clause 2 hereof the leave granted shall automatically lapse.
- iv. The respondent be and is hereby awarded costs of the application.
- v. The costs in terms of clause 4 be and are hereby certified in the sum of Kshs.15,000/=

49. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF JANUARY 2025

OGUTTU MBOYA

JUDGE.

In the presence of:

Mutuma – Court Assistant

Mr. Thiruaine for the Applicant

Mr. Kaba holding brief for Mr. Maranya for the 1st Respondent

No appearance for the 2nd Respondent

