



**Wangari & another v Ngugi (Environment & Land Miscellaneous  
Case E009 of 2021) [2022] KEELC 17 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E009 OF 2021**

**LN GACHERU, J**

**MAY 12, 2022**

**BETWEEN**

**JOHN GATHUA WANGARI ..... 1<sup>ST</sup> APPLICANT**

**JAMES GATHUA WANGARI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DANIEL MWANGI NGUGI ..... RESPONDENT**

**RULING**

**ARGUMENTS**

By a Notice of Motion Application dated 5th August 2021, brought under Order 50 Rule 6 & 7 and Order 51 Rule 1, of the Civil Procedure Rules and Section 95 of the *Civil Procedure Act*, the Appellants/Applicants sought for orders that;

1. That this Honourable Court be pleased to grant the Appellants leave to file an appeal out of time.
2. That the cost of this Application be provided for.

The Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit of Catherine Waithera Mwangi, Advocate, sworn on 5th August 2021. In the said Supporting Affidavit, it was deponed; that the Lower Court delivered its Judgment on 29th April, 2021. That the Advocate applied for certified copies of the said judgment and typed proceedings on 29th April, 2021. That the certified copies of the judgement and proceedings were supplied on 16th July, 2021. That the Appellants/Applicants have an arguable appeal, with chances of success as evidenced by the proposed Memorandum of Appeal. That the delay was occasioned by circumstances beyond the control of the Applicants or their Advocate and that no prejudice\*\* will be occasioned on the Respondents, if leave is granted.

The Application is opposed through the Replying Affidavit sworn by Daniel Mwangi Ngugi, the Respondent, on 12th January 2022. He averred that despite the Court directing that the Appellants serve him, with the



supplementary list of documents comprising the annexures to the instant application, the same were yet to be served. The he is informed by his advocate that typed proceedings are not a requirement for a party to file an appeal. That the Appellants/Applicants did not attend Court on 5th October 2021, despite fixing the application for hearing on the said date. That the Appellants only attended Court on 2nd December 2021, upon being served a notice by the Court.

Further, that it is evident that the Appellants/Applicants have no regard for timelines as exhibited by their non-attendance and failure to serve documents. That the decision that the Appellants/Applicants are seeking to appeal against was delivered over 8 months ago\*\*, and the prolonged and unjustified delay in filing the appeal is detrimental to the Respondent. That litigation must come to an end and the Application should be dismissed with costs.

The Application was canvassed by way of written submissions. The Appellants/Applicants filed their written submissions dated 28th January 2022, through the Law Firm of Waithera Mwangi & Co. Advocates and raised 3 issues for determination by this Court.

On whether the Appellants/Applicants should be allowed to file the appeal out of time, they submitted that the Applicants exercised due diligence in an attempt to ensure that they got the certified copies of typed proceedings and judgment, but their efforts were not successful. Reliance was placed on the Supreme Court case of *Hassan Nyanje Charo vs. Khatib Mwasbetani & 3 others* (2014) eKLR, where it was held that;

“Here is a case in which an applicant has exercised all due diligence, so as to move a Court of justice, in a situation of grievance on electoral issues. But the mechanisms of the Judiciary itself have shut the door to his knocks thereon. Today he comes before this Court, praying for an open window through which he can lodge his complaint, in the shape of enlarged time, during which one of the superior Courts will have availed to him the requisite appeal papers. [34] As the sluggish motion of the judicial machinery enjoys no constitutional privilege, as against the specific guarantees of the Bill of Rights, the inevitable decision in this matter, is one that favours the suitor’s claim”

On whether the intended appeal is arguable, the Appellants/Applicants submitted that the Court should be guided by the intended Memorandum of Appeal, and the grounds raised therein. They relied on the case of *Daniel Kakuta Karoi v. Tri-Clover Industries (9K) Limited* (2021) eKLR, where it was held that;

“26. This is not a case seeking the court’s sympathy. It is a case where there is a believable explanation for the delay. Is this explanation sufficient in the circumstances of the case? This must be established to warrant the flow of the court’s discretion in favour of the applicant. The question is whether this explanation amounts to sufficient cause. In *Daphne Parry v Murray Alexander Carson* (1963) EA 546 court stated that;

“Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.

I am of the view that the appellant’s explanation is sufficient in the circumstances of this case.

27. Does the appellant have an arguable appeal? Clearly this is a question to be answered by the appellate court that will hear the appeal. However, having perused the Memorandum of Appeal, it raises some legal issues. In any event there is a right of appeal and it is upon the appellant to persuade the court of its merits. Suffice it to say that I do not consider the appeal to be frivolous.”

The Respondent also filed his written submissions dated 16th February 2022, through the Law Firm of Igecha & Co. Advocates. It is the Respondent’s submission that a copy of judgment and typed proceedings is not a



requirement for filing an appeal as illustrated in Section 79G of the *Civil Procedure Act*, and reiterated in the case of *Bethany Village Africa v Bank of Africa Kenya Limited* (2021) eKLR. Further that the Appellants/Applicants had not demonstrated that they had an arguable appeal with chances of success.

The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is; -

**i. Whether the Application dated 5th August 2021 is merited.**

It is not in doubt that judgment was delivered in Kandara ELC No.3 of 2020 on 29th April, 2021. It is also not in contest that on the said date, the Appellants/Applicants herein through a letter applied to be supplied with a copy of the said judgment and typed proceedings. The Appellants/Applicants upon making the request for a certified copy of Judgment and proceeding were supplied with the same on 16th July\*\*, 2021.

It is on this basis that the Appellants/Applicants herein filed the instant application as the requisite time within which to file an appeal had already lapsed by the time they received the typed proceedings.

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.”

Further, Order 50 Rule 5 of the Civil Procedure Rules, which is replicated under Section 95 of the *Civil Procedure Act* which states:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997, the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

Therefore, an Applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

In the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR,\*\* the learned Judge cited with approval the case of *Feroz Begum Qureshi and Another vs. Maganbhai Patel and others* [1964] EA 633, where it was held that there is no difference between the words “sufficient cause” and “good cause” and the case // *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546, where it was held that;

“though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse



for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

The principles to be considered in exercising the discretion whether or not to enlarge time were elucidated in *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65*, where the Court set out the factors to be considered in deciding whether or not to grant such an application and these are; -

- i. The explanation if any for the delay;
- ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.

The above principles were restated by the Supreme Court of Kenya (MK Ibrahim & SC Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR 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.”

The Appellants/Applicants have explained that the delay occasioned was due to the time taken for them to receive a certified copy of the lower court judgment and typed proceedings, which were an integral part of the Record of Appeal. As stated above, this Court notes that the lower Court delivered its judgment on 29<sup>th</sup> April 2021, and the Appellants/Applicants wrote its requesting for certified copied of the said judgment and typed proceedings on the same day.

Order 42, of the Civil Procedure Rules provides for the form that the Appeal should take and it states as follows;

- (1) Every appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.
- (2) The Memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”



Order 42, Rule 2 proceeds to state that;

Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed”

From the above, it is clear that when filing a Memorandum of Appeal, it need not be accompanied by the judgment being appealed against or the proceedings in the first instance. An Appellant shall have time after filing the Memorandum to file the impugned Judgment and proceedings as provided in Order 42 Rule 2. Therefore, it follows that the Appellants who are also the Applicants herein were misguided on that fact.

Be that as it may, this Court appreciates the need to read the entire Judgment of the Court before preferring an appeal. The Appellants/Applicants have deponed that they were only able to get the Certified Copy of the judgment delivered by the Lower Court on 16<sup>th</sup> July, 2021. This averment has not been countered by the Respondent either orally or via evidence.

What then begs the question is whether the reasons advanced by the Appellant/Applicants amounts to a sufficient cause. "In *The Hon Attorney General vs the Law Society of Kenya & another*, Civil Appeal (Application) No. 133 of 2011 (ur)\*\* Musinga, JA saw sufficient cause to be:

“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 doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

Based on the above definition, this Court finds that the reasons advanced by the Appellants/Applicants; for failure to file the Appeal on time; falls within the definition of sufficient cause stated above. The Appellants/Applicants have availed before this Court sufficient documents to support their allegations and this Court has no reason to doubt the same, as it appears truthful and consistent.

On whether the delay was reasonable, the Court notes that the Lower Court delivered its Judgment on 29<sup>th</sup> April 2021, and the Appellants/Applicants applied for the copies of the Judgment and typed proceedings on the same day. However, the Appellants/Applicants neither received the certified copies of typed proceeding nor the copy of judgment until 16<sup>th</sup> July 2021, and on 5<sup>th</sup> August 2021, about 2 weeks later, the Appellants/Applicants filed the instant application. What amounts to inordinate delay was discussed by the court in the case of *Mwangi S. Kimenyi v Attorney General & Another* (2014) eKLR where it was held thus;

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.....”

In the instant case, the court notes that the delay occasioned is excusable though the same could have been avoided had the Appellants/Applicants filed the Appeal as they awaited the typed copy of the Judgment. Further, the Court notes that the Appellants/Applicants have given good reasons for the delay and have shown through evidence that the same was not intentional, contumelious or inexcusable.



On the issue of prejudice, the Respondent has deponed that he is likely to suffer prejudice if the application is allowed as litigation must come to an end and he wishes to utilize the property without any hindrance and/or interference. The Respondent has however not substantiated his prejudice and as such his statements remain general and carry minimal weight. In any case, the Appellants/Applicants have constitutional right to appeal and the same cannot be limited, as it is tied to hip with the right to fair hearing.

In Conclusion, the power of this Court to extend time within which to file an appeal is discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done.

Further, Section 3A of the *Civil Procedure Act* provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. It provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission* [2017] eKLR, it was stated that:

“Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit. [5] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King’s Bench in Rookey’s Case [6] stated as follows:-Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”

In the instant case, the Appellants/Applicants have established on a balance of probability that there was a sufficient cause that occasioned the delay and that the said delay was not inordinate. Further that the delay was occasioned by factors above their control.

The upshot of the foregoing is that this Court finds and holds that there is sufficient reason to grant leave to the Appellants/Applicants herein to file the intended Appeal out of time.\*\*

Consequently, the Court finds the instant Application dated 5{th} August 2021, is merited and the said application is allowed entirely\*\*, with costs being in the cause.

Further, this Court directs that Appellants/Applicants to file the Intended Appeal within 14 days of the date of this ruling.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 12 TH DAY OF MAY, 2022.**

**L. GACHERU**

**JUDGE**

**In the presence of: -**

**Alex Mugo - Court Assistant**



**Appellants/Applicants – Absent**

**Respondent – Absent**

**L. GACHERU**

**JUDGE**

