



Kariuki & another v Nyotta & another (Environment and Land Miscellaneous Application E135 of 2022) [2022] KEELC 15355 (KLR) (5 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15355 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E135 OF 2022
JO MBOYA, J
DECEMBER 5, 2022

BETWEEN

DANIEL KIMANI KARIUKI 1ST APPLICANT

BEBADIS COMPANY LIMITED 2ND APPLICANT

AND

JASPAL NYOTTA 1ST RESPONDENT

SEDCO CONSULTANTS LIMITED 2ND RESPONDENT

RULING

Introduction and Background

1. Vide notice of motion application dated the July 26, 2022, the applicants have sought for the following reliefs;
 - i. ...Spent.
 - ii. That this honourable court be pleased to grant Leave to the applicants to file an Appeal out of time against the ruling in Milimani CMCC No 10717 of 2018 delivered on May 24, 2022;
 - iii. That this Honourable Court be pleased to grant any other order that it deems fit;
 - iv. That cost of this Application be provided for.
2. The instant application is premised and anchored on various grounds which have been enumerated in the body thereof and same is further supported by the affidavit of the 1st applicant herein sworn on even date. For clarity, the Affidavit is stated to be sworn on behalf of the 1st applicant, as well as on behalf of the 2nd applicant herein.



3. On the other hand, the 1st Applicant has attached various annexures, inter-alia a copy of the ruling rendered by the Honourable Chief Magistrate on the May 24, 2022 and which forms the basis of the intended appeal.
4. Upon being served with the instant application, the respondents filed a lengthy replying affidavit, running to a total of 59 paragraphs. Besides, the respondents also annexed assorted documents, to vindicate the position taken in the Replying affidavit.
5. Be that as it may, the application herein came up for hearing, whereupon the parties agreed to canvass and dispose of the same by way of written submissions.
6. Pursuant to and in line with the directions of the honourable court, the Parties proceeded to and duly filed their respective written submissions.
7. For completeness, the two sets of written submissions, filed by either side form part and parcel of the record of the court. Consequently, same shall be duly considered and taken into account.

Submissions By The Parties:

Applicants' Submissions:

8. Vide written submissions dated the October 17, 2022, the applicants herein have raised and amplified two issues for consideration.
9. First and foremost, the Applicants herein have contended that the Honourable Chief Magistrate rendered a Ruling and decision on the May 24, 2022, wherein the chief magistrate inter-alia, proceeded to and struck out the Defendant's counterclaim under the pretext and guise that the Defendant's Counterclaim was well beyond the pecuniary Jurisdiction of the Chief Magistrate's Court.
10. Further, the Applicants have submitted that following the rendition and delivery of the impugned Ruling, same felt aggrieved and dissatisfied with the Ruling and hence proceeded to and filed an Appeal, namely, ELC Appeal E051 of 2022.
11. Nevertheless, the Applicants have added that same realized that the said Appeal, namely, ELCA E051 of 2022, was filed out of time. In this regard, the Applicants have contended that same were thereafter enjoined to and indeed filed an application seeking for liberty to validate the Appeal that had been filed out of time.
12. Additionally, the Applicants have submitted that the application which was filed vide ELC Misc E114 of 2022, came up for hearing before the Honourable Court but however same was ultimately withdrawn.
13. For coherence, the Applicants' have submitted that the withdrawal of ELC Misc E114 of 2022, was informed by the fact that the Honourable court was not seized of the requisite Jurisdiction to validate an appeal that had been filed out of time, albeit without leave of the Honourable court.
14. Having withdrawn the said application, namely, ELC Misc E114 of 2022, the Applicants have submitted that same were thereafter constrained to file and lodge the instant application with a view to procuring and obtaining the requisite leave to facilitate the filing of the intended Appeal.
15. In the premises, the Applicants have contended that the subject application is meritorious and thus ought to be granted. For clarity, the Applicants have annexed a Draft Memorandum of Appeal showing the various grounds that same would be disposed to ventilate and canvass, should the leave sought be granted.



16. In support of the submissions that the subject application is meritorious, the Applicants have cited and relied on various decisions, *inter-alia*, [Andrew Kiplagat Chamaringo v Paul Kipkorir Kibet](#) [2018] eKLR, [Philip Keipto Chemwolo & another v Augustine Kubende](#) [1986] eKLR, [Abok James Odera T/a A J Odera & Associates v John Patrick Machira T/a Machira & Company Advocate](#) [2013] eKLR and [Kenya Commercial bank Ltd v Nicholas Ombija](#) [2009] eKLR.
17. Secondly, the Applicants herein have submitted that the instant application does not constitute and or amounts to an abuse of the Due process of the Honourable court, either as contended by the Respondents or at all.
18. In this respect, the Applicants have submitted that following the delivery of the impugned ruling of the Chief Magistrate, same expressed a desire to Appeal and indeed proceeded to and lodged an Appeal, namely, ELCA E051 of 2022.
19. Be that as it may, the Applicants have further submitted that same thereafter discovered that the Appeal had been filed out of time and hence same were constrained to file an application to validate the Appeal.
20. Nevertheless, the Applicants have added that the application seeking to validate the Appeal was faulty and as a result of same, the said application was withdrawn.
21. Additionally, the Applicants have submitted that after the withdrawal of the application that sought to validate ELCA E051 of 2022, the Applicants herein were constrained to and indeed filed a Notice of withdrawal of the said appeal.
22. In the premises, it is the Applicants submissions that the previous appeal which had been filed against the impugned ruling rendered by the Chief Magistrate on the May 24, 2022, was duly Withdrawn and thus same is non-existent.
23. In any event, the Applicants have submitted that a Party who originates the court process, in this case the appeal, namely, ELCA E051 of 2022, has and is bestowed with a right to withdraw such Appeal.
24. In support of the foregoing submissions, the Applicants herein have cited and quoted the decision in the case of [John Ochanda v Telkom Kenya Ltd](#) [2014] eKLR and [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions](#) [2014] eKLR.
25. In view of the foregoing, the Applicants have therefore contended that the application before hand does not constitute or amount to an abuse of the due process of the Honourable court.
26. Premised on the foregoing, the applicants have therefore implored the Honourable court to find and hold that same have established and demonstrated sufficient basis to warrant the grant of the orders sought at the foot of the instant Application.

Respondents' Submissions:

27. The respondents herein filed written submissions dated the November 4, 2022 and same have raised a plethora of issues, for consideration and determination by the Honourable court.
28. First and foremost, counsel for the Respondents has submitted that the intended appeal for which extension of time is being sought, is not arguable and hence has no probability/ Chances of success.
29. To the extent that the intended appeal is said to be devoid of any chances of success, counsel for the Respondents has therefore contended that the intended extension of time would be an act in futility and vanity.



30. Secondly, counsel for the Respondents have submitted that the learned Chief Magistrate did not strike out the Counter-claim which was filed by and on behalf of the 1st Applicant herein (who was the Defendant in the lower court) either as alleged or at all.
31. Contrarily, counsel for the Respondent has submitted that the counterclaim which was struck out for being beyond the pecuniary of the subordinate court was the counterclaim filed by and on behalf of the 2nd Applicant, (who was the Third Party) in the Lower Court.
32. Premised on the foregoing, counsel for the Respondents has submitted that it is therefore erroneous and misleading for the Applicants and in particular, the 1st Applicant, to contend that the Chief Magistrate struck out the Defendant's counterclaim.
33. At any rate, counsel for the Respondents have added that despite being aware that the Defendant's counterclaim was never struck out by the Chief Magistrate, the 1st Applicant herein proceeded to and extracted an order purporting that the Defendant's counterclaim had similarly been struck out.
34. Thirdly, counsel for the Respondents has submitted that the Error which is evident on the face of the order extracted by the 1st Applicant and by extension in the ruling of the Chief Magistrate, is an Error that can easily be corrected vide the Slip Rule.
35. In this regard, counsel for the Respondents has invited the Honourable court to take cognizance of the provisions of sections 99 and 100 of the [Civil Procedure Act](#), chapter 21 laws of Kenya.
36. Additionally, counsel for the Respondents has submitted that the subject Application has been made and mounted with unreasonable and inordinate delay, which delay has not been sufficiently explained or accounted for.
37. To the extent that the subject Application has been mounted with unreasonable and inordinate delay, counsel for the Respondents has therefore contended that same ought not to be allowed.
38. To amplify, the implication and consequence of unreasonable and inordinate delay, counsel for the Respondents has cited various decisions, *inter-alia*, [Mwangi v Kenya Airways Ltd](#) [2003] eKLR, [Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission](#) [2014] eKLR and [Paul Wanjohi Mathenge v Duncan Gichane Mathenge](#) [2013] eKLR.
39. On the other hand, counsel for the Respondent has also submitted that the Applicants herein have not established or demonstrated any good and sufficient cause to justify the delay in mounting or commencing the subject Application.
40. According to counsel for the Respondents, it was incumbent upon the Applicants herein to demonstrate the existence of good and sufficient cause, prior to and before partaking of the Equitable discretion of the Honourable court.
41. The other issue that has also been raised and canvassed by the Respondents relates to whether or not the Intended Appeal is arguable. Yet again, the Respondents have argued that the intended Appeal for which leave is sought, is *ex-facie* frivolous and devoid of any realistic chances of success.
42. Finally, the Respondents herein have submitted that the Application by and on behalf of the Applicants constitutes a gross abuse of the Due process of the Honourable court.
43. To this end, the Respondents have submitted that the Applicants herein have filed numerous applications touching on and concerning the same issues and that most of the said Applications have been withdrawn, whilst others have been Dismissed.



44. Premised on the foregoing, the Respondents have therefore contended that the subject Application ought not to be granted.
45. Suffice it to point out that the Respondents have therefore cited and relied upon a plethora of decisions to amplify the contention that the subject Application amounts to and constitutes an abuse of the Due process of the Honourable court.
46. In this regard, the Respondents have cited inter-alia, the decision in *Muchanga Investment Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR and *Satya Bhama Gandhi v Director of Public Prosecution & 3 others* [2018] eKLR.

Issues For Determination:

47. Having reviewed the notice of motion application dated the July 26, 2022, the supporting affidavit thereto and the replying affidavit filed in opposition thereof; and having similarly considered the elaborate submissions filed by the respective Parties, the following issues are pertinent and thus deserving of determination;
 - i. Whether the instant application has been lodged and mounted with unreasonable and inordinate delay.
 - ii. Whether the applicants' have provided and demonstrated any sufficient cause or basis to explain the delay at the foot of the current application.
 - iii. Whether the intended appeal, for which extension of time is sought, is arguable and raises reasonable prospects of success.
 - iv. Whether the reliefs sought ought to be granted.

Analysis and Determination

Whether the instant application has been lodged and mounted with unreasonable and inordinate Delay.

48. It is common ground that the Respondents herein had filed and lodged a suit before the Chief Magistrates' court vide Milimani chief Magistrate's Court Civil Case No 10717 of 2018. For clarity, the Respondents herein were/are the Plaintiffs.
49. On the other hand, it is also appropriate to point out that there was only one Defendant in the said suit, which was mounted/lodged before the Chief Magistrate's court. For the avoidance of doubt, the Defendant in the said suit was Daniel Kimani Kariuki, who is the current 1st Applicant.
50. Other than the foregoing, there was also a Third Party who had been impleaded. For clarity, the Third Party in the Chief Magistrates's / Lower Court was the current 2nd Applicant.
51. Suffice it to point out that on the May 24, 2022, the Honourable Chief Magistrate rendered and delivered a Ruling whereby same issued various orders, inter-alia, an order that the Defendant (1st Applicant) whilst knowing the Jurisdiction of this Honourable court (Chief Magistrate's Court) filed a Counterclaim that he knew this court wont entertain and in doing so, he shot himself in the foot.
52. Having made the foregoing observation, the learned Chief Magistrate thereafter proceeded to and indeed struck out the Counterclaim with costs.



53. Be that as it may, upon the delivery and rendition of the Ruling by the Chief Magistrate, the Applicants herein (sic) felt aggrieved and thereafter filed/lodged an Appeal vide Milimani ELCA No E051 of 2022.
54. Nevertheless, it later turned out and transpired that the said appeal, namely, ELCA E051 of 2022 was filed/lodged out of time.
55. Upon realizing that the named appeal had been filed and lodged out of time, albeit without Leave of the Honourable court, the Applicants herein filed a Misc. Application vide ELC E114 of 2022, whereby same sought for validation of the appeal that had been filed out of time.
56. Be that as it may, when the application vide ELC Misc. E114 of 2022, came up for hearing on the July 26, 2022, same was withdrawn by the Applicants. Subsequently, the Applicant thereafter proceeded to and filed the instant application dated the July 26, 2022. For clarity, it is evident that the current application was filed on the same date when the previous application for validation was withdrawn.
57. Having taken cognizance of the foregoing facts, the critical question to determine in ascertaining the length of delay before the mounting of the current application, would obviously be the duration excluding the period during which the previous application remained in existence.
58. In my humble albeit considered view, for as long as the application vide ELC Misc. E114 of 2022, remained in existence, then the Applicants herein could not commence, mount or lodge the current application.
59. On the other hand, there is no gainsaying that the previous appeal which had been lodged against the impugned decision of the Chief Magistrate was lodged on the June 28, 2022. In this regard, the said Appeal was late by only five (5) Days.
60. In my humble view, the duration between the delivery of the impugned Ruling and the lodgment of the current Application, excluding the period for which the previous Application remained in existence, does not reflect/constitutes unreasonable and inordinate delay.
61. Consequently and in the premises, it is my finding and holding that the said duration cannot be relied upon or invoked to non-suit the Applicants from pursuing a Constitutional Right to Appeal against the impugned decision.

Whether the Applicants have provided and demonstrated any sufficient cause or basis to explain the delay at the foot of the current Application.

62. The Applicants herein contended and submitted that upon the delivery of the impugned Ruling, same were keen to prefer and mount an appeal to this Honourable court.
63. Nevertheless, the 1st Applicant has added that because same was acting in person, he chose to consult an advocate to authenticate the process required prior to and or before filing the intended appeal.
64. In this respect, the 1st Applicant has provided an elaborate explanation at the foot of paragraph 9 of the supporting affidavit.
65. Given the centrality and significance of the contents of paragraph 9 of the Supporting affidavit, it is appropriate to reproduce the contents thereof.
66. For convenience, the contents of paragraph 9 of the Supporting affidavit are reproduced as hereunder;

9. That the reason for the delay in filing the appeal on time was that by the time the decision of the Chief Magistrate Court was rendered, I was acting in person



and upon the impugned ruling I sought counsel of an advocate on how to proceed with the intended appeal. I was advised that:-

- i. That I needed to seek leave to appeal from Chief Magistrate Court before lodging an appeal in this Court, for reasons the order I was to lodge an appeal was not a matter of right.
- ii. That I needed to file memorandum of appeal together with record of appeal, which too substantive time to prepare, as was filed in the withdrawn ELCA E051 of 2022, by the time was I ready to file time had lapsed.
- iii. That I also wrongly construed to the 30 days given to appeal were exclusive of the holidays and Sundays.

67. Though the contents of paragraph 9 of the supporting affidavit whose details have been reproduced, relates to the delay in filing the said appeal, which has since been withdrawn, the point to note is that the delay in question touches on and relates to the same duration, pertaining to the subject Application.
68. Additionally, it is important to state and underscore that having realized that the previous appeal was filed out of time by 5 days, the Applicants herein sought to validate the said appeal.
69. However, it later turned out that an appeal filed out of time cannot be validated and hence the Applicants herein were constrained to withdraw the impugned application and in respect of which same had sought to validate the said appeal.
70. Be that as it may, the current Application was thereafter filed immediately and upon the Withdrawal of the previous Application.
71. In my considered view, the reasons that have been proffered and supplied by the Applicants to underpin the delay for filing of the subject application, are reasonable, credible and convincing.
72. In any event, the reasons and the circumstances that have been explained vide the Supporting affidavit, do not depict any outright inaction, negligence or mala-fides on the part of the Applicants, to warrant a finding against same.
73. Similarly, I come to the considered conclusion that the Applicants have supplied good and sufficient cause, to warrant the exercise of Equitable discretion in their favor.
74. To this end, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Attorney General v The Law Society of Kenya & another* [2013] eKLR, where the honourable court considered what constitutes good and sufficient cause.
75. For coherence, the Court of Appeal stated and observed as hereunder;

“.....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.
76. Duly guided by the definition of what constitutes sufficient cause enunciated vide the foregoing decision, I find and hold that indeed sufficient cause and basis has been demonstrated and established.



Whether the Intended Appeal, for which extension of time is sought, is Arguable and raises reasonable Prospects of Success.

77. The Applicants herein contend that the learned Chief Magistrate proceeded to and struck out their respective counterclaims which had been filed and lodged before the said court.
78. Nevertheless, it is imperative to note and observe that there appears to have been two sets of counterclaims, that were filed and lodged before the Chief Magistrates' court.
79. In this regard, it is evident that the 1st Applicant herein who was the Defendant in the Lower court had himself filed an Amended Defense and Counterclaim dated the December 16, 2021.
80. On the other hand, it is also discernable that the 2nd Applicant, who was the Third Party in the subordinate court similarly filed an Amended Defense and Counterclaim dated the December 18, 2021. However, it appears that the statement of defense and counter-claim by the Third Party was for the sum of Ksh 33, 035, 772/= only.
81. From the foregoing position, there is no gainsaying that the Counter-claim by and on behalf of the Third Party (who is the 2nd Applicant herein) was clearly beyond the pecuniary Jurisdiction of the Chief Magistrates' Court.
82. Nevertheless, in the course of crafting the impugned Ruling, the learned Chief Magistrate stated as hereunder;

“Therefore by dint of pecuniary jurisdiction, this court does not have the Jurisdiction to hear or try the counter claim. The defendant whilst knowing the pecuniary jurisdiction of this court filled a counter claim that he knew this court won't entertain and in doing so he shot himself in the foot. I hereby strike out the counter claim, with costs.

Should the defendant want to proceed with the counter claim he should file it in the High court and make an application that this file be transferred.

Parties to bear their own cost.”

83. From the foregoing excerpt, what comes out clear is that the learned Chief magistrate proceeded to and indeed struck out the counterclaim filed by the Defendant and not by the Third Party.
84. For clarity, there is no gainsaying that there were three different set of Parties before the subordinate court/ Chief Magistrates' Court, namely, the Plaintiff, the Defendant and the Third party.
85. In my respectful view, if the Third Party had filed a Defense and Counterclaim, which exceeded the pecuniary Jurisdiction of the Chief Magistrate court, then such a counterclaim would be amenable to be struck out.
86. However, the order to strike out the Third party's Counterclaim cannot apply to and impugn a separate and distinct counterclaim, that was filed by the Defendant.
87. Notwithstanding the foregoing trite and established position in law, what transpired before the learned Chief Magistrate was that same struck out the Defendant's counterclaim, which does not appear to be beyond the pecuniary Jurisdiction of the said court.
88. In view of the foregoing, there appears to be an arguable point as to whether or not the learned Chief Magistrate could strike out the Defendants' counterclaim, which was distinct and separate from that of the Third Party.



89. Additionally, there is also an arguable point as to whether the Defendant’s counterclaim, which is stated to have been in the sum of Kshs 14,650,000/= only exceeded the pecuniary Jurisdiction of the Chief Magistrate’s court.
90. Thirdly, another perspective which demonstrates an arguable point, relates to whether the striking out of the Defendant’s counterclaim was the subject of deliberations in the application dated the 16th March 2022, which culminated into the impugned Ruling.
91. Evidently, it appears that the learned Chief Magistrate proceeded to and indeed struck out the Defendant’s counterclaim, erroneously and without affording the Defendant an opportunity to be heard.
92. In view of the foregoing elaborations, I come to the conclusion that the intended appeal, for which extension of time is sought, ex-facie raises some bona fide and arguable points, which may require investigations and due interrogation by the Appellate court.
93. Be that as it may, I hasten to state and observe that what constitutes an arguable appeal must not necessarily be an appeal which will ultimately succeed. For clarity, it suffices that the impugned grounds, are capable of attracting credible and diverse legal arguments, which would thereafter merit determination by the Honourable court.
94. In this respect, it is imperative to take cognizance of the definition of an arguable appeal established and delineated by the Court of Appeal in the case of *Kenya Commercial Ltd v Nicholas Ombija* [2009] eKLR, where the court stated and observed as hereunder;
- “An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.”
95. Recently, what constitutes an arguable appeal was revisited by the Court of Appeal in the case of *Stanley Kangethe Kinyanjui v Tony Petter & 5 others* [2013] eKLR; where the Court of Appeal stated and observed, *inter-alia*, as hereunder;
- i)
 - ii)
 - iii)
 - vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
 - vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.
96. Nourished and guided by the foregoing, I come to the humble albeit considered view that the Applicants herein have demonstrated and exhibited the existence of an arguable appeal, which ought to be facilitated for purposes of hearing and determination on merits.

Whether the Reliefs sought ought to be granted.

97. What is being sought by and at the instance of the Applicants herein, is essentially an exercise of discretion of the Honourable court to extend time for lodging and filing of the intended appeal.



98. Suffice it to point out that the honourable court is vested and bestowed with the requisite jurisdiction to entertain and adjudicate upon an Application for extension of time.

99. To this end, it is imperative to take cognizance of the provisions of Section 95 of the [Civil Procedure Act](#). For clarity, same are reproduced as hereunder;

95. Enlargement of time.

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.

100. Additionally, the power and discretion of the court to extend time for doing an act provided under the law is also donated vide the provisions of article 259(9) of [the Constitution, 2010](#).

101. For convenience, the said provision of article 259(9) of the [Constitution of Kenya, 2010](#) are reproduced as hereunder;

(9) If any person or State organ has authority under this Constitution to extend a period of time prescribed by this Constitution, the authority may be exercised either before or after the end of the period, unless a contrary intention is expressly specified in the provision conferring the authority.

102. Premised on the foregoing provisions, it is common knowledge that this Honourable court is seized of and conferred with the requisite jurisdiction and mandate to extend time in appropriate circumstances, subject to sufficient cause being demonstrated.

103. In any Event, the circumstances that need to be considered and appraised before extending time, were well delineated, elaborated upon and established by the Supreme Court of Kenya in the case of [Nicholas Kiptoo Arap Korir Salaat v Independent Electoral & Boundaries Commission & 7 others](#) [2014] eKLR, where the Supreme Court distilled the various grounds and crystalized same 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.

104. In a nutshell, I come to the conclusion that the Applicants herein have certainly demonstrated and established a basis to warrant the grant of extension of time for purposes of filing the intended appeal.

Final Disposition:

105. Having evaluated and analyzed the various issues that were highlighted and amplified in the body of the Ruling, it is now appropriate to render the final and dispositive orders pertaining to the instant Application.
106. However, before venturing to pronounce myself on the final orders, there are two (2) incidental issues that require due mention and short deliberation.
107. For coherence, the first issue relates to the contention that the 2nd Applicant herein has already filed and lodged a separate Appeal, namely, ELCA No E050 of 2022 between Bebadies Company Ltd v Daniel Kimani Kariuki, Jaspal Nyota & Sedco Consultant Ltd, wherein same has appealed against a portion/segment of the impugned ruling rendered on the May 24, 2022.
108. However, it is important to state that the appeal vide ELCA No E050 of 2022 has been mounted by a firm of advocate who were found not to have been on record for the said purported Appellant. Consequently, a Question may arise about the propriety of the said Appeal
109. Additionally, the issue of directorship of the 2nd Applicant herein, who is purported to be the Appellant in ELCA No E050 of 2022, has been the subject of court proceedings and there are lawful orders of Lady Justice Mary Kasango, Judge issued on the November 21, 2018 vide Milimani HCC No E115 of 2018.
110. For clarity, the said orders designated the 1st Applicant herein as the sole Director vested with the capacity to manage the affairs of the 2nd Applicant, pending the Hearing and determination of the said Proceedings.
111. In the premises, there is a question as to whether the 2nd Applicant herein would lawfully lodge any appeal on the instruction of any other director other than the 1st Applicant, during the pendency of the orders/ruling of Lady Justice Mary Kasango, J.
112. Essentially, I must point out that the current application for which the 2nd Applicant is seeking leave to appeal, appears to be lawful and legitimate in view of the ruling of Lady Justice Mary Kasango, J, which I have alluded to in the preceding paragraphs.
113. Be that as it may, it is imperative to state and underscore that unless there is a serious debilitating and militating factor, it behooves the Honourable court to facilitate and ensure that every citizen enjoys the right of access to justice, as enshrined vide article 48 of the *Constitution, 2010*.
114. Having pointed out and alluded to the provisions of article 48 of the *Constitution*, I am now minded to and do hereby make the following orders;
 - i. The application dated the July 26, 2022, be and is hereby allowed.



- ii. Time for filing and lodging an Appeal against the impugned decision of the Chief Magistrate issued on the May 24, 2022 vide Milimani CMCC No 10717 of 2018 be and is hereby extended by 14 days from the date of this Ruling.
- iii. For clarity, the applicants are at liberty to file and mount the intended appeal albeit within the stipulated 14 days period.
- iv. Nevertheless, the applicants herein shall pay costs of the current Application assessed and certified in the sum of Kshs.30, 000/= only to the Respondents and same to be paid within 14 days from the date hereof.
- v. In default to pay/settle the costs in terms of clause (iv), the Respondents shall be at liberty to execute for same.

115. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Daniel Kimani Kariuki- The 1st Applicant in Person.

Mr. Chumo h/b for Mr. Desmond Otwal for the Respondents.

