



**Masha v Kenga & 3 others (Miscellaneous Application
E026 of 2023) [2024] KEELC 3626 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION E026 OF 2023**

EK MAKORI, J

MAY 2, 2024

BETWEEN

EMANUEL KAZUNGU MASHA APPLICANT

AND

CHARO MAITHA KENGA 1ST DEFENDANT

JUMAA MAITHA KENGA 2ND DEFENDANT

JOHN MAITHA KENGA 3RD DEFENDANT

DUNCAN KAHINDI KAZUNGU 4TH DEFENDANT

RULING

1. The Applicant, recognizing the significant implications of failure to obtain leave to appeal out of time in this case, seeks to have the time to appeal enlarged. The same is opposed. Parties were directed to file written submissions, and they complied.
2. The impugned ruling/order of the Court intended to be appealed against was issued by Hon. Kimwele Muneeni sometime in 1999, adopting an award from the Land Disputes Tribunal in Kaloleni Civil Case No. 10 of 1999 concerning land parcel No. Kilifi/Kadzozzo/1438.
3. The 24-year delay is said to have been occasioned by circumstances beyond the control of the applicant, who was not involved in the Lower Court proceedings, due to the late receipt of letters of administration. The primary suit involved the applicant's father and the respondents.
4. The applicant, in a demonstration of their commitment to the rule of law, supports their plea for extension of time with the well-established legal principles from *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission* [2014] eKLR, *County Executive of Kisumu v County Government of Kisumu and 8 others* [2017] eKLR, and *Richards Ncharpi Leiyangu v*



Independent Electoral and Boundaries Commission and 2 others [2013] eKLR. These references provide a comprehensive framework for considering such pleas for the enlargement of time.

5. The respondent's concerns are that the intended appeal is late, a fact that cannot be ignored. However, it is important to consider the circumstances and the fact that the parties in the primary suit are not the same as in the intended appeal. The first and second respondents were never parties in the primary suit, and the applicant is seeking to rectify this through the appeal process.
6. The respondent has cited the decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission* [2014] eKLR, highlighting the parameters to follow in an application for an extension of time within which to appeal. The respondent believes that the current application is incompetent as the Memorandum of Appeal has not been attached for the Court to determine whether we have an arguable appeal (see *Rika J. in Benedict Ojou Juma v A.J. Pereira & Sons Limited* [2016] eKLR).
7. The principles for the grant of leave to appeal out of time are as enunciated in the cases cited by the parties and as emphasized by the Supreme Court in the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR:

“25] Concerning extension of time, this Court has already set the guiding principles in the *Nick Salat Case* as follows:

“... 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.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents if 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” [emphasis supplied]

8. The intended appeal seeks to reverse orders issued by a Kaloleni Court in 1999; the exact date is not stated. I cannot see the Memorandum of Appeal or the orders issued by Hon. Muneeni that are intended to be appealed against. It's been approximately 24 years since 1999. The reasons proposed by the applicant are that he got letters of administration late and the person involved in the primary suit was his father. The reasons for the delay are not pertinent; besides, he was neither a party nor were the



respondents parties in the primary suit. The parties in the intended appeal have never been adequately joined as parties in the primary suit. This Court cannot join them at the appellate level.

9. As I have said, the orders to be appealed against are not disclosed. I cannot speculate on what appeal we will have, as emphasized by Rika J. in *Benedict Ojou Juma v A.J. Pereira & Sons Limited* [2016] eKLR:

“In the current Application there is no draft Memorandum of Appeal. The Court has no way of forming a view on the presence of an arguable Appeal. In this Court’s Cause Number 236 of 2013, between *Ignas Mghona & 4 others v. Star of Hope International Foundation*, a similar Application was rejected for failing to show arguable grounds, a draft Memorandum of Appeal having not been attached. In the case of Bernard Gonzale Lando cited by the Claimants above, there was attached a draft Memorandum of Appeal, which the Court nonetheless found to contain insufficient material to conclude there was an arguable Appeal. In the current Application there is not a single ground of Appeal availed to the Court.”

10. Motion dated 29th May 2023 is hereby dismissed with costs.

Dated, signed, and delivered at Malindi virtually in open court on this 2nd day of May 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms Apiyo, for the Applicant

Mr. Anaya for the Respondents

Court Clerk: Happy

