



**Parkire v Nasieku (Environment and Land Appeal E001 of 2023)
[2024] KEELC 3487 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

CG MBOGO, J

MAY 2, 2024

BETWEEN

TIAPUKEL OLE PARKIRE APPLICANT

AND

DOPOI MONYIS NASIEKU RESPONDENT

RULING

1. Before the court is the Notice of Motion Application dated 22nd July, 2023 filed by the appellant/ applicant, and it is expressed to be brought under Order 42 Rule 6 and Order 50 Rule 6 of the [Civil Procedure Rules](#), Section 79G and Sections 1A, 3A, and 3B of the [Civil Procedure Act](#) seeking the following orders: -
 - 1 Spent.
 - 2 Spent
 - 3 Spent.
 4. That this honourable court be pleased to grant the applicant leave to appeal out of time against the ruling delivered on 22nd July, 2019 by Hon. W. Juma in Narok Chief Magistrate’s Court Civil Case No. 25 of 2014.
 5. That this honourable court be pleased to order stay of execution of the judgment delivered on 15th December, 2015 in Narok Chief Magistrate’s Court Civil Case no. 25 of 2014 pending the hearing and determination of this application inter parties.
 6. That the costs of this application do abide outcome of the appeal filed herewith.
 7. That this honourable court be pleased to set aside the summary judgment entered against the appellant on 17th December, 2015.



8. That this honourable court be pleased to order a re-hearing of the suit as defended suit on such terms that may be imposed by this honourable court.
 9. That the costs of this application to abide the outcome of the appeal.
2. The application is premised on the grounds inter alia that the appellant is aggrieved with the ruling delivered by Hon. W. Juma, and the delay in filing the appeal was inadvertently contributed by the previous advocates who neglected to act on the appellant's instructions to file the appeal.
 3. The application was supported by the affidavit of the appellant sworn on even date. The applicant deposed that he is aggrieved by the ruling delivered by Hon. W Juma in CMCC No. 25 of 2014 and that he has a defence which raises triable issues and it would be unfair for him to be condemned unheard.
 4. The applicant further deposed that he has an arguable appeal with a reasonable chance of success and if execution is carried out, it will render the entire appeal nugatory. He deposed that he will abide by any conditions and terms as to security that the court may deem fit to impose. He also deposed that it is in the interests of justice that the orders sought are granted in order for the ends of justice to be met and also to facilitate just expeditious, proportionate and affordable resolution of the instant case.
 5. The application was opposed by the replying affidavit of the respondent sworn on 15th February, 2024. The respondent deposed that the application is time barred since the same has not been appealed for a period of 9 years, that the applicant has not tendered satisfactory explanation for the delay in filing the notice of appeal. The respondent further deposed that there is a pending judgment yet to be delivered in ELC Appeal No. 15 of 2019 which was an appeal on the same subject matter instituted by the applicant.
 6. The respondent deposed that the applicant's intentions are to waste the court's time and to prevent any possibility of the respondent realizing the fruits of any eventual judgment/ decree. He deposed that the explanation tendered by the applicant is not sufficient and it is an afterthought meant to deny him his rights.
 7. The application was canvassed by way of written submissions. On the 16th February, 2024 the respondent filed his written submissions dated 15th February, 2024 where he raised two issues for determination: -
 - i. Whether the applicant has satisfied the conditions precedent for the grant of an order for stay of execution pending hearing and determination of an appeal.
 - ii. Whether the applicant should be granted leave to appeal out of time against the ruling dated 22nd July, 2019.
 8. On the first issue, the respondent submitted that applicant has not satisfied the conditions precedent for grant of an order for stay of execution as it was discussed in the case of *Bonface Kariuki Wahome v Peter Nziki Nyamai & Another* [2019] eKLR.
 9. On the second issue, the respondent submitted that there is no plausible explanation for the 8 years' delay in filing the intended appeal. He went on to submit that there is a pending judgment in ELC Appeal No. 15 of 2019 that is yet to be delivered regarding the same matter. He also submitted that the present application is incompetent and ought to fail since the applicant failed to file a substantive appeal.



10. It was also submitted that extension of time is an equitable remedy reserved for a deserving applicant, and since the applicant has failed to demonstrate a good case, the same ought not to be granted. The respondent relied on the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR.
11. The applicant did not file his written submissions. Be that as it may, I have considered the application, the replying affidavit thereof and the written submissions filed by the respondent. In my view, the issue for determination is whether the application has merit.
12. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.
13. Section 79G of the *Civil Procedure Act* provides as follows;
- “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.”
14. Section 95 of the *Civil Procedure Act* provides thus: -
- “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.”
15. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which is similar to Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”
16. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:
- “The underlying principles a court should consider in exercise of such discretion include;
1. Extension of time is not a right of any 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 Respondent if the extension is granted;
 6. Whether the application has been brought without undue delay.
 7.”
17. In this case, the applicant contended that the reason for delay in filing the appeal was inadvertently contributed by the previous advocates who neglected to act on his instructions to file the appeal. According to him, his appeal raises arguable issues with high chances of success and it would be unfair to be condemned unheard.
 18. On the other hand, the respondent argued that the reason for delay in filing the appeal is not plausible and there is a pending judgment over the same issue between the parties in ELC Appeal No. 15 of 2019.
 19. To avoid embarrassing this court, I sought to look at the proceedings in ELC Appeal No. 15 of 2019 and I noted that the parties herein were represented by the counsel on record in this matter. On 19th April, 2024, Mr. Kamwaro, learned counsel for the applicant informed the court that he had instructions to withdraw the appeal. Mr. Onduso, learned counsel for the respondent did not object to the same save for costs. On the same date, the appeal was marked as withdrawn.
 20. Having said the above, it is clear that there is no pending judgment in ELC Appeal No. 15 of 2019 as the appeal was marked as withdrawn. Turning to the application before me, it is necessary to establish whether the applicant has satisfactorily met each of the said principles as stated in the case of *Nicholas Kiptoo Korir Arap Salat* (*supra*).
 21. On the length of the delay and the explanation, if any, the present application was filed on the 22nd July, 2023. The impugned ruling, the subject of this application, was delivered on 22nd July, 2019 which delay is 4 years. The explanation given by the applicant for not filing the appeal was attributed to the advocates who neglected to act on his instructions to file an appeal. Whereas the respondent has not refuted this position save to state that the reason is not plausible, I find the reason for delay not satisfactory.
 22. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
 23. This court is left to wonder why it took the applicant four years to realize that his advocates on record did not act on his instructions to file an appeal. The applicant has not informed the court the exact time when he realized that his advocate had refused to act on his instructions. He has also not explained what actions he took when he realized that his advocate had not acted as instructed. There is nothing to show that his advocates failed to act on his instructions. In my humble view, it is not sufficient for the applicant to merely state that his advocate ignored his instructions to file the appeal. In any case, it



appears that the applicant is intent on seeing that the respondent will not enjoy the fruits of judgment in his favour.

24. Arising from the above, I find that filing the instant application 4 years later as inordinate. The reason advanced is also not satisfactory. For that reason, I find no merit in the notice of motion dated 22nd July, 2023 and it is hereby dismissed with costs to the respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 2ND DAY OF MAY, 2024.

HON. MBOGO C.G.

JUDGE

2/05/2024.

In the presence of: -

Mr. Meyoki Pere – C.A

