



Kimutai v Lerayan (Environment and Land Miscellaneous Application E020 of 2024) [2024] KEELC 13586 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 13586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E020 OF 2024
MAO ODENY, J
OCTOBER 16, 2024**

BETWEEN

FELIX KIMUTAI PLAINTIFF

AND

PAULINE C LERAYAN DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 3rd June, 2024 by the Defendant/Applicant seeking the following orders:
 - a. Spent
 - b. That this Honourable court be pleased to grant the applicant leave to lodge an appeal out of time.
 - c. That this Honorable court be pleased to extend the time for filing an appeal in Nakuru CM ELC No 173 of 2019.
 - d. That upon grant of prayers 2 and 3 above, provide timelines for filing the Appeal.
 - e. That the costs of this application be in the cause.
2. The application was supported by the annexed affidavit of Pauline C. Lerayan, the Defendant/Applicant herein who deponed that on 21st March, 2024, judgment was delivered in favour of the Plaintiff against herself for permanent injunction, her eviction from the suit parcel as well as 45 days of execution of the judgment.
3. The Applicant further deponed that at the time of delivery of the judgment, her advocates were absent hence did not get the outcome of the judgment in time. It was her case that her advocates wrote letters dated 22nd March, 2024 and 29th March, 2024 to her but she did not respond. Further that her advocates



wrote a letter to court requesting for certified copies of judgment and typed proceedings in this matter for purposes of appeal, however to date the same has not been typed.

4. According to the Applicant, it was until 23rd May, 2024 when she visited her advocate's chambers and told them that the post office box she was using belonged to a nearby school which was closed during the intervening period hence lack of communication.
5. The Applicant further deponed that when she became aware of the judgment, the time for filing an Appeal had already lapsed and that being dissatisfied with the judgment, she wished to appeal against the said judgment in its entirety out of time. She stated that the intended appeal raises substantial issues, which ought to be heard and determined on merit as the period of delay in filing the Appeal was not intentional.
6. The Plaintiff/Respondent filed a Replying Affidavit dated 9th July, 2024 where he deponed that the application is an abuse of court process as the Applicant was fully aware of the contents of the judgment herein but decided not to treat the same with the seriousness that it deserves. He further deponed that the Applicant is guilty of laches and if the instant application is allowed, he stands to suffer substantial loss incapable of being compensated by way of damages and urged the court to dismiss the application with costs.

Defendant/applicant's Submissions

7. Counsel for the Defendant /Applicant filed submissions dated 16th July, 2024 and identified the issue for determination as whether court can admit a suit out of time.
8. Counsel submitted that the applicant is aware that time has lapsed and it is due to this circumstance that she is seeking for leave to lodge an appeal out of time. Counsel relied on the cases [*Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*](#) (2015) eKLR and [*Martha Wangari Karua v Independent Electoral and Boundaries Commission*](#) Civil Appeal No 1 of 2017.
9. Counsel further relied on Article 50 and 159 of the [*Constitution*](#) of Kenya and submitted that any short comings of the Applicant is curable and the court is obliged to hear and determine each case on merit and no litigant should be driven from the seat of justice without being heard.
10. Ms. Kiprop also submitted that mistake of an advocate should not bar the Applicant from his or her constitutional right to appeal and cited the case of [*Hudson Kihanda v Romagego Kenya Limited*](#) (20100 eKLR. Counsel urged the court to allow the application as prayed.
11. On 23rd September, 2024 when the matter came up in court for mention, counsel for the Plaintiff/ Respondent informed the court that he will rely on the Replying Affidavit.

Analysis And Determination

12. The issue that arises for determination is whether this Honourable court should grant the Defendant/ Applicant leave to lodge an appeal out of time.
13. In the case of [*First American Bank of Kenya Ltd v Gulab P.Shah & 2 others*](#) Nairobi (Milimani) HCCC No 2255 of 2000 [2002] 1 EA 65 the court set out the factors to be considered in deciding whether or not to grant an application for extension of time to lodge an appeal out of time as follows:
 - 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 favorable exercise of discretion in favor of the applicant.
14. Further in the Court of Appeal case of *Omar Shurie v Marian Rashe Yafar* [2020] eKLR the court outlined factors to consider when dealing with an application for leave to appeal out of time as follows:
- i. the length of the delay
 - ii. the reason for the delay
 - iii. the chances of the appeal succeeding if the application is granted
 - iv. the degree of prejudice to the respondent if the application is granted
15. The judgment the applicant seeks to appeal against was delivered on 21st March 2024 and the application was filed on 3rd June 2024. An applicant in an application for extension of time to file an appeal out of time must adhere to the principles set out above. An applicant must satisfactorily explain the delay in not filing the appeal within the stipulated period.
16. The Applicant stated that she became aware of the judgment when time stipulated to file an appeal had lapsed. She also stated that here advocates were not present in court when the same was delivered hence the delay. She further explained that there was lack of communication as the Post Office Box Number that she was using was for a neighboring school, which had been closed during the intervening period. She further stated that the lawyer had written to her two letters and later requested for the typed proceedings for purposes of appeal.
17. The applicant also stated that she is aggrieved by the judgment and her appeal has substantial issues that should be tried on merit and as such arguable and has high chances of succeeding. It was further her case that there will be no prejudice caused to the respondent as the delay was not intentional.
18. In the case of *Mbukoni Services Limited & another v Mutinda Reuben Nzili & 2 others* [2021] eKLR, the Learned Judge cited with approval the decision in *Daphne Parry v 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.”
19. On the issue of length of delay, reason for delay and prejudice to the Respondent, the Defendant/ Applicant stated that judgment was delivered on 21st March 2024 and the application filed on 3rd June 2024 which is 2 months delay. In computation of time to establish whether there was delay or not, time is of essence when certain activities are supposed to be done or happen at appointed times. In certain circumstances, a delay of one or two days might be found to be inordinate and a period of a



year found not to be depending on circumstances of the case like was held in the case of Mwangi S. Kimenyi v Attorney General & Another that:

“ 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 case; the nature of the case; the explanations given for the delay; and so on and so forth.”

20. In the case of *County Executive of Kisumu v County Government of Kisumu & others* (2017) eKLR where the Supreme Court held that:

“ Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time the whole period of delay should be stated and explained to the satisfaction of the court.”

21. It should be noted that leave to file an Appeal out of time is not of right but an equitable remedy, which is discretionary. The court must be satisfied that the Applicant has shown sufficient cause why the discretion should be in his/her favour which she has explained above.

22. I have considered the application together with the submissions by counsel and find that the application has merit and is therefore allowed as prayed. Applicant to file the appeal within 14 days failure to which the order lapses. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

