



**M'mwarania v M'impwi (Sued as the Legal Representative of the Estate of Petero M'impwi Nabea – Deceased) (Miscellaneous Civil Application E040 of 2022) [2023] KEELC 590 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 590 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E040 OF 2022  
CK NZILI, J  
FEBRUARY 8, 2023**

**BETWEEN**

**JOHN MAITIMA M'MWARANIA ..... APPLICANT**

**AND**

**STANLEY M'ITWARUCHIU M'IMPWI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETERO M'IMPWI NABEA – DECEASED) ..... RESPONDENT**

**RULING**

1. The court is asked by an application dated 4.11.2022 to enlarge time for the filing of an intended appeal against a judgment in Meru No. Chief Magistrates ELC No. 63 of 2019 which delivered on 5.7.2022.
2. The reasons for the delay as contained in the supporting affidavit sworn on 3.11.2022 by John Maitima M'Mwarama are that he instructed his counsel on record to file an appeal only to be told that the time expired on 5.9.2022. Secondly, it is stated there will be no prejudice to the respondent which may not be compensated by way of damages. The application is opposed on the ground that the delay of 89 days has not been sufficiently explained.
3. By written submissions dated 1.12.2022, the applicant submitted that under Sections 79G and 95 of the *Civil Procedure Act*, the court has discretion to enlarge time. Reliance was placed on *Jaber Mohsen Ali & another vs Priscillah Boit and another* (2014) eKLR, *Richard Ncharpi Leiyagu vs IEBC and 2 others*, *Mbaki & others vs Macharia & another* (2005) 2 E.A 206 *Jaldesa Tuke Dabelo vs IEBC & another* (2015) eKLR, *Raila Odinga & 5 others vs IEBC & 3 others* (2013) eKLR, *Lemanken Aramata vs Harun Meitamei Lempaka & 2 others* (2014) eKLR, *Cherotich Sawe vs IEBC & 4 others* (2015) eKLR, *Equity Bank Ltd vs West Link Mbo Ltd* (2013) eKLR, *Board of Governors Moi High School Kabarak & another vs Malcom Bell* (2013) eKLR, *Joseph Schmaderer vs Serah Njeri Ngene* (2021) eKLR & *Vishva Stone Suppliers Co. Ltd vs RSR Stone (2006) Ltd* (2020) eKLR.



4. The facts in this matter are that the judgment was sent via email to the parties on 5.8. 2022. The judgment itself is dated 5.7.2022. Parties however appear to be referring to 5.8.2022 as the date of delivery. Be that as it may, the court under Section 79 G of the Civil Procedure Act may admit an appeal out of time if there are good reasons and sufficient cause shown for not filing the appeal in time. The principles to apply on whether to extend time or not were discussed by the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others (2014) eKLR. that it is a discretionary power of court which is not a right of a party but exercisable based on material which is satisfactory to the court; there must be reasons for the delay; any prejudice to the opposite party must be considered and the extent of the delay has to be considered.
5. In this application, the reasons for the delay have not been stated in the supporting affidavit. Counsel for the applicant has however mentioned that the applicant lacked funds for lodging the appeal in time. Nothing has been placed before the court on the nature of the financial status of the applicant.
6. In Joseph Schmaderer vs Serah Njeri (supra) the court cited Diplack Kenya Ltd vs William Muthama Kitonyi (2018) eKLR, where Odunga J as he then was held that the court must guard itself against the danger of being led by sympathy especially if there was no excuse for the delay.
7. The application has attached a draft memorandum of appeal which to my mind raises some arguable points. The respondent has not stated through an affidavit what prejudice would be occasioned to him if the appeal were to be filed out of time. There is nothing stated by the respondent if the subject matter has changed status such that the delay has prejudiced him.
8. The upshot is, I find that the application should be given an opportunity to exercise his constitutional right of appeal. I allow the application and order the memorandum of appeal to be filed and served within 14 days from the date hereof. Costs to the respondent in any event.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023**

**In presence of:**

C/A: Kananu

Miss Kiome holding brief for Gikundi for applicant

Kirimi for Kariuki for respondent

**HON. C.K. NZILI**

**ELC JUDGE**

