



Kalsi & another v Kalsi (Sued personally and as the administrator of the Estate of Mohan Singh Kalsi (Deceased) (Environment & Land Case E016 of 2021) [2023] KEELC 18070 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E016 OF 2021**

JA MOGENI, J

JUNE 5, 2023

BETWEEN

JOGINDER SINGH KALSI 1ST APPLICANT

SURJIT KAUR SYEAN 2ND APPLICANT

AND

GURMIT KAUR KALSI (SUED PERSONALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF MOHAN SINGH KALSI (DECEASED) RESPONDENT

RULING

1. Before this Court for determination is the Applicants' Notice of Motion Application dated June 10, 2022 brought pursuant to Section 79G, 95, 1A, 1 & 3A of the *Civil Procedure Act*, Order 43 Rule 2 and Order 51 of the *Civil Procedure Rules* and all other enabling powers and provisions of the law. The Applicants are seeking for the following orders: -
 1. Spent.
 2. That this Honourable court be pleased to extend time to lodge an Appeal.
 3. That this honourable court do grant leave to the applicant to lodge an Appeal against the Judgement delivered on December 6, 2021.
 4. The costs of this application be in the cause.
2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Joginder Singh Kalsi, the 1st Applicant herein sworn on May 31, 2022. I do not need to reproduce the same.



3. The main ground is that the Applicants having been out of the country could not be reached to issue instructions to the advocates regarding filing the Appeal. They further indicate that they are aggrieved by the said judgment as it does not disclose the way forward regarding the Applicant's separation property. They are desirous of filing an appeal against the judgment which was delivered on December 6, 2021 and that the intended Appeal raises questions of law needing to be addressed by the Appellate court.
4. The application is opposed. There is a Replying Affidavit by Gurmit Kaur Kalsi, the Respondent herein, sworn on February 23, 2023. The Respondent deponed that the entire application as drafted and filed is an abuse of court process as the applicants have not demonstrated and/or given sufficient reasons for the delay in filing the purported appeal.
5. On February 27, 2023, directions were given on filing of written submissions to the application. By the time of writing this Ruling, none of the parties had duly submitted.

Issues for determination

6. I have considered the Applicants' Application, both affidavits (in support and against) and find the main issue for determination to be whether the Applicants are entitled to an extension of time to lodge their appeal.
7. The Applicants seek one main prayer is leave to file appeal out of time.
8. To begin with, I note that the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. See [*Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application NO NAI 165 of 2013 \(UR 113/2013\) \(2014\) eKLR*](#). One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows: -

' One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.'
9. Section 7 of the [*Appellate Jurisdiction Act*](#) Cap 9 vests this court with the requisite jurisdiction to enlarge/ extend time within which to lodge the Notice of Intention to Appeal, it provides as follows:

' The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.'
10. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/1997*, the court, in considering the exercise of discretion to extend time, held 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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the



appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.'

11. For one to be granted leave to file appeal out of time, he/she must satisfy the court that he/she has good and sufficient cause for not filing the appeal within time.
12. It has been largely acknowledged that power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case-by-case basis. The discretion must also be exercised judiciously and only after a party seeking the exercise of the discretion places before the court sufficient material for the court to act on. See *Mwangi –vs- Kenya Airways Ltd (2003) eKLR*.
13. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy [1964] 3 All ER 933*.
14. I will therefore proceed to consider this application in light of the factors stated above and establish whether the Applicants have satisfactorily met each of the principles. In the instant case, the judgment sought to be challenged was delivered on December 6, 2021. Any appeal ought to have been filed on or before December 20, 2021. The application herein was filed on June 15, 2022. It was therefore filed 177 days after the prescribed period of 14 days. 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 Chemarigo vs Paul Kipkorir Kibet [2018] eKLR*. I find this to be inordinate delay.
15. The Respondent has deponed that the Applicants have not demonstrated and/or given sufficient reasons for the delay in filing the purported appeal. I have gone through the grounds and supporting affidavit and I find that the Applicants simply stated that they had been out of the country and could not be reached to issue instructions to the advocates regarding filing the Appeal. It is the Applicant who was late in giving instructions to their advocates to file the appeal. I find that no good reason has been advanced.
16. In the case of *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR*. Odunga J found that:

' An applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633*, there is no difference between the words 'sufficient cause' and 'good cause'. It was therefore held in *Daphne Parry vs Murray Alexander Carson [1963] EA 546* that though the provision for extension of time requiring 'sufficient reason' should receive a liberal construction, 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.'
17. Annexed to this application is a draft memorandum of appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. On whether the applicant has an arguable case I am unable to say that the intended appeal is arguable. The arguability or otherwise of the intended appeal is merely a possible consideration. It is not a mandatory requirement. There is therefore no need for me to determine at this juncture as to



whether the appeal is arguable or not. In *Athuman Nusura Juma vs Afwa Mobamed Ramadhan, CA No 227 of 2015*, the Court of Appeal stated thus, on that issue:

' This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word 'possibly'.'

18. On prejudice, in the case of *Abdul Azizi Ngoma vs Mungai Mathayo [1976] Kenya LR 61, 62*, the Court of Appeal held:

' We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.'

19. From the foregoing, The Applicants were indolent. It is my finding that the delay has not been explained hence the applicants do not qualify for a favourable exercise of discretion.

20. In the result, I find the application is bereft of merit. It is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2023.

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MOGENI J

JUDGE

In the virtual presence of:-

Ms Koki for the Applicant

Ms Kerubo for the Respondent

Ms. Caroline Sagina Court Assistant

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MOGENI J

JUDGE

