



**Katiku & another v Musulu (Miscellaneous Application
E006 of 2022) [2023] KEELC 18716 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E006 OF 2022**

A NYUKURI, J

JULY 5, 2023

BETWEEN

MWANZIA KATIKU 1ST APPLICANT

TERESIA MBATHA MUSEMBI 2ND APPLICANT

AND

FRIDAH KAVINDU MUSULU RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated February 23, 2022, the Applicants sought against the Respondent the following orders;
 - a. That leave be granted to the Applicants to file an appeal out of time against the ruling and order of Hon. E. H. Keago delivered on December 2, 2021 in Machakos ELC No E068 of 2021.
 - b. That costs of this Application be in the cause.
2. The application was supported by the grounds on its face as well as the supporting affidavit sworn on February 23, 2022 by Mwanzia Katiku. The Applicants' case is that they filed a preliminary objection before the subordinate court on August 13, 2021 in Machakos CMC ELC No E068 of 2021. That the preliminary objection was heard together with the Respondents application filed on July 12, 2021 and on December 2, 2021, the court delivered its ruling in respect thereto.
3. They stated that at the time of delivery of the ruling, the same had not been typed and that their counsel was served with the typed ruling on 2nd February 2022. That as they are dissatisfied with the ruling, they intend to appeal against the ruling. They contended that they have an arguable appeal with chances of success and that the Respondent shall not suffer any prejudice if the orders sought are granted. He attached pleadings and the ruling before the subordinate court.



4. The application was opposed. Francis N. Sila Advocate for the Respondent filed a replying affidavit sworn on 7th March 2022. It was the Respondent's case that the ruling was read in the presence of the Applicant and that it was the Applicants' advocate who informed the Respondent's counsel of the ruling. He stated that at the time the ruling was delivered it had already been typed.
5. He stated that the time to appeal was 30 days and that the same lapsed on January 2, 2022. According to the Respondent's counsel, the delay was inordinate. He also stated that no draft memorandum of appeal was attached and that there was no proof that the intended appeal had any chances of success.
6. In a rejoinder, the Applicant filed a supplementary affidavit sworn on July 28, 2022 wherein he deponed that the intended appeal was arguable. He attached a draft memorandum of appeal.
7. The application was disposed by way of written submissions. On record are the Applicants' submissions dated August 1, 2022 and the Respondent's submissions dated August 18, 2022.

Submissions

8. Counsel for the Applicants submitted that Sections 79 G and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules* granted this court the power to extend time for filing an appeal out of time. Counsel argued that the draft Memorandum of Appeal demonstrated an arguable appeal.
9. Reliance was placed on the cases of *Thuita Mwangi v. Kenya Airways Ltd* [2003] eKLR, *Stanley Kaboro Mwangi & 2 Others v. Kanyamwi Trading Company Limited* [2015] eKLR, *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Limited & 2 Others* [2009] eKLR and *East African Foundry Works (K) Ltd v. Kenya Commercial Bank Limited* [2002] eKLR; for the proposition that for the court to exercise its discretion to extend time, there ought to be a plausible and satisfactory explanation and an arguable appeal.
10. On their part, counsel for the Respondent submitted that the Applicant did not produce a duly stamped letter requesting the typed copy of the ruling to demonstrate that they sought for typed ruling. According to counsel, the delay by the Applicant was a two months delay which was inordinate. Counsel argued that the Applicants had not sufficiently explained the delay.
11. Counsel contended that as jurisdiction to extend time was discretionary, the Applicant must place sufficient material before court explaining the delay; which was not done in this case.
12. Reliance was placed on the case of *Leo Sila Mutiso v. Rose Hellen Kangari Mwangi Civil Appeal No 251 of 1997* for the proposition that in deciding whether or not to extend time, the court ought to consider the length of the delay, reason for the delay, chances of success of the appeal and the degree of prejudice to the Respondents. Counsel also relied on the cases of *Rabman v. Camarasamy* [1964] 3 ALL ER 933 Page 935 and *Republic v. Teachers Service Commission Civil Appeal No Nai 7 of 2008* for the proposition that for the court to extend time, there ought to be material placed before court for the court to exercise its discretion.

Analysis and Determination

13. I have carefully considered the application, the response and submissions. The issue that arise for determination is whether there is justification for the court to exercise its discretion in extending time to file appeal out of time.



14. Section 79 G of the *Civil Procedure Act* grants the court the jurisdiction to grant extension of time and 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.

15. In a long line of decisions, courts have held that extension of time is not a right of any party but the party seeking extension of time is under duty to explain the reason for the delay to the court's satisfaction. In considering an application for extension of time, the court will usually consider among other factors, the reason for the delay, the period for delay and the prejudice that may be suffered by the Respondent.
16. In the case of *Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others* SC App. No 16 of 2014; [2015] eKLR the Supreme Court of Kenya held 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 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 would 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.
17. In the instant application, the ruling which the Applicants intend to appeal against was delivered on December 2, 2021. Order 50 Rule 4 of the *Civil Procedure Rules* provides that time does not run between 21st December to 13th January of the following year. In this matter, the appeal ought to have been filed within 30 days. Taking into account the provisions of Order 50 Rule 4 of the *Civil Procedure Rules*, the 30 days lapsed on January 25, 2022. This Application having been filed on 1st March 2022 means that there was a delay of 34 days. The Applicants have explained that the delay was because they had not been furnished with a typed ruling to enable them file the appeal and that it was not until



February 2, 2022 that they were provided with a copy of the ruling. If that is the position, and if indeed the reason for delay was that the Applicant was waiting for the typed ruling which was supplied to their counsel on February 2, 2022, then clearly, the Applicants have not explained the delay between February 2, 2022 to 1st of March 2022 which is a delay of 28 days. In any event, as correctly pointed out, by the Respondent, the Applicant did not attach evidence of application of a typed ruling to the application and therefore it cannot be said that the delay was caused by the wait for the typed ruling.

18. In the premises, the reasons given by the Applicants for the delay in filing the appeal are not satisfactory to the court. The upshot is that the Notice of Motion dated February 23, 2022 lacks merit and the same is hereby dismissed with costs to the Respondent.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Nyakundi holding brief for Mr. Musyoki for Applicants

No appearance for Respondent

Josephine – Court Assistant

