



**Nyale v Ziro (Miscellaneous Civil Application E25 of 2022)  
[2023] KEELC 18504 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18504 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS CIVIL APPLICATION E25 OF 2022**

**MAO ODENY, J**

**JULY 3, 2023**

**BETWEEN**

**NAAMAN KITHI NYALE ..... APPLICANT**

**AND**

**CATHERINE JACOB ZIRO ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated May 30, 2022 seeking the following orders;
  - a. Spent
  - b. That this court be pleased to grant the Applicant leave to file appeal out of time against the whole ruling delivered on April 5, 2022 by Hon JM Kituku (SPM) in SPMCC No 421 of 2009 at the Senior Principal Magistrate's court at Kilifi.
  - c. That costs of the application be provided for.
2. The Applicant relied on the grounds on the face of the application and the Supporting Affidavit of Naaman Kithi Nyale dated May 30, 2022 where he deponed that having been aggrieved by the ruling of the lower court delivered on June 22, 2021, he instructed his former advocates who filed an application on December 3, 2021 seeking to review and/or set aside the orders of the court which application was dismissed on April 5, 2022 and was delivered in the absence of parties without notice to the Applicant..
3. He further deponed that he was unaware of the delivery and/or existence of the impugned ruling until May 17, 2022 when he was informed by his former advocates by which time to file an appeal had lapsed thus a fall out with his former advocates. He added that the delay in filing the appeal is no inordinate and that he has adequately explained the reasons for the delay



4. The Applicant also stated that he stands to suffer irreparable loss and damage in the event the prayer for extension of time to file the appeal is not granted.
5. In response to the application, the Respondent filed a Replying Affidavit dated June 20, 2022 stating that a notice was sent to the Applicant's former advocates' known email address regarding the delivery of the ruling and the Applicant's disagreement with his former advocates cannot be a reason for issuance of the orders sought.
6. She added that there have been previous applications for extension of time against the entire judgment of the trial court which applications were later withdrawn thus the Applicant is keen on delaying the suit and urged the court to dismiss the application with costs.

### **Analysis and Determination**

7. The issue for determination is whether the Applicant has satisfied the court with reasons why he did not file the appeal within the stipulate period.
8. Under Section 79G of the *Civil Procedure Act*:

“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 a good and sufficient cause for not filing the appeal in time.”
9. Section 95 provides that;-

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.”
10. In the case of *County Executive of Kisumu vs 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.”
11. In the above case the Supreme Court relied on its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No 16 of 2014 (2014) eKLR where Hon Judges reiterated the considerations to be made in such a case as follows:
  1. Extension of time 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 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 respondents if the 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.”
12. The impugned ruling herein was delivered on April 5, 2022. A cursory glance of the ruling on the last page indicates that the ruling was delivered in the absence of the parties. The Applicant maintains that his former advocates were not aware of the ruling date and by the time he was informed of the ruling, time within which to file an appeal had lapsed.
13. The Respondent stated that a notice was sent to the Applicant’s advocates’ last known email address though no evidence was produced in support of this claim.
14. 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 favour which he has explained above.
15. 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 file the appeal with 14 days failure to which the order lapses.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF JULY 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

