



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kangethe v Kienye & 2 others (Miscellaneous Application 64 of 2022)  
[2023] KEELC 19899 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19899 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
MISCELLANEOUS APPLICATION 64 OF 2022**

**JG KEMEI, J**

**SEPTEMBER 18, 2023**

**BETWEEN**

**KAGITU KANGETHE ..... APPLICANT**

**AND**

**ALICE WAMBUI KIENYE ..... 1<sup>ST</sup> RESPONDENT**

**PETER WAWERU CHEGE ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time to allow the appellant to file  
Memorandum of Appeal out of time against the Judgment in ELC NO 4  
of 2018 -Kikuyu (Hon. Jacinta Orwa SRM) delivered on the 30/8/2022)*

**RULING**

1. The Applicant moved this Court vide a Notice of Motion filed on the October 26, 2022 under Order 51 rule 1 of the [Civil Procedure Rules](#), Section 79G of the [Civil Procedure Act](#) and Article 48 and 159 (2) (d) of the [Constitution](#) of Kenya and all enabling provisions of the law.
2. The Applicant sought the following orders; leave to file an appeal out of time; the annexed draft Petition of appeal be deemed as duly filed.
3. The application is premised on the grounds annexed and supported by the Affidavit of the Applicant deponed on the October 26, 2022 as follows; delay in lodging the appeal was occasioned by the delay in supply of proceedings which were furnished by the Court 42 days after the delivery of the Judgement, which delay he argues was not deliberate; that he has a good appeal with high chances of success; and that he has approached the Court diligently and expeditiously.



4. The application is opposed. Alice Wambui Kienye filed a Replying Affidavit deponed on the January 31, 2023 on her own behalf and that of the 2<sup>nd</sup> Respondent. That Judgement in the trial Court was delivered on the 30/8/2022 in favour of the Respondents wherein the suit was dismissed. That the Applicant failed to file an appeal within the 30 days stipulated in law. That no satisfactory explanation has been given by the Applicant to explain the delay of about 67 days post Judgment. That the delay is inordinate and the reasons advanced by the Applicant for the inordinate delay are unjustifiable, inexcusable and evidence of laxity on the part of the Applicant. That there is no requirement to wait for supply of typed proceedings in the lower Court to lodge the appeal. Moreover, the proceedings were only requested on the September 26, 2022, only 4 days to the deadline of lodging the appeal. Even after being furnished with the said proceedings on October 12, 2022 the Applicant took another 25 days to file this application. No reasons have been given for this delay, she averred.
5. Further the Respondents challenged the Certificate of Delay obtained by the Applicant dated the October 19, 2022 on the grounds that it is not signed hence its veracity is in doubt.
6. The Respondents urged the Court to dismiss the application.
7. Despite service the 3<sup>rd</sup> Respondent failed to file any response to the application.
8. On the May 23, 2023 parties elected to file written submissions which I have read and considered. The Court wishes to thank the counsels for each party for their useful highlights.
9. The key issue for determination is whether the Applicant is entitled to the orders of extension of time to file an appeal out of time.
10. Section 79G of the *Civil Procedure Act* 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 appelland of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appelland satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”
11. The principles that guide the Court in the exercise of its mandate under the said Law have now been crystallized in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR in which the applicable threshold was laid by the apex Court as follows; 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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay; The delay should be explained to the satisfaction of the Court; whether there will be any prejudice suffered by the Respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.
12. In the case of *Aviation Cargo Support Limited v St Mark Freight Services Limited* [2014] eKLR the Court held that;

“the order whether or not to grant extension of time or leave to file and serve the Record of Appeal out of time is discretionary. Such discretion is exercised judicially with a view to



doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an Applicant, the latter must demonstrate to the Court that the delay in lodging the Record of Appeal is not inordinate and where it is inordinate the Applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the Applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps take to ensure compliance with the law by coming to Court to seek extension of time or leave to file an appeal out of time.”

13. The Court is enjoined under Section 1A of the Civil Procedure Act to give effect to the overriding objective which include the just determination of disputes. I am guided by the wisdom of the Court in the case of City Chemist (Nbi) & Another v Oriental Bank Limited Civil Application No Nai 302 of 2008 (UR 199/2008);

“The overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objectives. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file Record of Appeal where the Applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court. In the instant application, the Applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the Court. Consequently, I am unable to exercise my discretion in favour of the Applicant as his application lacks merit.”

14. In determining the application the Court must of necessity balance the rights of the parties. In the case of M/s Portreitz Maternity v James Karanga Kabia, Civil Appeal No 63 of 1997 the Court stated that :

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the Judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

15. An appeal ought to be filed timeously and in accordance with the law otherwise it may cause undue prejudice to other parties who have a legitimate expectation that the litigation had come to an end when no appeal was filed within the stipulated period. The Court must balance the interests of the Applicants to be heard on appeal with those of the Respondent to enjoy the fruits of the Judgment.

16. It is trite that there is no mathematical way of calculating delay. Where the delay is found to be inordinate the same should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. In the case of Monica Malel & Anor v R Et Al, Eldoret Civil Appl. No Nai 246 of 2008, the court stated thus:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the Applicants appears to show ... the Applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”



17. In exercising discretion, it should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in Haywood v Cope, (1858) 25 BEAV 140:

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the Court may oblige him to do so.”

18. With the above in mind, I shall now consider the application.

19. The Judgement of the Court was rendered on the 30/8/2022. According to section 79G of the Civil Procedure Act, time for filing an appeal is 30 days that is by September 30, 2022. The Applicant failed to file the appeal within time. The application seeking to extend time to lodge an appeal has been brought 37 days later. The Court finds that there is delay. That said, the Court notes that despite the Applicant being represented by counsel, he still spent time looking for the typed proceedings, an act that is not a prerequisite in filing the appeal. The typed proceedings would be necessary for the filing of the Record of Appeal. Even then time taken in obtaining the typed proceedings is normally disallowed in calculating time for the delay in filing the Record of Appeal. That is why the certificate of appeal is provided by the registry to account for the delay. Counsel being an officer of the Court ought to have known better. For this reason I believe the Applicant has explained the cause of the delay although it was totally unnecessary. I have seen the letters requisitioning the said proceedings. Upon securing the said proceedings the application was filed 14 days later. I hasten to state that the delay has been explained to the satisfaction of the Court.

20. In the interest of justice and to afford the parties the opportunity to be heard on appeal, I allow the application on terms as follows.

- a. The Applicant to file and serve the Appeal within the next 15 days in default the orders shall lapse automatically.
- b. Throw away costs in the sum of Kshs 20,000/- shall be in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and payable by the Applicant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Applicant absent but served

Ms. Wanjira HB Ngugi Kariuki for 1<sup>st</sup> and 2<sup>nd</sup> Respondents 3<sup>rd</sup> Respondent – Absent but served

Court Assistant – Phyllis & Lilian

