



Kanampiu v M'Raiji - Deceased (Environment & Land Miscellaneous Case 2 of 2022) [2022] KEELC 3254 (KLR) (7 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND MISCELLANEOUS CASE 2 OF 2022**

CK YANO, J

JUNE 7, 2022

BETWEEN

TIMOTHY MICHENI KANAMPIU APPLICANT

AND

TILAS M'BORE M'RAIJI - DECEASED RESPONDENT

(Being an Application for Leave to Appeal out of time against the findings and Judgement of the Learned JM Njoroge Chief Magistrate In Chuka Chief Magistrate's Court Environment and Land Case No. 118 of 2017 Delivered on 26th Day of November 2021)

RULING

1. The matter was brought pursuant to a notice of motion dated February 3, 2022 seeking leave to file appeal out of time. The application is supported by the affidavit of Timothy Micheni, the applicant and is based on the following grounds:-
 - a. That part of the judgement in Environment and land Case No 118 of 2018 Chief Magistrate' Court was delivered against the applicant on November 26, 2021.
 - b. That the applicant was dissatisfied with the said judgement and applied for copies of proceedings and judgement on December 5, 2021 and the same were not supplied until January 14, 2022 when time to file appeal had expired.
 - c. That the delay was caused by not getting the copies of proceedings and judgement in time.
 - d. That he has a good appeal and it is fair and just that the application is granted.
 - e. That the orders sought are the best and most apt in the circumstances of this case
 - f. No party stands to be prejudiced in the event the orders sought are granted.



2. The applicant filed a supporting affidavit dated the 3rd of February 2022 wherein he reiterated the above grounds and further averred that he is advised by his advocates on record Muthomi Gitari & Co. Advocates and which advise he believes to be true that the principles for extension of time for filing appeal were laid down by the supreme court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 others 2014 eKLR that: -
 - a. Such extension is not a right but only an equitable remedy available to a deserving party at the court's discretion.
 - b. A party seeking extension must lay a basis for the same to the satisfaction of the court.
 - c. Where there is delay, the same must be explained to the satisfaction of the court.
 - d. Whether any prejudice will be caused to the respondents if the extension is allowed.
 - e. The circumstances of each case must be considered.
3. The applicant averred that the orders sought are the best and most apt in the circumstances of this case and no party stands to be prejudiced in the event the orders sought are granted.
4. The respondent filed a replying affidavit dated the 5th of March 2022 wherein she contends that the judgement in Chuka ELC Case No 118 of 2017 was delivered on November 26, 2021 in their presence and the court ordered that they be supplied with copies of the judgement. That if the applicant was dissatisfied by the court judgement, he ought to have filed the appeal on or before December 26, 2021 but he never did so for reasons which have not been explained to the honourable court.
5. The respondent avers that the judgement was ready for collection as early as 1/12/2021 as evidenced by the certified copy marked "KKT1" but the applicant did not collect the same. That the applicant is guilty of inordinate delay and the delay is not excusable under the circumstances of this case, the applicant having failed to collect the judgement on time.
6. The respondent further avers that in any event, the applicant resides within Chuka area and he has not demonstrated any efforts to collect on time the proceedings and Judgement from the court.
7. The respondent contends that the applicant has not annexed any receipt for the payment of the proceedings and the judgement on time and therefore he is guilty for concealing vital material particulars to this honourable court hence he does not deserve the exercise of discretion by this honourable court.
8. The respondent further contends that she will suffer a lot of prejudice and hardship and prays to be allowed to enjoy the fruits of her lawfully obtained judgement.
9. The respondent avers that the applicant having gone to sleep, is an indolent litigant and this honourable court ought not to exercise its discretion in favour of the applicant. That the applicant will not suffer substantial loss if part of the decree is executed.
10. The respondent urged the honourable court to find that the applicant's application has no merits and the same be dismissed with costs as the same has not been made in good faith.
11. The parties agreed by consent and the court directed that the application be canvassed by way of submissions, but only the respondent filed.
12. The respondent submitted that the applicant's application dated 3/2/2022 has no merits and urged the court to dismiss the same with costs to the respondent.



13. The respondent submitted that the applicant is guilty of inordinate delay and that he has not adequately explained the reasons for the delay and also did not pay for the proceedings. The respondent submits that even a delay of one day ought to be explained sufficiently to court and that the applicant has failed to do so.
14. The respondent urged the court to be persuaded by the holding in the case of *Joseline Kinanu Murungi v/s Aniceta Kajuju* Meru HCC Miscellaneous Application No 183 of 2009.
15. The respondent submitted that the delay has not been explained and to allow the application at this stage will be prejudicial to the respondent and urged the court to find that the applicant has been indolent and that he has not come to court with clean hands. The respondent relied on case of *Gerald Mirigi M'mbui M'Mwiricha & Douglas Meme* Meru HCC Misc Application No 102 of 2006.
16. The respondent further submitted that the applicant is an indolent litigant and his intentions is to delay justice at the detriment of the respondent. The respondent urged the court to refuse the applicant's application with costs as it has no merits.

Analysis and Determination

17. I frame the issue for determination in respect of the application herein as to whether the court should grant the applicant leave to file an appeal out of time.
18. The application is in respect to extension of time to file an appeal out of time. The reason stated by the applicant is that the delay was caused by not getting the copies of proceedings and judgement in time.
19. The statutory provisions that deal with the requisite period for filing of appeals from the subordinate courts to the High Court is section 79 G of the *Civil Procedure Act* which provides that:

“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 the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree 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.”
20. In *First American Bank of Kenya Ltd vs Gulab P. Shah & 2 Others* Nairobi (Milimani) HCCC No 2255 of 2000 (2002) 1EAG5 the court set out the factors to be considered in deciding whether or not to grant such an application and these are:
 - i. The explanation if any for the delay;
 - ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the court of justice;
 - iii. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”
21. The court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension of time, the court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.



22. As already stated, the grant of the extension of time is discretionary. The court is entitled to take into the account the nature of the process against which the extension is sought and satisfy itself that there is reasonable basis to justify the orders sought. This was the holding in the case of Republic v Public Administrative Review Board & Another (2019) eKLR.
23. In the case of Abdul Azizi Ngoma vs Mungao Mathayo (1976) Kenya LR 61,62, the Court of Appeal held:
- “We would like to state once again that this courts’ 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 consideration such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”
24. Similarly, in Karny Zabarya & Another vs Shalom Levi. C Appl No 80 of 2018, Koome, JA (as she then was) stated:
- “Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason (s) for the delay the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion: the conduct of the parties: the need to balance the interests of a party who has a decision in his favour against the interest of a party who has a constitutionally underpinned right of opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes: the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.....”
25. Article 159 (2) (d) of the Constitution of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. I must however point out that article 159 of the Constitution is not a panacea for all problems.
26. Turning to the request by the applicant to allow the applicant to exercise his now undoubted constitutionality, underpinned right of appeal the position is as crystalized by case as set in the case of Richard Nchapi Leiyagu vs IEBC & 2 others; Mbaki & others vs Macharia & Another (2005) 2EA 206 and the Tanzanian case of Abbas Sherally & Another vs Abdul Fazaiboy, Civil Application No.33 of 2003; where it was held *inter alia* that:-
- “i. The right to a hearing is not only constitutionally entrenched but it is also the corner stone of the rule of law;
- ii. The right to be heard is a valued right; and
- iii. That the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.”
27. The court notes that the reason as stated by the applicant is justified and the delay is not inordinate. No prejudice will be occasioned to the respondent and it is in the interest of justice for the application to be allowed. In light of the assessment and reasoning above, the application is allowed and the intended appeal to be filed within 7 days from the date hereof and costs is in the cause.



28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF JUNE 2022 IN THE PRESENCE OF:

CA: Ann

Mutuma Kithinji h/b for Kiogora Areri for Respondent

Muriithi h/b for Muthomi Gitari for Applicant

C. K. YANO,

JUDGE.

