



**Nduati & 2 others (Suing as the legal representative of the Estate of Lawrence Nduati Gachorohio)
v County Government of Nairobi & 2 others (Environment and Land Civil Miscellaneous
Application E026 of 2021) [2022] KEELC 15324 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E026 OF 2021
JA MOGENI, J
NOVEMBER 1, 2022**

BETWEEN

**JOSEPH NGINGO NDUATI 1ST APPLICANT
DANSON MAINA NDIRANGU 2ND APPLICANT
STEPHEN THIONG’O KUNJURI 3RD APPLICANT
SUIING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE
NDUATI GACHOROHIO**

AND

**COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT
CHARLES ONYANGO DEYA 2ND RESPONDENT
SIMON OUKO TRUSTEE SUED AS OFFICIALS OF SHALOM WELFARE
ASSOCIATION 3RD RESPONDENT**

RULING

1. The application for consideration is the Applicant’s chamber summons dated March 1, 2022 brought under Order-50 Rule 5 of *Civil Procedure Rules* and Section 79G-1A,1B & 3A of *Civil Procedure Act*. The Applicant is seeking for the following;
 1. Time to file memorandum of appeal to be extended
 2. The draft memorandum attached to the application be admitted out of time and be deemed as duly filed upon payment of requisite court fee
 3. Costs be in the cause.



2. The application is premised on the grounds; that following delivery of this court ruling on October 12, 2021 on enlargement of time allowing the applicant herein to file their appeal out of time, the applicant lost time of when the ruling would be delivered since according to the applicant the ruling was not delivered on October 12, 2021.
3. The applicant avers that they appeared several times before the court seeking the delivery of the ruling and it was not until February 3, 2022 that the Deputy Registrar confirmed to the applicant that the ruling for enlargement of time had been delivered on the scheduled date of October 12, 2021 and the applicant was required to have filed their memorandum of appeal within 7 days from the date of the ruling.
4. The applicant states that the counsel who was holding brief for his advocate on November 8, 2021 conveyed the wrong information to his advocate and that the delay in filing the memorandum of appeal is not deliberate but was caused out of miscommunication and challenges of online connectivity issues.
5. The application is opposed. The 1st Respondent argues in his grounds of opposition filed on July 25, 2022 that the applicant has not given a satisfactory explanation for the delay and that the application is an abuse of court process intended to deny a successful litigant the success of his litigation.
6. Following directions, the parties agreed the application be disposed of by way of written submissions when the parties were in court on May 19, 2022. A mention date was reserved for July 12, 2022 to confirm compliance and take a ruling date. The applicant had not serve the application on all the parties and the court gave a further and final extension of time to the applicant of seven days to allow the applicant serve the application on all parties in person and a ruling date was reserved for October 19, 2022.
7. The court has perused the application, the respective affidavits, annexures, the written submissions and list of authorities by both sides.

Determination

8. The following are the issues for the Court's determination;
 - a. Whether the Applicants filed their application without inordinate delay.
 - b. Whether the Applicants have made a case for leave to file their appeal out of time to be allowed.
 - c. Who pays the cost?
9. Section 79 G of the *Civil Procedure Act* mandates an appeal from a lower court to be filed within thirty days upon delivery of judgment excluding such period as the lower court may take in preparing and delivering a copy of the decree or order to the appellant. An appeal may be filed out of time for good and sufficient cause why it was not filed in time.
10. In *Nicholas Kiptoo Arap Salat vs IEBC & 7 others 2014 eKLR* the Supreme Court stated that extension of time is not a right but an equitable remedy only available to a deserving party at the discretion of the court and such a party has to lay basis, explain the delay satisfactorily. Further matters of prejudice to the opposite party have to be considered as well as length of the delay.
11. In the instant application, there is no dispute that the lower court rendered a judgment on August 28, 2020. Further that the applicant made an application for extension of time dated February 19, 2021 which was granted by this court through the ruling delivered on October 12, 2021. There is a



suggestion by the applicant that he was not aware of the ruling despite the fact that his advocate was in court in person on October 4, 2021 when he informed the court that the matter was before the court that morning for highlighting of submissions. The advocate informed the court on that day that the application was unopposed and that he would rely wholly on the submissions filed. The court then reserved the date of October 12, 2021 as the day when Kenya will deliver its ruling in the matter.

12. It is therefore not correct for the applicant to state that he was unaware of the date of the ruling because the record shows otherwise.
13. The statutory period provided for under Section 79G of the *Civil Procedure Act* for the lodging of a memorandum of appeal from a subordinate court decision has long since passed. Section 79G grants the court a wide discretion to permit an applicant to file an appeal out of time provided a good and sufficient cause is demonstrated. Has the applicant shown good and sufficient cause in the instant application?
14. I have considered the fact that it is not disputed that the ruling for extension of time for the application dated February 19, 2021 was delivered on the date that the court had reserved for the ruling. It is however disputed that the applicant was ever notified when the judgment of the subordinate court was delivered. The applicants maintain that they were not informed of the date when the ruling on the application for extension of time was to be delivered by the advocate Mr Wanga who was holding brief for his advocate. From the court record the advocate Mr Wanga represented the advocate for the applicants on November 8, 2021 long after the ruling was delivered on October 12, 2021 and this date was taken in court when the applicant's advocate Mr Nduati was in court in person.
15. The respondents contend that the application does not disclose any serious reason why the court should extend time for the second time for the memorandum of appeal to be filed. Further that the applicants do not explain why it has taken a whole year for the application of extension of time to be made. The subordinate court judgment was delivered on August 28, 2020. The applicants made an application on February 19, 2021 which is about six months later. This court was inclined to believe that the applicants indeed were not present when the judgment was delivered and therefore granted the applicants leave to file the appeal. This was not to be.
16. The second application to enlarge time to file a memorandum of appeal was filed on March 1, 2022 which is another six months or thereabouts since the ruling dated October 12, 2021. The explanation that the applicant provided for failing to file the application on time is that the applicant resides upcountry and they were not available to sign the application in the required time.
17. The power to extent time for filing an Appeal is discretionary. Like every discretion relief the Court must exercise its discretion within the confines of the law and not capriciously or whimsically.
18. Whilst exercising such discretionary power the Court is empowered under section 95 of the *Civil Procedure Act* as follows;

' 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.'



19. The Supreme Court laid down the guiding principles on the question of extension of time in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2015] eKLR. The Court pronounced itself as:

- a. 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;
- b. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;
- c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- d. [Where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and,
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'

20. Extension of time cannot be taken lightly by the Court because the Court must balance the competing interests of the Applicant's right to Appeal against the right to enjoy the fruits of judgment of the Respondent and the greater public policy good that litigation must come to an end. This was well stated in the case of *M/s Portreitz Maternity Vs James Karanga Kabia, CA No 63 of 1997* where the Court stated:

' That the 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.'

21. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of its discretionary power. There has to be valid and clear reasons, upon which discretion can be favorably exercised. There have been numerous judicial pronouncements on this precise point as is seen in the case of [*Monica Malel & Anor Vs R, CA No 246 of 2008*](#), where the Court stated:

' 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.'

22. It should not be supposed that the Court's 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.'

23. I am unfortunately not convinced that the applicant has advanced a sufficient cause why the time to file a memorandum of appeal should be extended a second time. The applicant's counsel was in court when the court issued a date for the ruling and there is no justification why they did not attend court on the date when the ruling was delivered. I also noted that the applicant had to be given a last chance of serving the instant application after failing to serve from March to July 2022. All these actions point to the lack of commitment on the part of the to prosecute the application.
24. I have said enough to demonstrate that the applicant's application is destined to fail for the reasons that I have outlined above. I must however observe that even if I did not dismiss the application on the grounds that I have discussed above the applicant's application would nonetheless have been unsuccessful on account of the fact that no sufficient cause has been demonstrated to show why the memorandum of appeal was not filed within time. There was no evidence provided to show the efforts allegedly by the applicant to find out when the ruling was delivered. From the court records, the applicant attended court during the mention of the matter when the court gave directions on the next cause of action after the ruling.
25. The applicant's application has fallen short of meeting the guiding principles as held out Nicholas Kiptoo Arap Koriri Salat for they have not acted equitably. The explanation given is not satisfactory and lacks basis. The reasons for the inordinate delay are wanting in form and substance.
26. In the premises I find the application dated March 1, 2022 lacks merit. The same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2022.

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MOGENI J

JUDGE

In the virtual presence of:

Mr Nduati for Applicant

No appearance for the 2nd and 3rd Respondent

Mr Gituma for 1st Respondent

Ms Caroline /Yvette: Court Assistants

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MOGENI J

JUDGE

