



REPUBLIC OF KENYA



KENYA LAW
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Ndegwa v Ndegwa & 2 others (Miscellaneous Application Probate & Administration 6 of 2019) [2025] KEHC 61 (KLR) (15 January 2025) (Ruling)

Neutral citation: [2025] KEHC 61 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION 6 OF 2019
DKN MAGARE, J
JANUARY 15, 2025

BETWEEN

DAVID CHENUKA NDEGWA APPLICANT

AND

JERIOTH NYAMBURA NDEGWA 1ST RESPONDENT

CHARLES MWANGI NDEGWA 2ND RESPONDENT

GRACE MUTHONI IRURA 3RD RESPONDENT

RULING

1. This is a ruling over the application dated 27/2/2024 by the Petitioner and the application dated 8/7/2024 by the Applicant. The application seeks the following orders:
 - a. The Honourable court be pleased to extend time in which the Applicant may file his Memorandum of Appeal.
 - b. Costs be in the appeal.
2. The application is supported by the affidavit of the Applicant and premised on the following grounds:
 - a. The Applicant's protest was dismissed on 28/11/2018 and the Applicant is dissatisfied with the Judgment.
 - b. The Applicant applied for certified copies of proceedings on 13/12/2018 with intention to appeal which were supplied on 25/3/2019 and the certificate of delay was issued on 9/4/2019 when time of appeal had expired.
3. The Applicant also filed a supplementary affidavit sworn on 8/7/2024 as follows:



- a. The 1st Respondent died on 24/2/2020 and the 2nd and 3rd Respondents obtained letters of administration ad litem for the purpose of substituting the deceased in *Nyeri CM Succession Cause No. 30 of 2018*.
 - b. The Respondents are beneficiaries of the estate with the duty to prosecute the matter.
4. The Respondent filed a replying affidavit dated 10/6/2019. She opposed the extension of time and argued that the Applicant was guilty of laches. It was deposed that the judgment was rendered on 18/11/2018 and the application was filed on 3/5/2019. Further, that allowing the application would prejudice the Respondent.
 5. Parties also filed submissions. The Applicant submitted that he has satisfied all the conditions of extension of time to lodge appeal. He relied on *Tbuita Mwangi v Kenya Airways* (2003) eKLR to submit that this application was timely filed on 3/5/2019, certificate of delay having been issued on 9/4/2019. It was also submitted that there was an arguable appeal.
 6. The Respondent submitted that the Applicant was not entitled to extension of time as was he guilty of laches.
 7. It was submitted that the extension of time was a discretionary function of the court that could be exercised only in accordance with the law. Reliance was pegged on *Peter Maina Mwangi v Nancy Muthoni Nyaruai* (2017) eKLR.

Analysis

8. The issue is whether the Applicant satisfied the conditions on which to enlarge time for appeal. In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves. Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company* Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”



9. The reasons for the delay are in the application and the supporting affidavit filed by the Applicant. The Applicant states that the delay is not inordinate. On the other hand, the Respondent vide the replying affidavit opposed the application on the ground that the application had not satisfied grounds upon which this court would exercise discretion to enlarge appeal time.
10. The extension of time for appeal is no doubt an exercise of discretion. In the Supreme Court's decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR it was held as doth:-
- “(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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
11. There must be some material before the Court to enable its discretion. In Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR Odunga J. observed that:-
- “In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See Ratman v Cumarasamy [1964] 3 All ER 933; Savill v Southend Health Authority [1995] 1 WLR 1254 at 1259.
12. The judgment was delivered on 28/11/2018. The appeal to this Court should have been filed by 29/11/2018. This application was filed on 3/5/2019. The court notes that there is certificate of delay dated 9/4/2019. Based on the certificate of delay, the Applicant submitted that he was not inordinately late in seeking to extend time.
13. The certificate of delay discounts 105 days. The Applicant was under duty to show the reasons for the delay. However short or long the period of delay, it must be explained. In Alfred Iduvagwa Savatia v Nandi Tea Estate & another [2018] eKLR J. Mohammed JA. cited Aganyanya, JA in Monica Malel & Another V. R., Eldoret Civil Application No. Nai 246 of 2008 the Learned Judge 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.”
14. Further, Section 79 G of the Civil Procedure Act provides as doth: -
- “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. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an application is considered.
16. The factors to consider in dealing with such an application are: -
 - a. The length of delay.
 - b. The reason for delay.
 - c. The animus of the applicant.
 - d. The prejudice to the Respondent.
17. Therefore, the Applicant having filed this application on 3/5/2019 did so 14 days after issuance of the certificate of delay. The Applicant cannot be said to have been inordinately late having timely applied for certified proceedings on 13/12/2018 within the time of appeal. If the Applicant had also filed a memorandum of appeal together with the request for proceedings, the issue of delay would not have even arisen. However, it is apparent that delayed proceedings delayed the action by the Applicant.
18. The business of this court is to do justice for both parties. In *Harris Horn Senior, Harris Horn Junior v Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:
 - (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”
19. Therefore, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending.
20. In our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file where there is no record of follow up, is not lost. When applying for proceedings, they must first be as of necessity, a letter bespeaking the proceedings and payment of deposit. Without such, proceedings were never requested. The *raison d'être* for payment is to enable the court prioritize according to payment and only serious applicants for proceedings. Without payment, there are no proceedings being sought. Further, proceedings must be formally sought, even where the same were requested for in court, the registry must be moved and follow ups be done.
21. In this matter, the reasons for the delay were plausible and not doubtful and the length of delay is not inordinate in the circumstances. The application is thus merited and I allow it.

Determination

22. The upshot of the foregoing is that I make the following orders:
 - a. Leave is hereby granted to the Applicant to file the Memorandum of Appeal.



- b. The Appeal shall be filed within 14 days from the date hereof.
- c. Each party shall bear own costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF JANUARY, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

Represented by:-

Kebuka Wachira & Co. Advocates for the Applicant

J. Ngumo Mbogo & Co. Advocates for the Respondent

Court Assistant – Jedidah

