



REPUBLIC OF KENYA



KENYA LAW
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**Cheruiyot & another v Attorney General (Petition 579 of 2017) [2025] KEHC 2233 (KLR)
(Constitutional and Human Rights) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 579 OF 2017

LN MUGAMBI, J

FEBRUARY 18, 2025

BETWEEN

PAUL KIPKOWCH CHERUIYOT 1ST PETITIONER

DAID KIPSANG BIY 2ND PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 26th February 2024, the Petitioners prays for:
 - i. Spent.
 - ii. This Court be pleased to extend the time and grant the Petitioners leave to lodge a Notice of Appeal out of time against the Judgment delivered by Hon. H.I. Ong'udi on the 22nd September 2023.
 - iii. This Court do give a time within which the appeal may be instituted.
 - iv. Costs of this application be provided for.

Petitioners' Case

2. The Application is supported by the 1st Petitioner's affidavit in support and the grounds on the face of the Application.



3. According to the Petitioners, they stand to suffer irreparable loss if they do not appeal the impugned Judgment since it is their constitutional right to dignity, liberty and fair administrative action that were infringed.
4. The Petitioners thus seek leave to be allowed to file the appeal out of time on the basis that the delay in lodging the appeal was not intentional.
5. It was deponed that the Judgment was delivered in the absence of the Petitioners who only received a certified copy of the Judgment on 14th February 2024 upon request. All along they were unaware that the Judgment had been delivered. That by the time they discovered, it was the time specified for lodging an appeal had lapsed.
6. They maintained that that the intended appeal is arguable and has merit. That if the extension of time is not granted, their constitutional rights will continue being infringed.

Respondent's Case

7. In response to the Application, the Respondent filed Grounds of Opposition dated 11th June 2024 on the basis that:
 - i. The Application is incompetent and fatally defective, as this Court lacks the jurisdiction to hear and determine the matter, as the application ought to have been filed at the Court of Appeal.
 - ii. The Application is a classic abuse of this Court's process as the same has been filled after inordinate delay and the Applicant has failed to demonstrate the justifiable reasons for the delay.
 - iii. The Application is incompetent, fatally defective, in form and substance for failure to satisfy the legal conditions for granting leave to file an appeal and extending time within which to file an appeal.
 - iv. Such other grounds and/or reasons to be adduced at the hearing hereof.

Parties' Submissions

Petitioners' Submissions

8. The firm of Osoro Juma and Company Advocates on behalf of the Petitioners filed submissions dated 14th October 2024.
9. Counsel submitted that the Petitioners had filed the instant application as soon as they received a copy of the impugned Judgment. Counsel submitted thus that the Petitioners should be heard in line with the principles of natural justice.
10. Counsel further submitted that by the time the Petitioners understood the contents of the Judgment and made the decision to appeal, time had lapsed. Counsel urged in this regard that the Court consider the principles set out in Article 47 and 48 of *the Constitution* on behalf of the Petitioners.
11. Counsel stressed as well that the Petitioners would suffer great prejudice if the application is not allowed. This is because the 1st Petitioner will lose his retirement benefits and compensation for the torture meted out on him while serving as an air force officer in Kenya. Counsel additionally stressed that the Respondent would not suffer any prejudice if the application is allowed.



Respondent's Submissions

12. Special State Counsel, A. K. Tuitoek for the Respondent filed submissions dated 4th October 2024 and outlined that the issues for discussion as: whether this Court has jurisdiction to hear and determine the instant application and whether the Petitioner's application has merit.
13. It was the Respondent's submission that this Court lacks jurisdiction to entertain this matter. Citing Section 3(1), (2) & (3) of the [Appellate Jurisdiction Act](#) as read with Rules 4, 39, 42, 43 and 75 of the Court of Appeal Rules the Respondent maintained the jurisdiction to grant the extension of time within which to file an appeal lies with the appellate Court hence the instant application belongs to the Court of Appeal as this Court's lacks jurisdiction to entertain it.
14. On the issue, the Respondent contended that the Petitioners had not provided reasonable explanation for their delay in filing this Application or demonstrated that the intended appeal is arguable. That there was no evidence to show when they applied for and receive a copy of the Judgment as alleged. The Respondent thus submitted that the Application lacks merit and so should be dismissed.
15. It was submitted that the threshold for seeking orders for extension of time as guided by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR had not been established.
16. The Court was urged weigh the competing interests between the Petitioner and the Respondent which the Respondent submitted tilted in its favour. The case of *M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No 63 of 1997* was cited to buttress this point.

“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.”

Analysis and Determination

17. It is my considered view that the issues that arise for determination are:
 - i. Whether or not this Court has the requisite jurisdiction to entertain this matter.
 - ii. Whether this Court has discretion to extend time as sought by the Petitioners.

Whether or not this Court has the requisite jurisdiction to entertain this matter

18. The Respondent opposed the application on grounds that under Sections 3(1), (2) and (3) of the [Appellate Jurisdiction Act](#) as read with Rules 4, 39,42,43 and 75 of the Court of Appeal Rules, the discretion to extend time for filing an appeal rests with the appellate Court.
19. In *Diamond Trust Bank Kenya Limited v Invesco Assurance Company Limited & another* [2021] eKLR, the Court observed as follows:

“I have considered Section 7 of the [Appellate Jurisdiction Act](#), Cap 9 and it provides as follows:

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“S. 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a



certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

10. In view of the above provisions, it is explicitly clear that the High Court may extend time for giving notice of intention to appeal from a judgment of the High Court and in my view the said Section 7 does not need any more than a literal interpretation. Therefore, Section 7 of the *Appellate Jurisdiction Act* clearly confers to the High Court jurisdiction to extend time for the filing of a Notice of Appeal and to decide otherwise is akin to completely disregarding a clear provision in the law.

11. Similar finding is expressed in the decision of Odunga, J in the case of Nyamodi Ochieng Nyamogo v Telkom Kenya Limited, Nairobi H.C.C.C. No. 1736 of 1993. His observation therein was that:

“It is clear that the High Court’s powers under section 7 aforesaid is limited to three instances and these are giving notice of intention to appeal from a judgment of the High Court and for making an application for leave to appeal or for a certificate that the case is fit for appeal.”

20. Section 7 of the *Appellate Jurisdiction Act* Cap 9 states as follows:

Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

21. It is thus crystal clear that the submission that the High Court lacks jurisdiction to extend time for lodging an appeal is misconceived as Section 7 of the *Appellate Jurisdiction Act* vests the High Court with authority to extend time for giving notice of intention to appeal, or making an application for leave to appeal or the certificate that the case is fit for appeal.

Whether the Court should exercise its discretion to extend time for filing the appeal as sought by the Petitioners.

22. According to the Petitioners, the judgment they seek to appeal from was delivered in their absence and were only able to receive a certified copy on 14th February 2024 after making a request. This was already past the time specified for lodging an appeal.

23. The Petitioners further maintained that that the intended appeal is arguable and has merit and that if the extension of time is not granted, their constitutional rights would continue to be infringed.



24. The Supreme Court in Nicholas Kiptoo Korir arap Salat (*supra*) articulated the principles applicable in an application for extension of time as follows:

“The underlying principles a court should consider in exercise of such discretion should include:

- i. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- v. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- vi. Whether the application has been brought without undue delay.”

25. Equally, the Court of Appeal in *Anti-Counterfeit Authority v Francis John Wanyange, Robert Paul Gachoka Wanyange, Director of Public Prosecutions, Inspector General of Police & OCS Industrial Area Police Station* [2021] KECA 381 (KLR) opined as follows:

“Courts have devised appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” [Emphasis supplied].

10. The issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR where the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it 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, the reason for the delay, (possible) 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 delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”



11. This was reiterated further in the case of Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019 where it was explained that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s 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.”

12. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible.

13. In Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR as was cited by the applicant, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily 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.”

26. Turning to the instant application, the Respondent blame the Petitioners for the inordinate delay that they have not reasonably explained. However, the Petitioners insists that they were unaware of the delivery judgment until very late and by then, the time for lodging the appeal had long lapsed. That they applied for a certified copy of judgment and it was not until 14th of February, 2024 that it was supplied thereby enabling them to file this application.

27. Although the Petitioners have not attached the letter seeking to be supplied with the certified copy of the Judgment, I have perused the Court file and I have confirmed that a letter dated 26th September, 2023 from Osoro Juma & Co Advocate (4 days after delivery of the said Judgment) was dispatched to the Deputy Registrar seeking to be supplied with a copy of the said judgment. In his letter, the Advocate for the Petitioner wrote:

The Deputy Registrar Date: 26th September, 2023

High Court

Nairobi.

“RE: HC Petition No. 579 OF 2017

We refer to the above matter.

Kindly favour us with a certified copy of the Judgment which was delivered on 22/9/2023 before Hon. Lady Justice Hedwig I Ongundi.

We shall pay your charges.

Yours faithfully,



Osoro Juma & Co. Advocates

D. Osoro”

28. The above letter is accompanied with an attached electronic payment receipt of Kshs. 1000/- issued on 27th September, 2023 at 15:30:33 Hours.
29. It is clear that a certified copy of judgment was provided, but from the certification rubber stamp affixed on the copy of the judgment by the Deputy Registrar, it shows the judgment was certified on 14th February, 2024. It is safe to presume therefore that this is the date it was provided.
30. That being the case, delay of close to four months (4) before obtaining the certified copy of the judgement for purposes of lodging an appeal cannot be blamed on the Petitioners.
31. In any case, as soon as the Petitioners obtained the certified copy of the said judgment, it appears that they moved with dispatch and on 26th February, 2024, they filed this application for extension of time to appeal the said judgement out of time.
32. I have also dived deeper to ascertain the deposition by the Petitioners that they were unaware of the date of delivery of judgement as they were not present on the day of its delivery.
33. From the Court file, it is evident that on 27th April, 2023 during virtual court session; in the presence of Ms. Wanjiru Mwangi for Ms. Najja for the Respondent and Mr. Osoro for the Petitioner, the Court fixed the matter for Judgement on 21/9/2023. However, on 20/9/2023 (day before the judgement day), there was a direction by the Court that notice be issued changing the date of judgement from 21/9/2023 to 22/9/2023 (a difference of one day).
34. There is however no evidence that in the court file to indicate that the change was actually notified to the Petitioners or their Advocate on record as directed by the Court.
35. On the 22nd September, 2023 when judgement was delivered by Lady Justice H.I. Ongundi, the only Counsel present was Mr. Thande Kuria for the Attorney General. The Petitioner’s Advocate did not appear. I assume given my observations in the foregoing, it is likely the change of date was not communicated as directed, hence the non-attendance by the petitioner.
36. Clearly therefore, the Petitioners story is unassailable in view of the foregoing facts. The situation that they found themselves is not their own making.
37. I thus find the Petitioners have sufficiently demonstrated to this Court that there were good reasons that failure to appeal within the time prescribed was not their fault.
38. On the flip-side, the Respondent has not demonstrated any prejudice it would suffer should this application be allowed.
39. I hereby allow the application for extension of time to appeal. The appeal be filed within (30) days from the date of this order.
40. Each Party shall bear its own costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2025.

L N MUGAMBI

JUDGE

