



Kiche General Engineering Works v Esike & another (Civil Appeal E1421 of 2024) [2025] KEHC 3241 (KLR) (Civ) (17 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1421 OF 2024

AC MRIMA, J

FEBRUARY 17, 2025

BETWEEN

KICHE GENERAL ENGINEERING WORKS APPLICANT

AND

PASCAL OSIKUKU ESIKE 1ST RESPONDENT

NAIROBI WATER & SEWERAGE CO LTD 2ND RESPONDENT

RULING

1. The application by way of Notice of Motion, subject of this ruling, is dated 2nd December 2024. It is supported by the Affidavit of Vincent Kamau Gichomo, the Applicant's Director deposed to on a similar date.
2. The application sought the following reliefs;
 - a. Spent.
 - b. That the Memorandum of Appeal dated 29th November 2024, be deemed as duly filed and served and/or leave be granted to file and serve the Record of Appeal out of time against the Judgment delivered by the Chief Magistrates Court, by the Honourable Mr. Paul Rotich on 17th September 2024, in CMCC Suit No. 6168 of 2015.
 - c. That the Honourable Court be pleased to grant an Order for stay of execution and/or further execution of the Orders/Decree/Judgment issued on 17th September 2024, by P.K. Rotich (SPM) until the hearing and determination of the intended Appeal.
 - d. That the costs of this application be provided for.
 - e. That any other or such Orders as the Honourable Court shall deem fit and just.



3. As discerned from the supporting Affidavit and the grounds in support of the application, it is the Applicant's case that judgment in the trial Court was delivered in their absence and without notice on 17th September 2024 and that they only learnt of the same much later through a correspondence from the Respondents Counsel. Further, the last time the matter came up in Court was on 15th May 2024 when the Court was not sitting and no directions were rendered.
4. The Applicant contended that the draft Memorandum of Appeal disclosed arguable grounds of Appeal and that it had lodged the application without prolonged delay. The Applicant filed written submissions and referred to several decisions in buttressing the above.
5. The 1st Respondent challenged the application through Grounds of Opposition dated 4th February 2025. He mainly asserted that nonsufficient grounds were tendered for the grant of the orders sought and that the application was meant to delay the determination of the matter. He also filed quite comprehensive written submissions and referred to various decisions.
6. From the foregoing discourse, the only issue that arises for determination is whether the application satisfies the threshold for extension of time to lodge an appeal.
7. Section 79G of the Civil Procedure Act regulates the timelines within which appeals can be lodged to the High Court. It 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 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.

8. The principles on which this Court will exercise its discretion on this matter are well established. In Supreme Court Application No. 16 of 2014, *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Apex Court observed as follows;

... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents, if extension is granted;



6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time [emphasis supplied]
9. This Court will, hence, sequentially pit the foregoing principles against the circumstances of the case. Right off the bat, the decision to extend time is unfettered discretion, meaning, it is unrestrained or uninhibited, but it must be exercised within the law.
10. The judgment sought to be appealed from was delivered on 17th September 2024. However, that was in the absence of the Applicant who only learnt of the same vide the 1st Respondent's Counsel letter dated 19th September 2024. The Applicant then sought clarification from the Court and obtained a copy of the judgment in November 2024. Later Counsel obtained instructions from his client and eventually filed the instant application.
11. The above facts were not controverted. That is, therefore, the correct position in this case. As per Section 79G of the *Civil Procedure Act*, the Applicant had until 16th October 2024 to lodge its appeal. However, that was not possible. The period the Applicant took to file the instant application cannot, in anyway whatsoever, be said to be inordinate. Once a decision is rendered in the absence of a party without notice, it is impractical to expect such a party to comply within some timelines provided in such decision.
12. It is, in this Court's view that the delay was satisfactorily and reasonably explained.
13. In respect to the question whether the Respondents will suffer any prejudice, this Court notes that no substantial reason has been advanced to that end. Just like the fact that 1st Respondent has a judgment in his favour, likewise the Applicant has a constitutionally-guaranteed right of appeal. The grounds of appeal before Court cannot be said to be frivolous. They ought to be interrogated accordingly. In advancing constitutionalism, and in the unique circumstances of this case, the Respondents cannot be heard to say that they stand to suffer any prejudice if the application is allowed.
14. This Court is, without doubt, persuaded that discretion ought to be exercised in favour of the Applicant.
15. Having paid regard to the entirety of the principles for extension of time vis-à-vis the circumstances of the suit, it is this Court's finding that the application is merited and the following final orders hereby issue: -
 - a. The Memorandum of Appeal dated 29th November 2024 is hereby deemed to be properly on record.
 - b. The Appellant shall file and serve the Record of Appeal together with written submissions within 21 days of today notwithstanding the unavailability of certified copies of proceedings and/or the decree.
 - c. Once served, the Respondents shall file and serve written submissions within 14 days of service.
 - d. A date for highlighting of the submissions shall be fixed.
 - e. The Lower Court file be availed.
 - f. There shall be no costs in respect of the application.
 - g. The prevailing status quo be maintained pending the outcome of the appeal.



16. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Karita, Learned Counsel for the Applicant.

No appearance by Mr. Moturi, Learned Counsel for the 1st Respondent.

No appearance for the 2nd Respondent.

Michael – Court Assistant.

