



**Okwayo v Mwebi (Miscellaneous Civil Application E124 of 2024)
[2025] KEHC 4435 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E124 OF 2024**

AC BETT, J

APRIL 4, 2025

BETWEEN

ELPHAS MAKEYA OKWAYO APPLICANT

AND

CLEVELAND M. MWEBI RESPONDENT

(Appeal against the judgment and decree by Hon. Marcella A. Onyango in Mumias CMCC Case No. E033 of 2020 delivered on 7th December 2023)

RULING

1. The application dated 2nd August 2024 seeks orders of leave to file an appeal out of time against the judgment and decree by Hon. Marcella A. Onyango in Mumias CMCC Case No. E033 OF 2020 delivered on 7th December 2023.
2. In his supporting affidavit, the Applicant avers that he intended to appeal against the lower court decision delivered on 7th December 2023, but that he had been ill for the better part of the year and unable to instruct his advocate on time to file the appeal.
3. According to the Applicant, the judgment was scheduled to be delivered on 7th December 2023 but due to a power outage, they were not able to join the court session for the delivery of the judgement and were not able to access the file until 29th July 2024. He also stated that he suffered frail health and was not able to instruct his Advocate to appeal.
4. He maintained that his appeal has merit with a high chance of success and that the Respondent will not suffer any prejudice if he is granted an opportunity to argue his appeal.
6. In his replying affidavit, the Respondent deponed that the judgment was entered in his favor in the sum of Kshs. 700,000/= plus costs.



7. He averred that the Applicant was aware of the judgment and the decree by the lower court and contested the claim that the file was not available at the lower court.
8. He further maintained that the Applicant's Counsel was aware of the judgement and was served with the notice of taxation, and on 19th February 2024, when the matter was being taxed, the Applicant's advocate was present, and so was the lower court file.
9. He contended that the application for extension of time lacks merit and should be dismissed.

Submissions

10. In his submissions, the Applicant contends that the intended appeal raises arguable issues for determination.
11. On the issue of delay, he argued the reasons in detail in his supporting affidavit and submitted that the delay was justifiable since he was of frail health at the time he needed to appeal, and further that the Respondent would not be prejudiced since appeals were expedited at the High Court. He quoted the case of *Touring Cars (K) Ltd vs. Ashok Kumar Man kanji* in support of his application.
12. The Respondent did not file their submissions.

Analysis and Determination

13. I have considered the application by the Applicant, the supporting affidavit, the replying affidavit, and the submissions in support of the application as supported by cited authorities. In my view, the main issue for determination is whether the application has any merit.

14. Section 79G of the provides that:

“Every appeal from a subordinate court to the High Court shall be filed within 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. For the Applicant to be successful, he must demonstrate “good and sufficient cause” for not filing the appeal in time.
16. In the case of *Salat v. Independent Electoral & Boundaries Commission & 7 Others* [2014] KLR – SCK, the Supreme Court set out the principles to be considered by the court in exercising the discretion to extend time for filing an appeal as follows:-
 - (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 that seeks an extension of time has the burden of laying a basis to the satisfaction of the court.
 - (3) Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case-by-case basis.
 - (4) Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.



- (5) Whether there would be any prejudice suffered by the respondents if the extension was granted.
- (6) Whether the application had been brought without undue delay, and finally, whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
17. The Court of Appeal in the case of *Omar Shurie v. Marian Rasbe Yafar* (Civil Application No. 107 of 2020) UR stated:-
- “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 that 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.”
18. In his supporting affidavit, the Applicant avers that the delay was caused by a power outage that occurred on 7th December 2023 and that the file was allocated to an individual court clerk, and his advocate was not able to access the file until 29th July 2024. I find this ground not to be plausible because of the fact that the Applicant’s Advocate was present during assessment of the bill of costs.
19. I have perused the court records and note that the delay was 7 months and 22 days. The Applicant stated that he was not able to file the appeal on time due to his frail health, and in support, he attached copies of the sick sheet as evidence.
20. In *Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecution & 3 others* [2015] eKLR, the Court of Appeal articulated that:-
- “It must be realized that courts exist to dispense justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of article 159 (1) of *the Constitution*, which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers and, consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance, which require them, whenever applying or interpreting *the Constitution* or interpreting the law, to ensure, inter alia, that the rule of law, human dignity and human rights, and equity are upheld.
- For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests), while others may transcend the interests of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court, in exercising its judicial authority, to ensure dispensation of justice, as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”
21. Article 48 of *the Constitution* guarantees every person access to justice. In addition, under Article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 50(2): Every person has a right to a fair trial.



22. The end goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
23. In the instant case, the Applicant filed the application for leave to appeal 7 months late and has approached this court for an extension of time as stipulated in section 79G of the Civil Procedure Act, the proviso thereof. He is before the court seeking to be granted a chance to challenge the judgement of the lower court.
24. On the issue of the arguability of the appeal, the Applicant has annexed a draft memorandum of appeal indicating the issues they intend to take up on appeal. In the case of Atbuman Nusura Juma vs. Afwa Mobamed Ramadhan [2016] eKLR, the court held that:-

“Whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature, but by the court dealing with the merits of the appeal; that is why the requirement that the intended appeal be arguable is preferred with the word ‘possibly.’”
25. This court cannot at this point determine whether the appeal will succeed or not, but upon perusal of the memorandum of appeal, I find that it raises issues that are open for determination on appeal.
26. I have taken into account the competing interests of the parties in this application, and in the interest of justice, I do find that the applicant is entitled to pursue his appeal.
27. In the circumstances, the Applicant is hereby granted fourteen (14) days leave to file and serve his memorandum of appeal upon the Respondent.
28. The costs of the application shall abide by the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Waswa for Applicant

No appearance for Respondent

Court Assistant: Polycap

