



REPUBLIC OF KENYA



**Republic v Mwiraria & 6 others (Civil Appeal E004 of 2023)
[2024] KEHC 6773 (KLR) (Civ) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E004 OF 2023
F GIKONYO, J
JUNE 3, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

DAVID MWIRARIA 1ST RESPONDENT

DAVE MUNYA MWANGI 2ND RESPONDENT

JOSEPH MBUI MAGARI 3RD RESPONDENT

DAVID LUMUMBA ONYONKA 4TH RESPONDENT

RASHMI CHAMNLAL KAMANI 5TH RESPONDENT

DEEPAK KUMAR KAMANI 6TH RESPONDENT

INFOTALENT LIMITED 7TH RESPONDENT

RULING

Leave to appeal out of time

1. The significant orders sought by the DPP in the Notice of Motion dated 1st September, 2023 are: -
 - a. Leave to appeal out of time; and
 - b. The annexed draft Petition of Appeal to be deemed as duly filed.
2. The application is premised upon the grounds set out in the application and the supporting affidavit sworn by Eunice Oloo, Principal Prosecution Counsel, which have been elaborated upon in the submissions by the applicant.



3. The applicant cited the following three major grounds for not filing appeal in time: -
 - i. That the applicant was unable to obtain a certified copy of the ruling and proceedings within reasonable time;
 - ii. That the appeal has high chances of success; and
 - iii. That the ruling of the trial court was delivered virtually on 14th July, 2023 and copy of the same availed [sic] to the applicant on 29th August, 2023.
4. The applicant argued that their application for extension of time was filed without inordinate delay.
5. The applicant claimed that the ruling subject of the intended appeal was delivered online on 14th July 2023, and that, they applied for the ruling and proceedings on 25th July 2023, which was supplied by the court on 29.8.2.23- after the time for filing appeal had lapsed.
6. The respondents opposed the application through their respective replying affidavits, and grounds therein which were elucidated upon in their respective written submissions.
7. The common grounds amongst the respondents are that;
 - i. The delay in not filing appeal in time has not been explained to the satisfaction of the court, thus, making the application to be bad in law, frivolous and utter abuse of the process of the court;
 - ii. The applicant deliberately failed to disclose pertinent facts to the court, including but not limited to, when they obtained the ruling they have annexed to the application;
 - iii. Typed proceedings were not necessary to file appeal;
 - iv. The draft petition of appeal bears general grounds which do not raise any point of law which would require consideration by the court, which renders the appeal not arguable;
 - v. The decision to appeal was an afterthought; thus, the application is not aimed at achieving any legitimate and or lawful purpose of advancing justice, but rather, a collateral purpose; and
 - vi. Allowing the application will prejudice and violate their right to fair and expeditious trial given that the trial lasted for over 8 years. They urged the court not to grant the applicant leave to appeal out of court.
8. The respondents relied on the following cases: -
 - i. [*Nicholas arap Salat vs. IEBC & 7 others*](#) [2015] eKLR
 - ii. [*Abdul Aziz Ngoma vs. Mungair Mathayo*](#) [1976] KLR 61
 - iii. [*Benard Kibor Kitur vs. Alfred Kiptoo Keter*](#) [2018] eKLR
 - iv. *Mugo vs. Wanjiru* [1970] EA 481, 483
 - v. [*R vs. William Macharia*](#) [2016] eKLR
 - vi. [*Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet*](#) [2018] eKLR
 - vii. [*R vs. Lingstone Nyaga Muthuri*](#) [2020] eKLR
 - viii. [*DPP vs. Peter Mcharo*](#) [2018] eKLR



- ix. [R vs. Harpeet Singh Lotay](#) [2014] eKLR.

Analysis And Determination

Issue

9. Careful consideration of the application, the affidavits and submissions filed, and the applicable law, cuts out a singular issue for determination, to wit: -
- Whether the applicant has established good cause upon which the court should grant the applicant leave to file appeal out of time, and deem the annexed draft petition as duly filed.

The law

10. According to Section 349 of the [Criminal Procedure Code](#): -
- An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:
- Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.
11. The formulation of the law is that, leave to file appeal out of time or to admit an appeal out of time is discretionary; not a matter of course. The court must be satisfied that there is good cause shown why the applicant did not file appeal in time. Thus, good cause is neither to be inferred nor implied. It must be established by the applicant to the satisfaction of the court.

Twinning of inability to obtain and time for applying

12. In this case, the applicant must satisfy the court that the failure to enter the appeal within the prescribed period has been caused by the inability of the applicant to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.
13. In Section 349 of the [CPC](#) there is a deliberate twinning of; ‘inability of the appellant to obtain’ the judgment or order appealed against; and ‘within reasonable time of applying to the court’, making the time when the judgment or order appealed against, was applied for, a relevant consideration in an application for leave to file appeal out of time.
14. According to the respondents, it is expected that a party wishing to appeal a decision should apply for certified copy of the decision and proceedings immediately upon delivery of the decision or soon thereafter.
15. The respondents claim that, the applicant was present during the delivery of the ruling, yet, applied for the ruling on 25th July, 2023 which was a day or two to the expiration of the statutory period of filing appeal.
16. In the view of the respondents, it appears from the conduct of the applicant that, the decision to appeal was an afterthought.
17. The 3rd and 4th respondents were more specific that, curiously, the applicant has annexed a copy of the ruling sought to be appealed from as exhibit E01 to the supporting affidavit, but the applicant did not disclose how and when the annexed copy of the ruling was obtained. These are important details.



Letter dated 25th July 2023

18. From the letter dated 25th July 2023, certain important revelations are discernible.
19. The applicant claims in the said letter dated 25th July, 2023 that: -

‘We have followed up on the said Ruling by making several phone calls and visits to the registry with no avail’.
20. There is nothing to show any formal application for a certified copy of the ruling was made before 25th July, 2023, which brings to question; to which application were the follow-ups and the ‘several phone calls and visits to the registry’, made. The applicant did not even provide details of the said ‘follow-ups’, ‘phone calls’ and ‘visits to the registry’. Without these details, it is safe to conclude that, these claims were contrived merely to portray, and to make the court believe that, the applicant acted diligently and swiftly in pursuit of the ruling.
21. The court is aware that, the respondents have accused the applicant of failing to disclose pertinent facts to the court, and that the application is an afterthought. The DPP did not give any explanations of these issues, which renders credence to, and makes the allegations by the respondents to be of perfect sense in the circumstances of this case.
22. The only application for certified copy of the ruling is the letter dated 25th July, 2023 bringing to the fore pertinent concerns.
23. It bears repeating, there was no application for certified copy of the ruling pursuant to which the alleged several phone calls and visits to the registry were made.
24. Of these concerns also is, whether the DPP acted diligently in applying for certified copy of the ruling so late, and whether this delay has been explained?
25. The office of the DPP is a professional office run by professional personnel completely aware of the importance of their mandate and the need to comply with timelines prescribed in law.
26. The party applying for leave to file appeal out of time should also show that it applied promptly for certified copy of the decision to be appealed from.
27. The applicant did not apply promptly for the ruling; it applied for the ruling towards the last day or two of the expiration of the time prescribed for filing appeal. The delay was not explained which may be responsible for the respondents’ argument that the decision to appeal is an afterthought. A party should not go to slumber, only to wake up the last day of or after expiry of the time prescribed for filing appeal, and expect the court not to ask for explanations of the inertia. The law will demand of such plausible and satisfactory explanation for the delay and inertia.
28. Although the applicant claims that the ruling was supplied on 29th August, 2023, there is nothing to show when the ruling was obtained, certified or supplied by the court.
29. The respondents have raised concern that the applicant did not disclose when it received the ruling annexed to the application or when it was certified. The applicant did not respond to these concerns, leaving quite obscure their severely economical explanations on relevant events or steps purportedly taken herein by them.
30. The court has perused the page 1 of 360 of the copy of the ruling annexed to the application as exhibit marked E01. There is nothing to show when the ruling was obtained, or certified or supplied by the court. Except, there is a signature with a date 14/7/2023 initialed C.M.



31. Given the reason by the applicant which is said to be responsible for not filing the appeal in time, details as to when the copy was obtained or certified, are important so as to give the ground the power and punch required for purposes of satisfying the court of the applicant's inability to obtain the ruling within reasonable time of applying for it.

Of draft petition

32. The applicant has submitted that the annexed draft appeal has high chances of success. The respondents stated that the grounds set out in the annexed draft petition are too general and do not raise any point of law for consideration by the court-something they say completely negates their claim that the intended appeal has high chances of success.
33. The applicant argued that the draft appeal annexed to the application has high chances of success. On this, Kimaru J (as he then was) stated in *R vs. Harpeet Singh Lotay* (*supra*), that: -

‘It is a requirement under section 348A of the *Criminal Procedure Code* for the State to establish that there exists a matter of law which forms the basis of the appeal. In an application where the State seeks to be granted leave to file appeal out of time, it must establish that its draft petition of appeal raises a matter of law which ought to be considered by the High Court’

34. Although the circumstances of the said case were different, the idea of the applicant to argue and substantiate the grounds of the application, is a legal obligation.

Of prejudice to respondents

35. The court should consider the entire circumstances of each case to determine whether justice demands that leave should be granted.
36. The respondents have been under trial for over 8 years. They have claimed that, allowing the application by the DPP in the circumstances of this case, will prejudice their right to fair and expeditious trial guaranteed in the *Constitution*.
37. According to the respondents, this application is not intended to achieve any legitimate or lawful purpose of advancing justice, but, a collateral purpose which is inconsistent with their rights.
38. These claims should be seen within the DPP's exercise of State powers of prosecution (art. 157(6) of the *Constitution*), which must be exercised in a manner, inter alia, that is in the interests of the administration of justice, prevents and avoids; abuse of the legal process or infringement of rights and fundamental freedoms in the Bill of Rights (art. 157(11) and 21 of the *Constitution*).
39. Directly connected thereto, in exercise of state power of prosecution, the DPP should care to adhere to statutory timelines which regulate filing of appeal so that, it may lawfully advance its case against the respondents through appeal on behalf of the public, but also ensuring the right to fair and expeditious trial of the respondents is not prejudiced.
40. The logic that, the DPP must act swiftly and in accordance with the law especially where they intend to appeal a decision acquitting the accused, is founded on human rights logic that, persons who have been under a criminal trial for over 8 years, are also entitled to an orderly and tranquil life and not to be subjected to further torment occasioned by actions of the DPP which show a disposition to avoid exertion. This public policy idea was accepted in the case of *Stanley Munga Githunguri vs. R* [1986] eKLR, which is remembered for the great obiter remarks to Githunguri, that: -



When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.

41. The applicant did not file appeal in time, and has offered no explanation why it did not promptly apply, but applied for ruling subject of these proceedings, just barely a day or two to the expiry of the time for filing appeal.

Conclusions and orders

42. Courts have stated times without number that, discretion to extend time to file appeal out of time is unlocked by plausible and satisfactory explanations offered by the applicant on the delay. See *Andrew Kiplagat vs. Paul Kipkorir* (*supra*) that: -

‘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.’

43. This court is not satisfied that the DPP did not file appeal in time because of ‘inability...to obtain’ the ruling, ‘within reasonable time of applying to the court’ [emphasis supplied]. The DPP occasioned the delay in obtaining certified copy of the ruling when it applied for such certified copy too late; one or two days to the expiration of the time prescribed for filing appeal.
44. The fact that the trial lasted for over 8 years is an important consideration in the circumstances of this case which ought to have prompted the DPP to act diligently so that it may lawful continue its case against the respondents through appeal.
45. Proportioned balance of the competing interests herein favour dismissal of the application.
46. In the upshot, the Notice of Motion dated 1st September, 2023 is dismissed. right of appeal explained.

READ AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 3RD DAY OF JUNE, 2024

F. GIKONYO M

JUDGE

In the presence of: -

Khadijah for Ahmed for 5th and 6th respondents

Achochi for DPP (also Ms. Ndombi present

Dave Mwangi present

Ngatia for 3rd respondent absent

Oonge for 4th respondent absent

Ms. Diana Mwendu C/A

