



Chege v Mureithi; S Ndungu & Company Advocates (Interested Party) (Miscellaneous Succession Application 6 of 2024) [2024] KEHC 12821 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS SUCCESSION APPLICATION 6 OF 2024
DKN MAGARE, J
OCTOBER 24, 2024**

BETWEEN

MIRIAM WANJIRU CHEGE APPLICANT

AND

HELLEN NJERI MUREITHI RESPONDENT

AND

S NDUNGU & COMPANY ADVOCATES INTERESTED PARTY

RULING

1. This is a ruling of the application dated 31/1/2024 seeking leave to appeal out of time by lodging appeal against the ruling delivered on 29/6/2020 in Nyeri CMCC *Succession Cause No. 600 of 2018*.
2. The application is premised on the grounds inter alia that:
 - a. The advocates did not communicate to the Applicant the actual time of appeal.
 - b. The consent of the Applicant was not sought and obtained in the lower court.
 - c. The Applicant is thus dissatisfied with the ruling and wishes to appeal.
3. There is no response to the application filed in the e-filing portal. Notwithstanding, I proceed to determine it.



Analysis

4. The court will first establish whether the Applicant has satisfied the conditions based on which to enlarge time for appeal. In the case of *Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company* Civil Application No. Nai. 349 of 2005, Waki, JA 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.”

5. The application and supporting affidavit set out the reasons the applicant believes are sufficient to extend time. The impugned ruling was delivered on 29/6/2020. It is this Ruling that the Applicant intends to appeal against. The only reason given is that the Applicant’s advocate did not advise the Applicant on the time required for appeal. She does not say when she gave instructions to appeal. However, there is on record a certificate of delay purporting that the advocate applied for proceedings on 13/10/2022. There was delay of 152 days. It is therefore evident that as at October 2022, the parties were aware of the need to appeal. The certificate was given on 24/5/2023. Nevertheless, nothing was done until 31/1/2024 when the application was filed.
6. At the time of request of proceedings, the matter was already out of time for 866 days. The parties did not explain any of the days. It shall never drop out of a litigant’s mouth that they were unaware of the law, since, *ignorantia juris non excusat*; ignorance of the law excuses no-one.
7. The other reasons are not reasons based on which to extend time of appeal but on the merits of the appeal. I have no jurisdiction to pay attention to such grounds as I am not dealing with the appeal. The extension of time for appeal is out of doubt an exercise of discretion. In the Supreme Court’s Decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat vs 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.
8. However the Applicant must place before the court some material to enable its discretion to be so exercised as stated in the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR where 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.

9. A delay of 1,312 days after the delivery of the impugned ruling is inordinate and inexcusable. Surely none can posit that they thought that an appeal could be filed any time. The Applicant was under duty to show the reasons for delay. However short or long the period of delay, it must be explained and in this case it has not been explained. Even where delay is not inordinate, it must be explained. An application of this nature must be specific and not based on guess work, conjecture, hyperbole or surmise. The delay must be explained in such a manner that a fairly minded court, looking at the reasons as ascertained will be inclined to ordinarily allow the application. However, the more the period of delay, the more the implausible such explanations become. Aganyanya, JA in *Monica Malel & Another v. R.*, Eldoret Civil Application No. Nai 246 of 2008 stated as doth: -

“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.”

10. Therefore, 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. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

11. 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.
12. The Applicant has not explained the delay. How the advocate's failure of advice on appeal time could keep the Applicant out of action is a mystery known to herself. She had the duty under Section 1A (3) of the Civil Procedure Act, Cap 21 to facilitate the overriding objective of the court. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfil each as you move to the next. If the delay is inordinate, it may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay.
13. In this case, the Petitioner has failed in all the parameters and indeed prejudice to the Respondents would be insurmountable if leave were to be granted to lodge appeal more than 1,312 days after the impugned decision without a succinct explanation for delay. The object of this court is to do justice to 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.”
14. Therefore, the court can 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. In this matter, the reason for the delay is doubtful and the length of delay is inordinate in the circumstances. The application dated 31/1/2024 is thus not merited and is accordingly dismissed.
15. As regards costs, there were no responses. In that case there were no costs incurred by the Respondent. In the circumstances, each of the parties will bear their costs.

Determination

16. The upshot of the foregoing is that I make the following orders:
- a. The application dated 31/1/2024 and filed by the Petitioner is devoid of merit and is hereby dismissed.
 - b. Each party shall bear own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF OCTOBER, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties



