



**Ndugire & another v Ndugire & 3 others (Miscellaneous Case 18 of 2023)
[2024] KEHC 12416 (KLR) (Family) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS CASE 18 OF 2023
HK CHEMITEI, J
OCTOBER 17, 2024**

BETWEEN

JOHN MUYA NDUGIRE 1ST APPLICANT

ANOTONI NJENGA 2ND APPLICANT

AND

SHADRACK MUYA NDUGIRE 1ST RESPONDENT

BAHATI WAMAITHA MOHAMMED 2ND RESPONDENT

RICHARD SURE MAGANGA 3RD RESPONDENT

KENNEDY MONG'ARE NYACHIRO 4TH RESPONDENT

RULING

1. This ruling relates to the application dated 15th September, 2023 filed by the Applicants John Muya Ndugire and Antoni Njenga and seeking for orders that.
 - (a) Spent.
 - (b) The honourable court be pleased to grant the Applicants leave to appeal out of time against the decision and ruling of the honourable Chief Magistrate Wendy Micheni delivered on 30th June, 2023 in CMCC No. 5008 of 2018.
 - (c) The costs of this application be in the cause.
2. The application is supported by affidavit sworn by John Muya Ndugire on 15th September, 2023. He avers inter alia that he and the 2nd Applicant instructed Gachie Mwanzia & Co. Advocates to appeal against the decision of Hon. Wendy Micheni delivered on 30th June, 2023 in the Chief Magistrates



Court at Milimani in CMCC 5008 of 2018. As Administrators of the estate of Jane Ndungire, they filed a suit seeking inter alia a permanent injunction restraining the Respondents from interfering with their lawful, peaceful occupation and possession of Plots No. E155 and E156 at Embakassi Ranching Company Limited.

3. That the Respondents opposed the suit on the ground that they lacked locus to institute it because they were no longer administrators of the estate. The Grant issued in Succession Cause No. 3257 of 2014 was revoked, on the court's motion, and the Public Trustee was appointed as administrator of the Estate of Jane Ndungire.
4. They filed for review of the order appointing the Public Trustee which application was compromised by consent of the parties and it was agreed that the application for revocation of grant be heard and determined on merit. The application for revocation of grant is yet to be heard and determined and it was scheduled to come up for hearing on 17th October, 2023 where the preliminary objection was upheld resulting in their suit being struck out.
5. They therefore wish to appeal out of time and the delay is explained to be due to delay in obtaining a copy of the ruling.
6. The application is opposed vide replying affidavit sworn by Purity Makori on 26th October, 2023. She avers inter alia that the applicant's suit was dismissed for lack of locus to file the suit because the grant issued to them had been revoked and issued to the Public Trustee and the said orders had not been reviewed or set aside. They failed to file their appeal within the 30 days statutory timeline.
7. The Applicants have filed written submissions dated 6th March, 2023 placing reliance on the following:-
 1. Section 79G of the Civil Procedure Act which provides, "Every appeal from a subordinate court to the high court shall be filed within a period of 30 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 a good and sufficient cause for not filing the appeal in time."
 2. David Kimilu Mutinda (Suing as the Legal Representative Wycliff Kimilu – Deceased) v. Masinde Wamela Samule [2019] eKLR where the court relied on Mugo & Others vs Wanjiru & Anor [1970] EA 482 where it was stated as follows: "Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time as an application is made to extend time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused."
 3. Edith Gichungu Koine vs. Stephen Njagi Thoitbi [2014] eKLR where the court stated: "Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the degree of prejudice to the respondent if the application is granted, and where the matter raises issues of public importance amongst others."
 4. Kamlesh Mansukhlal Damki Patni vs. Director of Public Prosecution & 4 others [2015] where the court stated as follows: "It must be realized that courts exist for the purpose of dispensing 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 the Constitution of 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) and while others may transcend the interest 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.

8. The 3rd and 4th Respondents have filed written submissions dated 3rd March, 2024 placing reliance of the following:-

1. Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the Supreme Court laid down the principles that govern the exercise of discretion in applications for extension of time as follows:
 - i. 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.
 - 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 case to 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 Respondents if the extension is granted.
 - vi. Whether the application has been brought without undue delay.”
2. Section 79G of the Civil Procedure Act (supra).
3. George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri C. A. No. 4 of 2014 where an extension of time was declined on account of the applicant’s failure to explain a delay of 20 months.
4. Susan Ogutu Oloo & 2 others v. Doris Odindo Omolo (2019) eKLR where the court held as follows: “A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court. Of paramount importance, the reason for delay must be explained to the satisfaction of the court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.”
5. Andrew Kiplagat Chemaringo v. Paul Kipkorir Kibet [2018] eKLR where the court stated as follows: “The law does not set out any minimum and 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 favorably exercisable.”



Analysis and Determination

9. I have carefully considered the application before the court; the responses and the written submissions filed by the parties and address them as below.
10. The issues for determination, as crafted by the Applicant are:
 1. Whether the prayer for extension of time is merited and whether this court can extend the time?
 2. Who should bear the cost?
11. In the case of *Kenya Agricultural Research Institute v Kariuki & 16 others* [2023] KESC 25 (KLR) the court stated as follows:

“We now pronounce as follows, bearing in mind all these submissions:

6. Appreciating that the court, under rule 15(2) of the Supreme Court Rules, 2020 has unfettered discretionary powers to extend the time limited by the rules or by any of its decisions; that any person intending to appeal to the court is required by rule 36(1) of the Supreme Court Rules, 2020, to file a notice of appeal within fourteen days from the date of the decision intended to be challenged;
7. Restating the guiding principles in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC Application No 16 of 2014; [2014] eKLR enunciated 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 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 a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the Respondents if the 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.
 8. Further restating the principles in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* SC Civil Application No 3 of 2016; [2017] eKLR where we emphasized the need for the applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the court; as well as the case *Base Titanium Limited v County*



Government of Mombasa & another SC Petition (App) No 22 of 2018 [2019] eKLR, was echoed in *GEO Chem Middle East v Kenya Bureau of Standards* [2020] eKLR where we held that the principles for grant of an order of extension of time are that an applicant must give sufficient reasons for any delay and that the period of delay is nonetheless an important consideration in the court's exercise of discretion to grant or deny the extension."

12. In the case of *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others* [2022] KESC 3 (KLR) the court stated as follows:

" 14. Having considered this court's decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court, for the first time considered and outlined the guiding principles in applications for extension of time in this court, as follows:

- i) "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;
- 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 to 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 Respondents if the extension is granted;
- vi) Whether the application has been brought without undue delay; and
- vi) Whether in certain cases, like election petitions, public interest should be a consideration for extending time..."

13. In light of the foregoing cited authorities it is my view that the Applicants ought to be granted an opportunity to test the trials court decision vide an appeal. I note that there are issues of law which need to be canvassed through an appeal process.

14. At the same time, I do not think the delay was inordinate in the circumstances and the explanation of delay in getting the ruling was well explained.

15. Lastly, I do not see much prejudice to be suffered by the Respondents. In any case the succession matter which in my view is the substratum of the issue bedeviling the parties is ongoing and there are no orders staying the same.

16. In the premises the application is allowed, the Applicants granted 14 days from the date herein to file and serve the Memorandum of Appeal.

17. Costs to the Respondents.



DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 17TH DAY OF OCTOBER 2024.

H K CHEMITEI

JUDGE

