



REPUBLIC OF KENYA



**Chege v Wamugunda (Miscellaneous Application E012 of 2022)
[2023] KEHC 2363 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS APPLICATION E012 OF 2022
CM KARIUKI, J
MARCH 23, 2023**

BETWEEN

SAMUEL NGUME CHEGE APPLICANT

AND

JESSE MWANIKI WAMUGUNDA RESPONDENT

RULING

1. The matter pending before court is the Application dated August 31, 2022 filed by Samuel Ngume Chege, the Applicant herein, seeking for the following orders: -
 - i. Spent.
 - ii. That this honourable court be pleased to enlarge time to enable the Applicant file an appeal out of time.
 - iii. That costs be in the cause.
 - iv. Which application is premised on the following grounds: -
 - v. That the ruling delivered by Hon Wanyanga in the absence of both parties on August 6, 2021 in respect to the Respondent's notice of motion application dated January 26, 2021 which application sought permanent stay of execution orders against the Respondent in Nyahururu CMCC No 189 of 2018.
 - vi. That Hon. Wanyanga who was on transfer then never notified parties the date of delivery of ruling hence the Applicant was waiting for a ruling notice to issue.



- vii. It is on March 14, 2022 that the Applicant’s counsel sent his office clerk to Nyahute ruru Law Court registry where it emerged that the ruling regarding the aforesaid application had been delivered.
 - viii. That the Applicant was aggrieved by the ruling of Hon Wanyanga dated August 6, 2021 and hence craved leave to file a memorandum of appeal out of time in the wider interests of justice.
 - ix. That this application had been brought to this court expeditiously and without any delay whatsoever and has overwhelming chances of success.
 - x. That the Respondent will suffer no prejudice if this application is allowed as prayed.
 - xi. That it is within the wider interest of justice to enlarge time within which the Applicant seeks leave to appeal
 - xii. That the cost of this application be borne by the Respondent
2. Moreover, the Applicant filed a supporting affidavit of even date and a further affidavit dated December 19, 2022.
 3. On the hand, the Respondent filed a replying affidavit dated December 13, 2022. He deponed that the ruling was delivered on 6th August 2021 which is one year upto the time the application for enlargement of time to appeal against the ruling was made. That the delay of over 1 year is so inordinate in the circumstances of the case and the application is defeated by the doctrine of laches.
 4. The Respondent averred that the Applicant did not explain why he filed this application 5 months after in August 2022 even after knowing that the ruling had been delivered on March 14, 2022. That the Applicant was indolent on the circumstances and the court should not exercise discretion in his favour.
 5. It was asserted that the Applicant’s claim that he was awaiting a ruling notice is a mere allegation with no evidentiary indication or direction that ruling would have been delivered on notice.
 6. Lastly, the Respondent deponed that from the application the subject of the ruling that enlargement of time is sought which application is annexed to the Applicant’s notice of motion is a straight forward application and would not result in any other ruling other than the one that was delivered giving fortification to the Respondent to aver that the intended appeal has no merit and as such there is no need to enlarge time.

Applicant’s Submissions

8. The Applicant submitted that in considering this application, the court should take into account the factors observed in *Edith Gichungu Koine v Stephen Njagi Thithi* [2014] eKLR thus: -

“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 reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance amongst others.”
9. On the period and reason for delay, it was contended that the trial court delivered the ruling without the required notice explaining why both parties’ counsels were absent on the date of delivery of the ruling.



10. The Applicant stated that they learnt that a ruling had been delivered on March 14, 2022 which action caused counsel for the Applicant to file an application dated April 19, 2022 seeking to enlarge time to file an appeal out of time but the same was withdrawn for want of form and not being clear on the orders sought on the face of the application. It is then that the Applicant filed the application dated August 31, 2022.
11. Reliance was placed on [*Kamlesh Mansukbalal Damji Patni v Director of Public Prosecution & 3 Others* \[2015\] eKLR](#)
12. On whether the Respondent shall suffer prejudice should the application be allowed, the Applicant stated that the Respondent has not demonstrated in what way he stands to suffer prejudice should the application be allowed and that the application should be allowed for the wider interest of justice.
13. On whether the intended appeal raises triable issues, it was asserted that the learned trial magistrate erred in law and in fact in arriving at an erroneous decision in the wake of a valid agreement where the Respondent had given a breakdown on how he intended to defray the decretal sum hence was bound by the terms and conditions of the said agreement particulars whereof were well within his knowledge. Reliance was placed on *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2022] EA 503.
14. Lastly, the Applicant submitted that the present application has been brought in good faith and as such no prejudice shall be suffered by the Applicant if the application is allowed and that it is in the interest of justice that this application be allowed as prayed. That the appeal has chances of success and delay in filing appeal was inadvertently and excusable in light of the fact that the trial court never gave notice on date of delivery of the ruling to parties and their counsels.

Respondent's Submissions

16. The Respondent asserted that for an Applicant to succeed in an application for extension of time, the Applicant must demonstrate good and sufficient cause for not filing the appeal on time.
17. Reliance was placed on [*Thuita Mwangi vs Kenya Airways* \[2003\] eKLR](#), [*Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* \[2014\] eKLR](#)
18. The Respondent stated that the Applicant is obligated to adduce material upon which the court should exercise its discretion in his favour. They cited the case of [*Telcom Kenya Limited v John Ochanda & 996 Others* \[2015\] eKLR](#).
19. It was argued that the delay in filing this application cannot be disregarded and that in a feeble attempt to explain the delay the Applicant brought forth the issue of another application dated April 19, 2022 which he claims was withdrawn as it was not proper in form but questions abound from the same ie when was the application withdrawn? Was the Respondent served with the said application if indeed it existed? If at all the application was withdrawn why does the current misc. application been given the same number E012 as per the withdrawn application?
20. The Applicant stated that the Applicant failed to demonstrate that there was any indication from the court that it would deliver the ruling on notice.
21. Finally, the Respondent asserted that equity aids the vigilant not the indolent and that the Applicant has not been vigilant.



Analysis and determination

23. Having considered the application, the affidavits on record, submissions by counsel and the law, the main issue for determination is whether the court should grant the enlargement of time orders as sought by the Applicant.

24. The applicable law for enlargement of time is Order 50 Rule 6 of the [Civil Procedure Rules](#) which provides that: -

“Power to enlarge time [Order 50, rule 6] Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

25. Further, Section 95 of the [Civil Procedure Act](#) provides that: -

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

26. As asserted by the Respondent, the principles to be followed as regards to the extension of time were laid out by the Supreme Court of Kenya in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) (2014) eKLR 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 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 Respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

27. I have considered the reasons for delay advanced by the Applicant. He contended that he was not aware of that ruling had been delivered in Nyahururu CMCC No. 189 of 2018 and further that his previous application was rejected for want of form. I have not come across any evidence to show that the Applicant was informed of the said ruling date nor has the Respondent stated whether him or his counsel were served with a notice for delivery of the ruling. Given the circumstances, I do not think it is fair to blame the Applicant for failing to know that the impugned ruling was indeed delivered.



- 28. The Applicant further argued that the intended appeal raises triable issues and that the present application has been brought in good faith and as such no prejudice shall be suffered by the Applicant if the application is allowed and that it is in the interest of justice that this application be allowed as prayed.
- 29. In the Salat case (Supra) the court observed that: -
 - “Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”.
- 30. Accordingly, this court is charged with balancing between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. The Applicant herein is desirous to pursue an appeal against the impugned ruling however the court is also not interested in depriving a successful litigant of the fruits of his or her litigation. In balancing the competing interests, I am cognizant of the fact that one of the most cardinal purposes of the justice system is to ensure that disputes are fully heard and determined and that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. I find that the the Applicant should be given an opportunity to articulate his issues on appeal.
- 31. In the instant application there is no evidence to demonstrate what prejudice the Respondent will suffer if the Applicant is granted an extension of time as sought. In the circumstances and in the interests of justice, it is my considered view that the Applicant has satisfied the requirements for granting of extension of time to file the intended appeal out of time and has offered sufficient reasons for the delay.
- 32. In the result, the court makes the following orders;
 - i. The application herein is allowed with costs to the respondent assessed at Ksh. 10,000 to be paid within 30 days in default execution to issue.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 23TH DAY OF MARCH 2023.

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CHARLES KARIUKI
JUDGE

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