



**Kipngetch v Republic (Miscellaneous Criminal Application
E071 of 2023) [2023] KEHC 22887 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 22887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E071 OF 2023**

RN NYAKUNDI, J

OCTOBER 2, 2023

BETWEEN

KENNEDY KIPNGETICH APPLICANT

AND

REPUBLIC PROSECUTOR

RULING

Coram: Before Hon. Justice R. Nyakundi

1. The applicant Kennedy Kipngetch lodged a Notice of Motion before this court on July 31, 2023 seeking extension of time to appeal against the decision of the trial court in Criminal Case No E071 of 2023. The application is premised on the following grounds:
 1. That: I failed to write the above mentioned matter within the stipulated period due to lack of court proceedings/ruling judgement
 2. That: I had relied on my parents/relatives to hire an advocate for the me but they failed to get money to pay advocates
 3. That while in prison, I requested the prison authority to allow me write the same
 4. That: What I deponed here above is truth and the truth alone. In support of the application he deposed as follows:
 1. That I am a male adult, Kenyan citizen and of sound mind and therefore capable to swear this affidavit
 2. That: I was arrested, charged, convicted and sentenced to 15 years imprisonment by the trial magistrate court for the offence of defilement c/section 8 (1) (2) of the SOA2006 on 13/5/2021 by Hon.Wewa



3. That: the applicant was informed of his right to appeal within 14 days but he could not do so because his judgement was delivered around the covid 19 period and he could not access the judgement on time leading to the delay in filing the appeal
 4. That for the interest of justice may this honourable court be pleased and allow my applicant to appeal out of time as prayed on this 7th day of August, 2023.
 5. That I believe my appeal has high chances of success and therefore wish to be present at the hearing of this application.
 6. That what is herein deponed is true to the best of my knowledge, information and belief.
2. Apparently, from the record the application stands unopposed.

Determination

3. The only issue for my determination is whether the applicant has been able to advance sufficient cause to warrant extension of time. Section 349 of the [Criminal Procedure Code](#) gives discretion powers to the court to enlarge time in favour of the applicant to file his or her appeal out of time. It states as follows:

"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 have elapsed and shall so admit the appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of appellant or his advocate to obtain a copy of the judgement or order appealed against and a copy of the record within a reasonable time of applying to the court thereof"

4. By the spirit of this provision, delay of even a single day has to be accounted for by the applicant to enable the court exercise discretion judiciously. The basis of it is to ensure there is compliance to the prescribed timelines within which an aggrieved party must approach the court for purpose of an appeal. The exercise of discretion is governed by the overriding objective of finality litigation and by the general principles underlying the appeal regime. In its exercise of discretion to extend time, or grant permission to file a memorandum of appeal out of time, it's the court's duty to take into consideration the special facts and circumstances of the case with an objective to achieve a just and fair outcome. The scrutiny should be on the length of delay, the reasons for the delay, the applicant's chances of success on appeal, and whether such an extension of time is likely to prejudice or occasion an injustice to the respondent. I observe from the record the applicant did not have the benefit of legal counsel as a constitutional imperative in terms of Article 50 (2) (g) & (h) of the [constitution](#). The overriding concern is whether he was capable or had the knowledge to appreciate the strict procedural timelines of our appeal process. Correspondingly, this court has to bear in mind the challenges likely to be faced by self represented litigants or defendants for that matter in a criminal case. The present case, concerns the file of a memorandum of appeal to challenge the impugned judgement of the trial court. The test therefore, is whether the intended appeal is hopeless likely to be summarily dismissed. A glance of the record does not possess any such indicator at the moment to persuade this court to decline exercise of discretion in this application. In any event, I do not think this to be a threshold test for the applicant to meet. The quest for justice of our people entails a continuous interrogation and a need to balance both the procedural and substantive justice parameters. It is that interaction the Supreme Court profoundly enunciated the principles in the case of [Salat V Independent Electoral & Boundaries Commission & 7 Others](#) (2014) KLR-SCK the following guidelines are of significance as formulated to assist the court in exercising discretion to decline or grant the remedy on extension of time.



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 ought to 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, 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
 7. whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
5. What is critical in this application is to establish whether the applicant has established sufficient reasons for this court to extend time as stipulated under Section 349 of the *CPC* or any such criteria to achieve the constitutional right of appeal or for the interest of justice. The applicant on his part has stated in the affidavit that the delay was as a result of lack of the trial court record and the impugned judgement. In the first instance under Article 50 (2)(q) of the *constitution*, the applicant has a right once convicted to appeal to or apply for review by a higher court as prescribed by law. Further in sub Section 4(b) of the same Article the applicant has the right to a copy of the record of the proceedings within a reasonable period after they are concluded. In return for a reasonable fee as prescribed by law.
6. Having considered the application, the factors raised by the applicant constitute sufficient good cause for extending the time to facilitate him to secure the record and file his appeal out of time. Pursuant to Section 349 of the *CPC* the Memorandum of Appeal prepared necessary to meet the requirements of the right of appeal be deemed as duly filed within time. By dint of this ruling the Deputy Registrar to supply the Applicant with a copy of the trial court record and judgement within 30 days from today's date. Further mention on 30th of October for further directions on the appeal process.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 2ND DAY OF OCTOBER, 2023.

In the presence of:

Applicant Present.

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R. NYAKUNDI

JUDGE

