



**Wanjiru v Kassim (Environment and Land Miscellaneous Application
3 of 2023) [2024] KEELC 953 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 3 OF 2023
NA MATHEKA, J
FEBRUARY 27, 2024**

BETWEEN

JOSEPHINE WANJIRU APPLICANT

AND

NUR ISAAK KASSIM RESPONDENT

RULING

1. The application is dated August 10, 2023 and is brought under Sections IA, 1B, 3, 3A, 40, 46 and 95 of the Civil Procedure Act Cap 21 and under order 42 rule 6; order 50 rule 6, order 51 rule of the Civil Procedure Rules, 2010 and under section 7 of the Appellant Jurisdictions Act Cap 9 seeking the following orders;
 1. That this Application be certified as urgent and service be dispensed with in the first instance.
 2. That this Honorable Court be pleased to stay execution of the Judgment Decree issued on January 12, 2023 and subsequent Orders therein pending hearing and determination of this Application and Intended Appeal.
 3. That this Honorable Court be and is hereby pleased to grant leave to the Applicant to file her Memorandum of Appeal out of time and the draft Memorandum of Appeal filed herein be deemed as filed upon payment of the requisite court fees/charges.
 4. That this Honourable Court do make any other order it deem fit in the circumstance.
 5. That this Honourable Court grants costs of the Application.
2. It is based on the grounds that the judgment on this matter was delivered on the 12th January, 2023 and Memorandum of Appeal ought to have been filed within 30 days from the date thereof. That when the judgement was delivered the applicant was sick and bedridden. That the Applicant's Advocate was not in communication with her as the contact provided for by the Applicant was not available. That it was



only on 8th August, 2023 when the Applicant gathered the strength to avail herself to the advocate's office and explained her condition. That the Applicant is ailing and can barely walk and/or sit down as her spinal cord was severely injured and has undergone several surgeries. That the delay in filling the Application was not deliberate out due to the fact that the application was not available and/or in a position to give instructions on the appeal. That the Applicant being dissatisfied with judgment intend to lodged an Appeal. That the application has been made within a reasonable time. The Applicant has a high chance of success in the appeal. That the Respondent will not be prejudiced if the said leave is granted. That there is sum of money deposited in joint interest account which the Respondent want to obtain and it is in the interest of justice that there be stay of execution so that the Applicant is given a chance to Appeal as once released the Applicant will lose the same. That the Respondent will not be prejudiced as the money attracts interest and is safe.

3. This court has considered the application and submissions therein. Section 79G of the [Civil Procedure Act](#) is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the [Civil Procedure Act](#) provides that:

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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 good and sufficient cause for not filing the appeal in time."

4. From the provision above, it is noteworthy that the phrase used is "an appeal may be admitted out of time". This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & others vs Wanjiru & another* (1970) EA 482 the court stated as follows;

"Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the 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."

5. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in [Edith Gichungu Koine vs Stephen Njagi Thoitbi](#) (2014) eKLR thus;

"Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no 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."

6. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. In [Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others](#) (2013) eKLR the court held 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.”
7. I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that on 12th January 2023, the Trial Court delivered Judgment in the suit herein in which the Applicant’s suit was dismissed. At the time of the delivery of the Judgement of the Trial Court, the Applicant was sick and bedridden. That the Applicant’s Advocate was not in communication with her as the contact provided for by the Applicant was not available. That it was only on August 8, 2023 when the Applicant gathered the strength to avail herself to the advocate’s office and explained her condition. This excuse is casual and unacceptable. The draft memorandum of appeal states *inter alia* that the trial magistrate erred in fact and law by failing to judiciously analyse the plaintiff’s evidence. I find that the applicant does not have an arguable appeal. I also find that the applicant is guilty of inordinate delay and this application is an afterthought. I find this application is not merited and I dismiss it with no orders as to costs.
8. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

