



REPUBLIC OF KENYA



KENYA LAW
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**Chai v Mkoka (Miscellaneous Application E017 of 2023)
[2024] KEELC 1710 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION E017 OF 2023
EK MAKORI, J
MARCH 19, 2024**

BETWEEN

ANDREW SEHE CHAI APPLICANT

AND

RACHEAL MWANZA MKOKA RESPONDENT

RULING

1. Application dated 24th March 2023, supported by the annexed affidavits of one Andrew Shehe Chai sworn on 24th of March 2023 and the supplementary affidavit deposed on 30th of June 2023, seeks among other prayers:
 - a. That this Court be pleased to grant the applicant leave to file an appeal out of time against the judgment delivered by Hon. J.M. Kituku - SPM delivered on 9th March 2022, in Kilifi SPMCC Case No.675 of 2019 - *Andrew Shebe Chai v Racheal Mwanza Mkoka*.
 - b. That the costs of this application be in the intended appeal.
2. The respondent filed his replying affidavit sworn on 14th April 2023 opposing the Notice of motion application.
3. The parties canvassed the application by way of written submissions
4. The main reason the applicant proffers for being late in the filing of the intended appeal as disclosed in the body of the application and the supporting and further affidavits deposed on 24th March 2023 and 30th of June 2023 respectively was that the applicant got the judgment of the Court and proceedings late. There are copies of correspondences from counsel for the applicant seeking the same, starting with the letter dated 16th March 2022 and ending with the one dated 18th August 2022. The decree in the Lower Court was also late that is on 6th December 2022.



5. The applicant submits that there is a meritorious and arguable appeal and that the orders sought herein ought to be allowed in the interest of justice since the judgment and proceedings for purposes of appeal were called for timeously but supplied by the Court late.
6. The applicant is of the view that the Court's main aim as it is called for in this case is always to do justice as the overall consideration in the quest for justice – see *Stecol Corporation Ltd v Susan Awour Mudemba* [2021] eKLR, quoting with approval the decision in *Charles Karanja Kuru v Charles Gitbinji Mwigwa* CA No. 71 of 2016.
7. The applicant submits that the discretion to extend the time within which to appeal is discretionary and unfettered and should be exercised on a case-to-case basis. The judgment by the trial Court does not resolve the status of the respondent on the suit property. It is an issue which the Court needs to resolve.
8. The respondent on the other hand is of the view that the current application is bad in law and brought late in the day solely because of execution proceedings which had been commenced by the respondent to recover costs.
9. Judgment in the Lower Court was delivered on 9th March 2022, and the current application was filed on 28th March 2023. No plausible explanation as to why there was a delay of over 1 year in applying for the extension of time within which to appeal. It is an afterthought.
10. The respondent cites the case of *Evans Kiptoo v Omwoyo* [2021] eKLR, elucidating that an applicant needs to file an appeal and at the same time, if late file an application for the extension of time. In this case, no such appeal has been filed.
11. The respondent further submits that the remedy of extension of time within which to appeal is equitable. A conceivable explanation has to be offered as to why one was late to appeal within the stipulated period. In this case, there are no cogent reasons for the late appeal. The principles to consider in the grant of the same were laid in the case of *Mombasa County Government v Kenya Ferry Services & Another* [2019] eKLR
12. The respondent avers that Sections 79(G) of the *Civil Procedure Act* provide mechanisms and timelines on appeal to the appellate Court. The Section provides 30 days within which to appeal after delivery of judgment or order made by the Subordinate Court. In case of being late, the Section provides that leave may be granted if one shows the Court that he had a good and sufficient cause for filing the appeal out of time. In this case, the respondent thinks that no sufficient cause has been provided nor has the applicant attached the draft Memorandum of Appeal.
13. Issues for the determination of this Court are whether to grant leave to appeal out of time and who should bear the costs of the instant application.
14. The principles for the grant of leave to appeal out of time are as enunciated in the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR:

“Concerning extension of time, this Court has already set the guiding principles in the *Nick Salat Case* as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.



“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if 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” [emphasis supplied]
- (26) Further, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court 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. On the issue of delay occasioned by typed proceedings, we stated as follows:
- (24) a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.” [emphasis added]”

15. The reasons provided for the delay in bringing up the intended appeal on time were that the trial Court did not provide the judgment and proceedings in good time for the preparation of the record of appeal within the stipulated timelines. Correspondences are attached to support the same.
16. I have perused the correspondences attached seeking the Court proceedings for purposes of appeal. The judgment was delivered on 9th March 2022, and the current application was filed on 28th March 2023. That is about a year after the judgment. A certificate of delay was issued on 21st October 2022, which cures the delay from 9th March 2022 to 21st October 2022 the date the certificate of delay was issued.
17. No explanation has been given as to why a decree was taken on the 6th of December 2022, and not earlier when the other proceedings were called for, nor is the period between when the decree was issued to the 24th of March 2023 when the current motion was filed.
18. In my view it lends credence that the only reason to proffer the appeal is to avoid the payment of costs arising from the litigation in the Lower Court. The delay to me is inordinate.



19. On the merits of the intended appeal, the applicant is of the view that the respondent's status in the suit property remains hanging since no substantive orders were issued for the respondent. There was no counter-claim in the Lower Court and it will not be an issue on appeal.
20. The upshot is that the application dated 24th March 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 19TH DAY OF MARCH 2024 IN THE ABSENCE OF THE PARTIES WHO HAD NOTICE OF THE RULING DATE.

E. K. MAKORI

JUDGE

