Murathe v Rural Electrification Authority (Civil Application E043 of 2025) [2025] KECA 1101 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1101 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E043 OF 2025

LA ACHODE, JA

JUNE 20, 2025

BETWEEN

NICHOLAS MUTURI MURATHE .... APPLICANT

AND

RURAL ELECTRIFICATION AUTHORITY .... RESPONDENT

(Being an application for leave to lodge a Notice of Appeal out of time against a Judgment in the High Court at Nyandarua (C. Kariuki J) dated 6th February, 2025 in Civil Appeal No. 40 of 2023)

RULING

1. By the Notice of Motion dated 10th April 2025, and brought under rule 4 and 5 of the Court of Appeal Rules, Article 159 of *the Constitution*, Nicholas Muturi Murathe the applicant, seeks to be granted leave to file a Notice of Appeal and Memorandum of Appeal out of time, in respect of the judgment dated 6th February, 2025, delivered in Nyandarua Civil Appeal No. 40 of 2023. He also prays that the Notice of Appeal and the Memorandum of Appeal attached to the application be deemed as properly filed and on record. The respondent is Rural Electrification Authority.

2. In the grounds upon which the application is based as set out on the face thereof and deposed in the supporting affidavit dated 10th April 2025, sworn by the applicant. The grounds state that the impugned judgment was scheduled for delivery on 3rd October 2024, but on that date the learned Judge erroneously delivered a ruling in an application dated 11th July 2022 instead. On 11th July 2024 parties appeared before the learned Judge and pointed out that the ruling delivered on 3rd October 2024 was in error, and what the court ought to have delivered was the judgment in the appeal.

3. The learned Judge then scheduled the judgment for 30th January 2025, but on that date, the judgment was not ready and was scheduled for delivery on notice. The applicant later learnt that the judgment was delivered on 6th February 2025 without notice to them, allowing the respondent's application. The

applicant was aggrieved and intends to appeal, but despite effort by his counsel, they only received a copy of the judgment on 25th February 2025 after the timeline had lapsed.

4. The applicant avers that he did not occasion the delay in filing the Notice of Appeal and that it is in the interest of justice for the application to be allowed so that the very weighty matters of law therein can be determined.

5. The applicant filed written submissions dated 13th May 2025 through the firm of Ndegwa Muhoro & Co Advocates and pointed the Court to the case of Anthony Burugu & Co Advocates v Electrowatts Ltd (Civil Appeal (Application) E444 of 2021 (2022) KEC 415 (KLR) where the principles for consideration when extending time were set out.

6. The applicant submits that the reason for the delay was that he received no notice of the judgment, and when he became aware of it, he could not access the file even from the CTS. Further, that the length of the delay was only 30 days from the date of learning of the judgment and approaching this Court.

7. On whether the intended appeal is arguable, counsel cites the case of Sammy Mwangi Kiriethe & 2 Others v Kenya Commercial Bank [2020] eKLR to urge that an arguable appeal is not one which must necessarily succeed but one which is worthy of interrogation. That he intends to urge on appeal that the learned Judge disadvantaged him in setting aside the special damages, despite the trial court having confirmed that there was proof of trespass and which was not disputed.

8. Counsel submits that on the issue of the prejudice to be suffered, the right of the applicant to be heard on the already initiated appeal outweighs any prejudice to be suffered by the respondent.

9. The firm of Messrs Lak Advocates filed written submission on behalf of the respondent and identified three issues for determination, to wit:

   i. Whether the applicant should be granted leave to appeal out of time.

   ii. Whether the application has been brought in good time, and

   iii. Who should bear the cost of the application?

10. Counsel argues that while the jurisdiction of this Court to enlarge time is not disputed, such discretion must be grounded on cogent, convincing and sufficient cause as envisaged in rule 4 of the Court of Appeal Rules 2022, and should not be granted to the indolent, or reward a party who is dilatory and inattentive to timelines set by law. He cites the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR on the principles governing extension of time established by the Supreme Court.

11. Counsel asserts that the delay is inordinate, unexplained and culpable. That the excuse proffered that the applicant was unaware of the judgment being read is misleading and offensive to the court, as the judgment was duly posted on the Judiciary Court Tracking System (CTS), and the burden of vigilance lay squarely on the applicant, which he did not discharge.

12. On whether the application has been brought in good faith, counsel contends that the applicant's case is rooted in fraud and discredited evidence. That the trial court found that the applicant had relied on forged documents. Counsel argues that the applicant sought for Kshs.999,204 by a letter dated 7th March 2025, instead of pursuing the intended appeal, and this action amounts to acceptance of the court's decision, and this application is an afterthought calculated to reopen a matter long settled.

13. Counsel has placed reliance on the case of Republic v Attorney General 16 Others: Kimeu & 242 Others (Interested Party): Musyoki (Exparte) (Judicial Review Application E007 of 2021) [2022]

KEHC (KLR) to urge every applicant must approach the court in absolute good faith and make full disclosure. That granting leave in this case would amount to a travesty of justice as the applicant seeks to benefit from his own fraudulent acts. He prays that the application be dismissed with costs.

14. The Court's mandate to exercise the discretion to extend time otherwise limited by these rules, or decision of this Court, or Superior Court is unfettered. It is donated by rule 4 of this Court's Rules which provides as follows:

> " The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

15. The principles that guide this Court in the exercise of its mandate under rule 4 have been delineated by case law. For example in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Nairobi *CA No. 255 of 1997* this Court stated that:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that, in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly the reason for the delay; thirdly possibly the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the respondent if the application is granted."

I have therefore examined the application before me guided by the foregoing principles, to establish whether it is merited.

16. On the length of the delay and the reason therefor, it is submitted that the length of the delay was only 30 days after learning of the judgment before the applicant approached this Court. The reasons for the delay were first, that he received no notice of the judgment when it was not delivered on the scheduled date. Second, that when he became aware of it, he could not access the file even from the CTS, until his advocate contacted the learned Judge who had since left the station.

17. The respondent on the other hand asserts that the delay was inordinate and unexplained. That the excuse that the applicant was unaware that the judgment was delivered is misleading to the Court, as it was duly posted on the Judiciary CTS, and the burden of vigilance lay squarely with the applicant and he did not discharge it.

18. The Rules do not state the number of days that may constitute inordinate delay. Each case is to be determined on its own facts, as stated in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR where this Court held that:

> "The law does not set out any minimum or 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 favourably exercisable."

19. I have considered the length of delay and the reasons therefor and find that in the circumstances of this case, the delay was not inordinate and the reason therefor are plausible and reasonable.

20. On whether the intended appeal is arguable, the applicant states that he intends to urge on appeal that the learned Judge disadvantaged him in setting aside the special damages despite the trial court having

confirmed that there was proof of trespass and which was not disputed. The respondent contends that the applicant's case is rooted in fraud and discredited evidence. That the trial court found that the applicant had relied on forged documents and therefore, this application is an afterthought calculated to reopen a matter long settled.

21. As stated in Sammy Mwangi Kiriethe (supra), an arguable appeal is not one which must necessarily succeed but one which is worthy of interrogation. In my view, the issues raised by the applicant herein are not idle. As to whether they will succeed is not for me to discuss, lest I should embarrass the bench that will be seized of the appeal.

22. In considering the question of the prejudice to be suffered, I have weighed the right of the applicant to pursue the intended appeal against the right of the respondent to have finality to litigation and enjoy the fruits of the judgement. In the circumstances of this case, I find that the interest of justice will be better served if this application is allowed, so that the parties are heard on the already initiated appeal, as the respondent will get a chance to ventilate their case.

23. In the end I find that the Notice of Motion dated 10th April 2025 has merit and is hereby allowed. The applicant will bear the cost of this application.

    It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

L. ACHODE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

Deputy Registrar