Kiptoo v Kangogo (Civil Application E015 of 2025)
[2025] KECA 1183 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KECA 1183 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E015 OF 2025

JM MATIVO, JA

JULY 2, 2025

BETWEEN

SAMUEL K KIPTOO ..... APPLICANT

AND

NOAH KIPROTICH KANGOGO ..... RESPONDENT

(Being an application for leave to file appeal out of time arising from the judgment and decree of the Environment and Land Court of Kenya at Nakuru (M. A. Odeny, J.) dated 3rd October, 2024 in ELC Case No. 65 of 2019)

RULING

1. Vide application dated 24th February,2025, brought under Section 3A of the *Appellate Jurisdiction Act*, rule 4 of the Court of Appea1 Rules 2022, the applicant prays for extension of time to file his appeal out of time against the judgment and decree of M. A. Odeny, J. delivered on 3rd October 2024 in Nakuru ELC Case No. 65 of 2019.

2. The application is premised on the grounds listed on the face of the application, the supporting affidavit sworn on 24th February 2025 and a further affidavit sworn on 25th March 2025 both by one David Siahi, the applicant's advocate. The grounds in support of the application are that: (a) the applicant instructed the law firm Motanya & Co. Advocates to come on record for him after delivery of judgment and file an appeal against the entire judgment; (b) a notice of appeal was lodged on 17th October 2024 and served upon the respondent's counsel on the same day. However, the said notice of appeal was signed on 8th November 2024 after the prescribed period had lapsed; (c) the failure to file a record of appeal within the stipulated period was due to pressure of work and the involvement in a road traffic accident which kept counsel out of work; (d) delay in filing the appeal was not deliberate; (e) the applicant's appeal is arguable with overwhelming chances of success; (f) the applicant will suffer great prejudice if the application is not allowed.

3. In his submissions dated 25th March 2025, the applicant cited the case of George Kagina Kariuki & 2 Others vs. George M. Gichimu & 2 Others [2014] eKLR in submitting that a plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour and there has to be valid reasons upon which discretion can be favourably exercisable.

4. In opposition to the application, the respondent filed the replying affidavit sworn on 11th March 2025 in which he avers that: (a) the application is frivolous and an abuse of the Court process; (b) the application has been brought in bad faith to delay the course of justice; (c) the applicant has not demonstrated substantial loss or offered security for due performance of the decree; (d) the delay of nearly four months is inordinate and the same was filed two days after the execution of the decree process began.

5. The respondent in his submissions dated 11th March 2025 cited the case of Misoi & 2 Others vs. Muhindi (Civil Application No. E024 of 2023 [2023] KECA 1295 (KLR) in submitting that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the Court.

6. I have considered the application, the affidavits in support thereto and the annextures, the replying affidavit, and the written submissions by both counsel. The only question for determination is whether the applicant has met the threshold for the exercise of this Court's discretion to grant leave for him to file and serve his record of appeal out of time. The application is governed by rule 4 of the Court of Appeal Rules which provides that:

> " 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."

7. The Supreme Court of Kenya pronounced itself in the question of extension of time in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR, and stated as follows:

> " 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."

8. This application will turn on the question whether the applicant has tendered sufficient reasons for not filing his record of appeal within the stipulated time and whether the respondent will suffer any prejudice should the application be allowed. Rule 84 of the Court of Appeal Rules provides:

> 1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
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> a. a memorandum of appeal, in quadruplicate;
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> b. the record of appeal, in quadruplicate;
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> c. the prescribed fee; and
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> d. security for the costs of the appeal.

> Provided that where an application for a copy of the proceedings in the Superior Court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the Registrar of the Superior Court as having been required for the preparation and delivery to the appellant of such copy.

9. It is not in dispute that the notice of appeal dated 17th October 2024 was filed and served within the stipulated time. The applicant was required to file the appeal within 60 days from the date of filing the notice of appeal. Therefore, time begun to run on 17th October 2024 when the notice of appeal was lodged and lapsed on or about 17th December 2024 after the lapse of 60 days. We take judicial notice that the recess commenced on Friday, 20th December 2021, and terminated on Wednesday, 13th January 2025, both days inclusive. Therefore, pursuant to the provisions of rule 3 (e) of the rules of this Court which provides that "...the period of the Christmas vacation shall not be reckoned in the computation of time", the period between 20th December 2024 and 13th January 2025 cannot be reckoned in the computation of time. The instant application was filed on 24th February, 2025. Therefore, there has been a delay of about 43 days in bringing the instant application.

10. In determining applications of this nature, the approach is that the Court has a discretion, to be exercised judicially upon a consideration of all facts and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore and the prospects of success. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

11. The Court must be appraised of all the facts and circumstances relating to the delay. An applicant must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Significantly, enlargement of time cannot be had for the mere asking. An applicant is required to make out a case entitling him/her to the Court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the cause of the delay. In the end, the explanation must be reasonable enough to excuse the default.

12. This application will turn on the question whether the applicant has provided a satisfactory explanation for delay. The applicant's counsel has attached official receipts from Annex Hospital dated 20th November 2024 and a treatment note dated 6th February 2025 to demonstrate that he had been indisposed as a result of a road traffic accident. This averment has not been controverted nor do I find any reason to doubt it. Therefore, I find the applicant's explanation to be plausible. Applying the principles in Andrew Kiplagat Chemaringo vs.Paul Kipkorir Kibet (supra), I find that the delay is not inordinate and it has been well explained. I find that this is a proper case for me to exercise my discretion in favour of the applicant. Accordingly, I hereby allow the applicant's notice of motion dated 24th February 2025 and order the applicant to file and serve the record of appeal within 30 days from today. I make no orders as to costs.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF JULY, 2025.

J. MATIVO

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JUDGE OF APPEAL

I Certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR