



Gichuru v Attorney General; Court of Appeal of Kenya (Interested Party) (Civil Application 75 of 2020) [2024] KECA 150 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KECA 150 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 75 OF 2020
FA OCHIENG, JA
FEBRUARY 16, 2024**

BETWEEN

JANE NJOKI GICHURU APPLICANT

AND

THE HON ATTORNEY GENERAL RESPONDENT

AND

COURT OF APPEAL OF KENYA INTERESTED PARTY

((Being an application for extension of time and leave to appeal as a pauper against the judgment and Decree of the High Court of Kenya at Nakuru (J. Mulwa, J.) delivered on 20th April 2017 in HCCC No. 94 of 2010))

RULING

1. Before me is an application dated 5th August 2020. The application is brought under the provisions of Article 159(2)(9) of the [constitution of Kenya](#), Rules 4,39,42, 43 and 115 of the [Court of Appeal Rules](#) and Order 44 of the [Civil Procedure Rules](#). In the application, the applicant prays for orders:

“

- a) That the honorable court to order the Deputy Registrar of the Court of Appeal to conduct an inquiry into the pauperism of the applicant and file a report over the inquiry.
- b. That the court be pleased to grant leave to the applicant to appeal as a pauper.



c. That the court be pleased to extend the period within which the appellant ought to file and serve her memorandum of appeal and record of appeal against the judgement and decree of Hon J. Mulwa delivered on 29th April 2017 in Nakuru HCC No. 94 of 2010.”

1. The application was premised on the grounds that:

- a) The applicant was aggrieved by the judgment and decree of Hon. J. Mulwa in dismissing her suit, and she wishes to appeal against the said decision.
- b. On 10th July 2020 the applicant was granted leave to file and serve her memorandum and record of appeal out of time in Nakuru Civil Application No. 11 of 2019; Jane Njoki Gichuru v The Honorable Attorney General.
- c. The application was to filed by 9th August 2020.
- d. The applicant prepared her memorandum and record of appeal which she sent to the court registry for assessment of filing fees, and the same was assessed at Kshs. 90,450/-.
- e. The applicant is not able to pay the said court fees as she is unemployed and the little funds she gets go to settle her medical bills as she is under continuous treatment.
- f. Due to her inability to pay the assessed fees, the applicant is apprehensive that the leave granted to file her memorandum and record of appeal will lapse before filing the appeal.
- g. The respondent will not suffer any prejudice.”

1. The application was further supported by the applicant’s affidavit in which she stated as follows:

- a) She filed HCC No. 94 of 2010 to seek compensation from the respondent for loss and harm suffered as a result of medical negligence at one of the Government medical facility, which suit was dismissed.
- b. Dissatisfied with the dismissal, she instructed counsel to pursue an appeal, but the time for lodging the appeal had since lapsed.
- c. Her counsel filed an application for extension of time within which to file an appeal; which application was allowed.
- d. She then prepared the necessary documentation only to find out that she was not able to raise the required filing fees of Kshs. 90,450/- as she is unemployed.
- e. The intended appeal has very high chances of success as per the memorandum of appeal and that the application is made in good faith with the sole interest of justice.”



4. There was no response to the application or submissions. Parties relied on their respective written submissions. The applicant relied on her written submissions.
5. The applicant submitted that she had made substantial steps to show that she had complied with the ruling dated 10th July 2010, granting her leave to lodge an appeal out of time. She had informed the court in an email on 5th August 2020 that she could not be able to raise the assessed filing fees, and requested that the appeal be considered under pauperism rule.
6. In a ruling dated 9th July 2021, the court ordered the applicant to appear before the deputy registrar for further investigations on her pauperism status. The deputy registrar was directed to prepare and file a report and place it before court for further directions.
7. The deputy registrar prepared a report dated 27th July 2021 in which he found that the applicant's pauperism status was justified for her to be considered a pauper.
8. Rule 120(1) of the [Court of Appeal Rules, 2022](#) provides that:

“If, in any appeal from a superior court, in exercise of its original or appellate jurisdiction in any civil case, the Court is satisfied on the application of an appellant that the appellant lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the Court may, by order, direct that the appeal may be lodged —

- a. without prior payment of fees of Court, or on payment of any specified amount less than the required fees; or
- b. without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 109,
and may order that the record of appeal be prepared by the registrar of the superior court without payment therefor or on payment of any specified sum less than the fee set out in the Second Schedule conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or property the appellant may recover in or consequence of the appeal.”

9. On the evidence of the deputy registrar's report, I find that the applicant lacks the means to pay the required fees due to her unemployment, and ongoing accumulation of medical bills. I therefore direct that she be allowed to lodge her appeal without prior payment of court fees.
10. As regards the extension of time, Rule 4 of the [Court of Appeal Rules](#) does not provide for the factors which the court ought to consider in an application for extension of time. However, courts have devised appropriate principles to be applied in achieving a just decision in the circumstances of each case. The Rule states:

“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.”



11. In the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, the court laid down the parameters for extension of time as follows:

“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.”

12. In *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR, the court stated that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”

13. In the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 the court observed as follows:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

14. It is trite that there is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant to the leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“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.”

15. The applicant stated that the delay in lodging an appeal was because she is not able to raise the filing fees. Having confirmed the applicant’s pauperism status, I find that the reason for the delay is justified.



16. As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. In *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

17. On the degree of prejudice, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying her an extension, against the prejudice to the respondent in granting an extension. The applicant has

demonstrated that she continues to incur medical bills and she has been unemployed as a result of her ill health.

18. In the result, I find that the application is merited. I therefore grant an extension of time, and direct the applicant to file and serve the memorandum of appeal and the record of appeal within the next 14 days.

19. Costs of the application shall abide the outcome of the intended appeal.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF FEBRUARY, 2024.

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

