



REPUBLIC OF KENYA



**Kipkorir & 3 others v Kipngochoch Farm Co Ltd & 2 others (Civil Application E062 of 2023) [2024] KECA 70 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 70 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E062 OF 2023  
WK KORIR, JA  
FEBRUARY 2, 2024**

**BETWEEN**

**OBADIAH K KIPKORIR ..... 1<sup>ST</sup> APPLICANT  
JOHN MARK MOI ..... 2<sup>ND</sup> APPLICANT  
JAPHETH K CHEPKERES ..... 3<sup>RD</sup> APPLICANT  
WELDON LABBAT ..... 4<sup>TH</sup> APPLICANT**

**AND**

**KIPNGOCHOCH FARM CO LTD ..... 1<sup>ST</sup> RESPONDENT  
NAKURU LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to file and serve a notice of appeal out of time to the decision of the Environment and Land Court (E&LC) at Nakuru (A.O. Ombwayo, J.) dated 8th May 2023) in Nakuru E&LC No. 305 of 2012)*

**RULING**

1. Obadiah K. Kipkorir, John Mark Moi, Japheth K. Chepkeres and Weldon Labbat, the respective 1<sup>st</sup> to 4<sup>th</sup> applicants have brought the notice of motion dated 25<sup>th</sup> July 2023 pursuant to rules 4 and 44(1) of the [Court of Appeal Rules, 2022](#). In the application, the applicants seek extension of time to file a notice of appeal and that the costs of the application be in the cause. The application is premised on the grounds on its face as well as those contained in the supporting affidavit of the 1<sup>st</sup> applicant.
2. In support of the application, the applicants aver that the impugned judgment of the Environment and Land Court (E&LC) in Nakuru E&LC Case No. 305 of 2012 was delivered on 8<sup>th</sup> May 2023. According to the applicants, their previous advocates, Kiplenge, Andama & Makau Advocates,



- believed that the judgment would be delivered on a later date as the learned Judge had intimated that he would be away on his annual leave from 2<sup>nd</sup> May 2023 to 13<sup>th</sup> June 2023. They aver that after their former advocates secured a copy of the judgment on 23<sup>rd</sup> May 2023 they immediately drew and filed a notice of appeal on 26<sup>th</sup> May 2023.
3. Subsequently, on 29<sup>th</sup> May 2023, the former advocates filed an application seeking leave for extension of time being, NKR Civ App No. E045 of 2023. However, that application was later withdrawn as it was lodged premised on repealed and non-applicable provisions of the law and also for being omnibus. It is their deposition that this led to the applicants instructing the current advocates who have lodged the present application. The applicants aver that the delay originally occasioned was for a period of 4 days. It is the applicants' prayer that leave be extended to 26<sup>th</sup> May 2023, being the date when the notice of appeal was filed, albeit out of time.
  4. The application was opposed by the 1<sup>st</sup> respondent through an affidavit sworn on 3<sup>rd</sup> August 2023 by Dickson K. Yatich, the chairman of Kipngochoch Farm Co. Ltd, the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent refutes the applicants' averment that their estranged advocates were unaware of the date of the delivery of the judgment. According to the applicants, the trial court sent out a notice of delivery of the judgment to all advocates and the applicants' advocates actually acknowledged receipt of the notice. Further, that a change of advocates is not a sufficient explanation for the delay in filing the notice of appeal. Additionally, the 1<sup>st</sup> respondent asserts that the applicants have no arguable appeal as the trial court properly rendered itself on all the issues raised at the trial. Mr. Yatich deposes that there has been a delay of 3 months, which, according to him is inordinate. It is his deposition that granting leave to the applicants to appeal out of time, will be greatly prejudiced to the 1<sup>st</sup> respondent as the 2<sup>nd</sup> applicant will continue occupying the suit property which is a coffee farm. The 1<sup>st</sup> respondent therefore urges that the application be dismissed for want of merit and for abusing the court process.
  5. This matter was heard in chambers on 17<sup>th</sup> November 2023. Kipkenda & Co. Advocates filed submissions dated 28<sup>th</sup> August 2023 for the applicants whereas Letangule & Co. Advocates filed submissions dated 25<sup>th</sup> August 2023 for the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent, Nakuru Land Registrar, and the 3<sup>rd</sup> respondent, the Attorney General, did not file any document in respect to the application.
  6. In support of the applicants' motion, their counsel referred to Rule 4 of the *Court of Appeal Rules* as well as the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 others* [2014] eKLR to point out the factors to be considered in an application such as the one before me. Counsel submitted that the delay was occasioned by the honest belief by the applicants' previous advocates that the learned trial Judge was on annual leave and the judgment would therefore not be delivered as earlier scheduled. Urging that the delay was excusable, counsel submitted that a delay of 4 days was not inordinate. In conclusion, counsel urged me to allow the application stating that no prejudice will be suffered by the 1<sup>st</sup> respondent if the applicants are allowed to appeal out of time.
  7. For the 1<sup>st</sup> respondent, counsel also relied on *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* (*supra*) to point out the underlying principles to be considered in an application for extension of time. Counsel reiterated the 1<sup>st</sup> respondent's opposition to the application stating that the advocates for the applicants were notified of the delivery of the impugned judgment but chose not to attend court. According to counsel, the filing of the notice of appeal and the instant application was an afterthought which is only meant to frustrate and prevent the members of the 1<sup>st</sup> respondent from enjoying the fruits of judgment. Counsel further submitted that the applicants were under an obligation to monitor the progress of their case and the allegation that the delay was due to their advocate's indolence is not sufficient reason to allow them to appeal out of time. In support of



the submission that blaming an advocate for the delay is not a good reason for extending time, counsel relied on *Habo Agencies Limited v. Wilfred Odhiambo Musingo* [2015] eKLR.

8. In further opposition to the application, counsel referred to the case of *Charles Karanja Kiiru v. Charles Gitbinji Muigwa* [2017] eKLR to urge that a party cannot seek extension of time to file a document which has already been illegally filed. In the end, counsel urged that the applicants do not deserve an extension of time and asked for the dismissal of their application with costs.
9. I have considered the pleadings and the submissions of the applicants and the 1<sup>st</sup> respondent. The main issue for determination in this application is whether the applicants have satisfied the conditions for the exercise of the discretionary jurisdiction under Rule 4 of the *Court of Appeal Rules, 2022* to extend time. In *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* (*supra*), the Supreme Court laid down the principles to aid judicious disposal of applications for extension of time as follows:
  - “This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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 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 a 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 respondents if the 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.”
10. Based on the stated principles, it follows that the questions to be answered in this matter are whether the applicants have satisfactorily explained the delay in filing the notice of appeal and whether the 1<sup>st</sup> respondent will suffer any prejudice in the event leave to appeal out of time is granted.
11. The judgment which the applicants intend to appeal was delivered on 8<sup>th</sup> May 2023. The applicants’ previous advocates on record secured a copy of the judgment on 23<sup>rd</sup> May 2023 while the time for lodging the notice of appeal had lapsed on 22<sup>nd</sup> May 2023. The applicants set in motion their quest to resuscitate their intention to appeal on 29<sup>th</sup> May 2023 when they moved the Court with an application seeking leave to file a notice of appeal out time. The initial period of delay was therefore 7 days. In my view, a delay of 7 days is not inordinate. However, as held by the Supreme Court in *County Executive of Kisumu v. County Government of Kisumu & 8 others* [2017] eKLR, the whole period of delay should be declared and sufficiently explained.
12. According to the applicants, the delay was occasioned by their former advocates who inadvertently believed that since the learned trial Judge was on annual leave, the judgment in their matter would



automatically stand deferred until his resumption of duty. In response to this assertion, counsel for the 1<sup>st</sup> respondent has submitted, and I agree with him, that mere allegation of indolence by counsel is not enough reason to allow an extension of time and that a litigant guilty of delay should offer an explanation as to the action taken in order to show that he did not condone or collude in the delay. Nevertheless, in the present case, the applicants' previous advocates and those now on record were prudent in the manner in which they responded to the delay. Once they learned of the delivery of the judgment, they promptly initiated the process of regularizing the notice of appeal filed out time. Further, upon realizing that they had a defective application for leave, counsel promptly withdrew the initial application and lodged the present one. In the circumstances, I find the prudence and candor on the part of the applicants and their counsel, as well as the explanation tendered for the delay, to be sufficient to warrant the grant of leave to appeal out of time.

13. With regard to the question as to whether the 1<sup>st</sup> respondent will be prejudiced if the application is allowed, I find that the 1<sup>st</sup> respondent has not demonstrated that it will suffer any prejudice. The application has been brought without delay and the only inconvenience the members of the 1<sup>st</sup> respondent may suffer is to wait a little longer to enjoy the fruits of the judgment, that is, if it is eventually held that they were indeed deserving of the victory they obtained at the trial. It is additionally observed that leave to appeal is not equivalent to stay of execution.
14. Finally, I wish to point out that the High Court decision of *Charles Karanja Kiiru v. Charles Gitbinji Muigwa* (*supra*) cited by counsel for the 1<sup>st</sup> respondent for the proposition that a party cannot seek extension of time to file a document which has already been irregularly filed does not align with the rules and jurisprudence of this Court. Rule 4 of the *Court of Appeal Rules, 2022* authorizes the extension of time "whether before or after the doing of the act."
15. In the end, I find the notice of motion dated 25<sup>th</sup> July 2023 to have merit and allow it on the following terms:
  - i. That the applicants' Notice of Appeal dated 23<sup>rd</sup> May 2023 and filed on 26<sup>th</sup> May 2023 is deemed as properly filed. The same to be served upon the respondents in accordance with the Rules of this Court.
  - ii. That the costs of this application shall abide the outcome of the intended appeal.
16. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2024**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

