



REPUBLIC OF KENYA



**KENYA LAW**  
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**Macharia & 2 others v Malewa Farmers Co-operative Society Ltd & 2 others (Civil Application E049 of 2021) [2024] KECA 59 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 59 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E049 OF 2021  
WK KORIR, JA  
FEBRUARY 2, 2024**

**BETWEEN**

**PETER KINYUA MACHARIA ..... 1<sup>ST</sup> APPLICANT  
DAUDI NDIRANGU MURAGE ..... 2<sup>ND</sup> APPLICANT  
GODFREY NDIRANGU MURIITHI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**MALEWA FARMERS CO-OPERATIVE SOCIETY LTD ..... 1<sup>ST</sup> RESPONDENT  
SETTLEMENT FUND TRUSTEES ..... 2<sup>ND</sup> RESPONDENT  
HON. 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 Nyabururu (Y.M. Angima, J.) dated 22nd July 2021) in ELC Appeal No. 11 of 2019)*

**RULING**

1. Peter Kinyua Macharia, Daudi Ndirangu Murage and Godfrey Ndirangu Muriithi, the respective 1<sup>st</sup> to 3<sup>rd</sup> applicants have brought the notice of motion dated 18<sup>th</sup> August 2021 pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act* and Rule 4 of the Court of Appeal Rules. Through the motion the applicants seek leave to file a notice of appeal out of time. They also pray that the costs of the application be in cause. The application is supported by the grounds on its face as well as those contained in the affidavit sworn on the date of the application by the 3<sup>rd</sup> applicant. Malewa Farmers' Co-operative Society Ltd, the Settlement Fund Trustees and the Attorney General are the respective 1<sup>st</sup> to 3<sup>rd</sup> respondents.



2. In support of their application, the applicants aver that they acted in person before the Environment and Land Court (E&LC) at Nyahururu where judgment was delivered on 22<sup>nd</sup> July 2021. Upon payment of the requisite court fees they were given a copy of the judgment on 30<sup>th</sup> July 2021. Thereafter, they convened a meeting on 6<sup>th</sup> August 2021 with the members of their association, Munyaka Gordon Cattle Dip, and it was resolved that they seek the services of an advocate. They depose that on 12<sup>th</sup> August 2021, they procured the services of the advocate on record but unfortunately the time for lodging the notice of appeal had lapsed on 5<sup>th</sup> August 2021. It is the applicants' deposition that they have already applied for the typed proceedings of the trial and will fast track the filing of the memorandum of the appeal if they are granted leave to appeal out of time. The applicants conclude by averring that the delay is not inordinate.

3. This application was not opposed by any of the respondents.

When the application came up for hearing before me in chambers on 17<sup>th</sup> November 2023, the law firm of Waichungo Martin & Co. Advocates had filed submissions dated 6<sup>th</sup> December 2021 in support of the applicants' motion. In the submissions, counsel referred to the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014]* eKLR to point out the applicable principles in an application for extension of time. Counsel conceded that whereas the applicants ought to have filed their notice of appeal by 5<sup>th</sup> August 2021, the present application was filed on 19<sup>th</sup> August 2021 occasioning a delay of 14 days. He, however, urged that the delay was not inordinate. Further, that in any event the application was not opposed. Counsel also submitted that the respondents will not be prejudiced if the applicants are allowed to pursue the intended appeal.

4. I have considered the applicants' motion, the supporting affidavit and the submissions. The principles to be considered in exercising the discretionary power to extend time were stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* (supra) as follows:

- “ 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.”

5. Guided by the above principles, it follows that this application turns on the resolution of the questions as to whether the applicants have tendered plausible reason or reasons for the delay and whether the respondents will suffer any prejudice if the application for leave to appeal out of time is allowed.



6. In this application, the decision the applicants intend to appeal was delivered on 22<sup>nd</sup> July 2021. At the trial the applicants were acting in person. The applicants obtained a copy of the judgment on 30<sup>th</sup> July 2021. It is not disputed that the period for filing the notice of appeal lapsed on the 5<sup>th</sup> August 2021 while the present application is dated 18<sup>th</sup> August 2021. The period of delay is therefore approximately 13 days. Although such a delay may not be deemed to be inordinate, it is trite law that that whole period of delay must be declared and explained to the satisfaction of the court (see *County Executive of Kisumu v County Government of Kisumu & 8 others [2017]* eKLR).
7. The question therefore is whether the applicants have tendered a satisfactory explanation for the delay of 13 days. According to the applicants, the delay was occasioned by the fact that they had to first convene a meeting on 6<sup>th</sup> August 2021 of all members of the Munyaka Gordon Cattle Dip whom they represented so as to chart a way forward regarding their next course of action. The applicants only managed to secure the services of an advocate on 12<sup>th</sup> August 2021 which was 7 days after the period for filing the notice of appeal had lapsed.
8. Whereas it would have been ideal for the applicants to file a notice of appeal immediately after securing a copy of the judgment on 30<sup>th</sup> July 2021, it is observed that they represented a group and any step to be taken needed authorization of the members of the group. It is also apparent that the applicants swiftly convened a meeting so that the members could agree on the action to be taken. Although parties who act in person bear no lesser responsibility when it comes to compliance with statutory timelines, it must be appreciated that the applicants may not have appreciated the strategic step of first filing a notice of appeal before asking the members whether they should proceed with the appeal. It is undoubtedly easier and less expensive to file a notice of appeal on time instead of seeking an extension of time for filing the notice of appeal. However, the instant application is not opposed and there is therefore nothing on record to upset the plausible reason given by the applicants for the delay in filing the notice of appeal. That being the case, the reasons advanced by the applicants, and the manner and speed with which they proceeded with their own in-house affairs cannot be disregarded. In my view, the explanation tendered is sufficient and excuses the applicants' slight delay.
9. As to whether the respondents will be prejudiced by the extension of time, I observe that the respondents have not placed anything before me to show that they will suffer prejudice. I therefore find that no prejudice will be suffered by the respondents if this application is allowed. Suffice to state that extension of time, just like the filing of a notice of appeal, does not act as stay of execution but rather offers an applicant an opportunity to exercise the right of appeal. In any case, the respondents will eventually have their day in court during the hearing of the intended appeal.
10. In conclusion, I find the notice of motion dated 18<sup>th</sup> August 2021 merited and allow it on the following terms:
  - i. The applicants are hereby granted leave to file and serve a notice of appeal in accordance with the Rules of this Court. Time will start running from the date of the delivery of this ruling; and
  - ii. The costs of the application shall be in accordance with the outcome of the intended appeal.

**DATED AND DELIVERED AT NAKURU THIS 2ND 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**

