



**Wanjhia v Alex Wainaina t/a John Commercial Agencies & 4 others (Civil Application E571 of 2023) [2024] KECA 333 (KLR) (28 March 2024) (Ruling)**

Neutral citation: [2024] KECA 333 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E571 OF 2023  
PO KIAGE, JA  
MARCH 28, 2024**

**BETWEEN**

**EDWARD JANSON MWANGI WANJHIA ..... APPLICANT**

**AND**

**ALEX WAINAINA T/A JOHN COMMERCIAL AGENCIES ... 1<sup>ST</sup> RESPONDENT  
JOHN ONYANGO T/A JOANS BEAUTY/EXCELLENT PHONE DEALERS  
EMBAKASI TASSIA STAGE (MPESA) ..... 2<sup>ND</sup> RESPONDENT  
IRENE KARANJA T/A GLORY MOTOR CYCLES ..... 3<sup>RD</sup> RESPONDENT  
EUNICE KANGETHE T/A EUNLITE AGENCIES ELECTRICLA HARDWARE  
STALL ..... 4<sup>TH</sup> RESPONDENT  
KENNEDY NYAPINDA T/A KEN INVESTMENT ..... 5<sup>TH</sup> RESPONDENT**

*(An application for execution of time to file the memorandum and record of appeal out of time against the judgment of the Environment and Land Court at Nairobi (E.K. Wabwoto, J.) dated 22nd December, 2022 in ELC Case No. 1018 of 2013)*

**RULING**

1. The applicant by the motion dated 29<sup>th</sup> November 2023 prays for leave to file the record of appeal out of time to challenge the judgment of the Environment and Land Court at Nairobi (Wabwoto, J.) delivered on 22<sup>nd</sup> December 2022. He states, in the grounds appearing on the face of the motion and in his own affidavit sworn on 29<sup>th</sup> November 2023, that he filed a notice of appeal dated 21<sup>st</sup> December 2022 on 22<sup>nd</sup> December 2022 through the law firm of Mola Kimosop & Njeru Advocates, then on record for him.



2. He then swears, at paragraph 15 of the affidavit as follows;

“That despite acceptance of instructions and incessant follow-ups by the appellant/applicant (sic) to the said firm of advocates to file the memorandum and record of appeal, they did not heed to the call leaving me with no choice but to change my legal representation on 6<sup>th</sup> November 2023, after approximately one (1) year stalemate.”

And he attached the notice of change of advocates.

3. He asserts that he has an arguable appeal as shown by the annexed draft memorandum of appeal, which he prays be deemed to be properly filed and opines that the delay herein is not so inordinate or so great as to be inexcusable.
4. The application is opposed with Alex Wainaina, the 1<sup>st</sup> respondent swearing a replying affidavit on 2<sup>nd</sup> February 2024 in which, among other averments, he pointed out that no documentary proof was given of the applicant’s alleged instructions to his former advocates to file a record of appeal or of his incessant follow ups on the same. He also charges that the applicant did not explain why the alleged stalemate between him and his then advocate took the inordinate period of one year, dismissing the explanation proffered as hollow. He also swears that the applicant’s inaction was due to negligence and recklessness and as his application is hopelessly out of time, it should not be granted.
5. An application for extension of time is a plea to a single judge of this Court to exercise discretion in favour of an applicant who has run afoul the timelines set by the Rules. That discretion is free and unfettered to the end that it is exercised to meet the ends of justice. It is, however, exercised on sound principles, which are settled, not on capricious or fanciful basis. Among the matters that a single judge considers are the length of delay; the reason or explanation for the delay; (possibly) the chances of the intended appeal succeeding, and the likelihood of grant of the applicant causing prejudice or harm to the respondent. As this is an equitable relief, the general conduct of the applicant both before and during pendency of the application is a relevant consideration. The Supreme Court in Nicholas Korir Arap Salat v Iebc & 7 Others [2014]eKLR authoritatively set out the guiding principles.
6. Each case has to be decided on its peculiar circumstances but it seems to me plain that that an applicant who seeks extension of time must show that the delay is not so long as to be inordinate in the circumstances of the case and, more critical, in my opinion, he needs to offer some plausible explanation for that delay. How else would a judge arrive at a fair and rational decision without some material being placed before him?
7. In the present case, there is no doubt that the delay, approaching a year, is on the face of it long and calls for explanation. Now, all I hear from the applicant is that there was some ‘stalemate’ between him and his former advocate. He claims that he gave instructions for the filing of the record and made some “incessant” follow up, but he does not say what form or shape that follow up took, nor does he provide any evidence of the same. It was not until 11 months later that he changed advocates, which begins the question: Why did it take that long? What was he doing all the while? Is this a case of the all-too-common instinct to blame one’s lawyers?
8. As the answers to these questions, posed by the 1<sup>st</sup> respondent in his replying affidavit, could only have come from the applicant, but did not forth-come, I am led to the inevitable conclusion that no plausible explanation has been placed before me to provide a hook upon which I am hang the picture of discretionary excusal.
9. In the result, I am unpersuaded that this application is merited, and I accordingly dismiss it with costs.



Order accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2024.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

Signed

Deputy Registrar

