



REPUBLIC OF KENYA



Kihara v Ajele (Returning Officer Naivasha Constituency) & 2 others (Civil Application E004 of 2020) [2024] KECA 285 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 285 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E004 OF 2020
LA ACHODE, JA
MARCH 8, 2024**

BETWEEN

JAYNE NJERI WANJIRU KIHARA APPLICANT

AND

ELECTORAL COMMISSION OF KENYA 1ST RESPONDENT

**CHRISTOPHER L AJELE (RETURNING OFFICER NAIVASHA
CONSTITUENCY) 2ND RESPONDENT**

JOHN MICHAEL NJENGA MUTUTHO 3RD RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal and /or the record of appeal out of time in the intended Appeal from Ruling/Orders of the High Court at Nakuru (Joel Ngugi. J) dated 19th December 2019) in Nakuru Election Petition No.2 of 2008)

RULING

1. Jayne Njeri Wanjiru Kihara (the applicant) filed this motion dated 10th July 2020 under Section 3A of the [Appellate Jurisdiction Act](#) and Rule 1(2), 4, and 41 of the [Court of Appeal Rules](#) 2010 seeking the substantive order:

“That leave be granted to the applicant to file and serve Notice of Appeal and/or the Notice of Appeal dated 6th July 2020, be deemed duly served and/or leave be granted to file and serve the Record of Appeal out of time against the Ruling/order/decree given by the Honourable Justice Joel Ngugi on 19th December 2019, in Nakuru High Court of Kenya election Petition No. 207 of 2008.”

Christopher L. Ajele (Returning Officer Naivasha Constituency), Electoral Commission of Kenya and John Michael Njenga Mututho are the 1st to 3rd respondent respectively.



2. The application is premised on the grounds on its face and the supporting affidavit of the even date sworn by the applicant.
3. The summary of her averment is that the applicant did not know the date of the impugned ruling. That they received notice dated 31st October 2019 indicating that the Ruling would be delivered on 11th November 2019. However, it was not delivered on the stated date, and no further notice was given. The applicant only learned of the impugned ruling when her goods were being proclaimed on 3rd July 2020. Regrettably, the time of filing and serving the Notice of Appeal and Record of Appeal had expired.
4. It is further deposed that due to the above circumstances, the delay in filing the appeal should be excused and the applicant be allowed to prosecute the appeal on merit. Also, that the intended appeal raises arguable points of law and has an overwhelming prospect of success.
5. A brief background of this application is that the 3rd respondent filed an application in the high court seeking for orders *inter alia* for the court to enter judgment in his favour and against the applicant for the Bill of Costs taxed by the Taxing Master at Kshs. 7,523,107/=, that the applicant failed to pay.
6. In response, the applicant filed a Preliminary Objection and Chamber Summons on the grounds that the firm of M/S Kithi & Company Advocates was not properly on record, and this vitiated the Bill of Costs filed and the entire taxation. Upon considering the matter before him, the learned Judge found the application by the 3rd respondent to be merited and allowed it. He dismissed the applicant's application with costs.
7. In response to the instant application, the 3rd respondent swore a replying affidavit on 22nd February 2023. He deposed that on the 24th June 2021 the applicant was granted leave to appeal but failed to appeal and by this application, she is seeking to have a second bite at the cherry. That by filing similar applications at the High Court and this Court, the applicant is forum shopping. As such, the application is *res-judicata*. Further, that the application has been orchestrated by the applicant to vex, embarrass, and unduly prejudice the respondent.
8. This application was canvassed by way of written submissions. The firm of M/S C.N. Kihara & Company Advocates filed written submissions dated 28th February 2023 on behalf of the applicant. While the firm of M/S Kithi & Company Advocates filed written submissions dated 23rd March 2023 on behalf of the 3rd respondent.
9. The applicant in his submissions reiterated the contents of his affidavit. In addition, he averred that the learned Judge in his subsequent ruling delivered on 24th June 2021 confirmed that the applicant counsel did not get notice of the impugned ruling and blame the operational inefficiencies on court staff. As such, the judge went ahead to grant the leave to appeal against his ruling. It was urged that in the circumstances, the delay to file and serve the Notice of Appeal and /or Record of Appeal within time is excusable.
10. In opposition, the 3rd respondent also reiterated the content of his replying affidavit and added that, the applicant has no audience before this Court having not complied with the directions given by the High Court on 24th June 2021 and has refused to pay the decretal sum. The 3rd respondent relied on the decision in *Patrick Libanda & 4 Others v Gedeon Kavisa & 3 Others* (2020) eKLR where the court emphasized that parties are required to obey court orders regardless of whether they favour them or not.
11. I have carefully perused the documents in support of the application and the ones against it. This application having been brought under Rule 4 of this *Court's Rules*, it must be considered in light of



the observations of this Court in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* Nairobi CA No. 255 of 1997, where it was held:

“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 the instant application, the applicant attached the Hearing Notice from the High Court dated 31st October 2019 indicating that the impugned ruling would be delivered on 11th November 2019. She averred that the impugned ruling was not delivered on the stated date, and she was not given notice of the next delivery date. She further averred that she only learned of the impugned ruling on the 3rd July 2020 when her goods were being proclaimed. She attached a proclamation order to the instant application. On 24th June 2021, she sought and was granted leave to appeal against the ruling by the trial Judge.
13. In rebuttal, the 3rd respondent urged that the applicant was given leave to appeal on 24th June 2021 and should have filed the appeal then. He argues that this application is res-judicata as it was filed and granted in the superior court. Further, that the applicant has no right of audience in this Court having not complied with the orders of the superior court.
14. The record before me indicates that in the application which was before the superior court and which was granted on 24th June 2021, the applicant sought leave to appeal. That was a different application from the one that is presently me seeking leave to appeal out of time. It therefore cannot be said to be res judicata. Also, the respondent has not convinced this court that the applicant has no right of audience before it.
15. Having stated the above, the first question to answer is whether the delay is excusable. The impugned ruling was delivered on 19th December 2023 without Notice. I am guided by this Court’s decision in *Kenya Airports Authority v Kabia & another* (Civil Application E079 of 2023) [2023] KECA 1549 (KLR) (8 December 2023) where it was observed that:

“Order 21 rule 1 of the *Civil Procedure Rules* provides that: In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates. Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

That notification is required whether the decision to be made is a ruling or judgement is not in doubt.

It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position expeditiously.” (Emphasis added).
16. This application was made on the 10th July 2020, that is, 7 days after the applicant learned of the impugned ruling. I am of the view that the delay is excusable, and the applicant filed this application expeditiously.



17. The next question to be answered is whether the respondent will be prejudiced if the orders sought are granted. The respondent has not demonstrated to this court that it would suffer prejudice if the orders sought are granted. While the applicant has urged the Court to balance the competing interests of the two parties herein. I find that it is in the interest of justice that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system.
18. Lastly, on whether the intended appeal is an arguable appeal. I find that the appeal is an arguable one. I am guided by this Court’s decision in *Muchungi Kiragu v James Muchungi Kiragu and another* (1998) eKLR where this Court observed:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”

19. Accordingly, the applicant is hereby granted leave to file and serve Notice of Appeal within 7 days from the date of the delivery of this ruling. Upon filing the Notice of Appeal, the applicant will have 60 days within which to file and serve the record of appeal. The applicant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

