



REPUBLIC OF KENYA



KENYA LAW
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**Kitulu v Law Society & another (Civil Application
E483 of 2023) [2024] KECA 247 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 247 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E483 OF 2023
S OLE KANTAI, JA
MARCH 8, 2024**

BETWEEN

MUEMA KITULU APPLICANT

AND

LAW SOCIETY 1ST RESPONDENT

JACINTA MUTHEU ANTHONY 2ND RESPONDENT

(Being an application for leave to file and serve a Record of Appeal out of time arising out of the decision of the High Court of Kenya (P. Nyamweya, J.) delivered on 3rd April 2019 in H.C. C JR No. 495 of 2017.)

RULING

1. I have noted from a record of the motion that my sister Ali- Aroni, JA. in a ruling delivered on 12th May, 2023 extended time for filing notice of appeal by 14th days; a notice of appeal dated 25th May, 2023 was lodged the next day 26th May, 2023 and the applicant Muema Kitulu through M/S Muema Kitulu & Company Advocates applied by letter dated 25th May, 2023 for proceedings and judgment to enable the filing of a record of appeal.
2. The applicant applies in the main in the motion before me brought under Rules 4, 42 and 47 of the [Court of Appeal Rules](#), 2010 (since replaced by the Court of Appeal Rules, 2022) that I be pleased to grant him leave to file record of appeal out of time and issue any other orders as may be necessary in the interest of justice. It is explained in grounds in support of the motion and in two affidavits of the applicant and of Grace D. Mwendwa, a clerk in the applicant's law firm, that leave to file notice of appeal was granted (as we have seen); that after filing that notice there was a follow-up of proceedings at the High Court; that on or about 22nd June, 2023 the said clerk in a routine check on progress of the proceedings found proceedings in the court file and was availed a copy by registry staff but that upon returning to the office she erroneously placed the typed proceedings in a different file and that



this only came to the attention of the lawyer on a routine file bring-up exercise. It is further explained that a record of appeal had been prepared awaiting certified copies of proceedings; that an application for Certificate of Delay had been rejected by the Deputy Registrar who refused to take responsibility for delay but that there was no letter from that office informing the applicant that

3. proceedings were ready for collection. The applicant is ready to file record of appeal immediately if leave to do so is granted but would suffer great prejudice if leave is refused. Various documents are attached to the application and the clerk explains in the affidavit that she was informed on 15th June, 2023 that proceedings were ready and were awaiting certification; that she was informed that an email would be sent by the court registry informing the law firm to collect proceedings but that no email was received. Upon a visit to the registry on 22nd June, 2023 she found proceedings ready for collection but there was no notification to collect the same; she anyway picked the proceedings but upon her return to the office she inadvertently placed them in a different file and in her own words:

" I deeply regret the error I made which can only attributed (sic) to pressure of work and an innocent mistake..."

4. Mubiike David, an Advocate of the High Court of Kenya practicing in the law firm of M/s Nyiha Mukoma & Company Advocates on record for the respondent in a replying affidavit depones that the application is vexatious, incompetent and an abuse of the process of the court:

" ...and the only thing that commends itself is to dismiss the said application with costs to the respondents..."

5. He says that the applicant has approached the Court under the wrong provisions of law; that the ruling intended to be appealed was delivered on 3rd April, 2019 and an appeal should have been filed within 60 days; that the applicant has not produced evidence that there was a follow-up for proceedings at the High Court; that the allegation that proceedings were collected and placed in the wrong file are false as are other allegations, the lawyer says that the applicant is not deserving of exercise of discretion in his favour and at paragraph 19 of the replying affidavit:

" 19. That the respondent will highly be prejudiced if the orders sought by the Applicant are granted as the Respondent will be denied the opportunity to enjoy the fruits of its judgment thereby subjecting it to financial hardships. The Applicant is evidently indolent and is coming before this Honourable Court with unclean hands and as such he's not deserving of the discretion of this Honourable Court in his favour."

6. I have seen and considered written submissions from both sides for which I am grateful.
7. The principles that govern an application for leave to extend time are old hat and were well set out in the oft-cited case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2 EA 231 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 stated 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."



8. Those principles have been confirmed in the later cases such as *Nicholas Kiptor Arap Korir vs. Independent Electoral Boundaries Commission & 7 Others* [2014] eKLR.
9. The applicant tells me in this application that after being granted leave to file notice of appeal out of time he proceeded to do so and also applied for proceedings to enable the filing of a Record of Appeal. According to the applicant his officer followed up on the proceedings but the same were not availed on time. Proceedings were availed when the clerk at the applicant's law firm stumbled upon them in the court file as the registry did not inform the law firm in the usual way that proceedings were ready for collection. As fate would have it the clerk collected proceedings but placed them in the wrong file and the applicant only came to find them in a routine file bring-up system. Such instances do occur in the course of human endeavor and, unlike the respondent, I am prepared to excuse the mistake.
10. I note that notice of appeal was lodged on 26th May, 2023; application for proceedings was by letter dated 25th May, 2023 and the application before me is dated 18th October, 2023. There is no inordinate delay. Ali-Aroni, JA. noted in the ruling of 12th May, 2023 that there were arguable points on appeal. I cannot see any prejudice that the respondent will suffer if I exercise my discretion in favour of the applicant. I do so by allowing the motion dated 18th October, 2023. Let the applicant file Record of appeal within ten (10) days of today. Costs of the motion will be in the appeal.

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

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

