



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kungu v Waiganjo & 3 others (Civil Application E025 of 2023)  
[2024] KECA 267 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 267 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E025 OF 2023  
FA OCHIENG, JA  
MARCH 8, 2024**

**BETWEEN**

**PAUL KAGIA KUNGU ..... APPLICANT**

**AND**

**BIDAN KAMAU WAIGANJO ..... 1<sup>ST</sup> RESPONDENT**

**PAUL KUNGU WAIGANJO ..... 2<sup>ND</sup> RESPONDENT**

**JOHN MUREITHI WAIGANJO ..... 3<sup>RD</sup> RESPONDENT**

**EUNICE WANJIRU WAINAINA ..... 4<sup>TH</sup> RESPONDENT**

*(An application for extension of time to file an appeal out of time from  
the decision of the Environment & Land Court at Nyahururu (Y.M.  
Angima, J.) dated 10th February, 2022 in ELC Case No. 385 of 2017)*

**RULING**

1. Before me is an application dated 10<sup>th</sup> March 2023. The applicant prays for orders that:
  - a) The court be pleased to grant the applicant leave to file an appeal out of time.
  - b) The court be pleased to extend the time within which to file a notice of appeal and lodge a memorandum of appeal.
  - c) The court be pleased to deem the draft notice of appeal annexed to the application as duly filed.
  - d) Costs abide the outcome of the appeal.”



2. The application is premised on the following grounds:
  - “ a) The delay was not deliberate, and it was not brought about by the applicant’s actions.
  - b) The applicant is a man of small means, a retired businessman with limited financial resources. His son who funded the trial suit is no longer in a position to do so hence the delay.
  - c) The delay is not inordinate and the applicant should not be made to suffer as a result.
  - d) The applicant is at the risk of losing half of his land in the event the application herein is not allowed.
  - e) The respondent will suffer no prejudice, and it is in the interest of justice that the application is allowed.”
3. The application was further supported by the applicant’s affidavit sworn on 10<sup>th</sup> March 2023 in which he reiterated the grounds on the face of the application.
4. In response, the respondents through the affidavit of Bedan Kamau Waiganjo sworn on 20<sup>th</sup> December 2022 stated that:
  - “ a) In the impugned judgment, the 1<sup>st</sup> respondent’s mother, (now deceased) was declared the proprietor of 3 acres of land parcel No. Laikipia/Ndindika 294, hereinafter, “the suit land”.
  - b) The 1<sup>st</sup> respondent was appointed as the legal administrator of the estate of the deceased on 22<sup>nd</sup> February 2021.
  - c) The applicant has not given a satisfactory reason why he should be granted leave to file an appeal out of time.
  - d) The applicant has not explained the inordinate delay in filing the application.
  - e) The application lacks merit and it should be dismissed with costs.”
5. Parties relied on their respective written submissions.
6. The applicant submitted that the period within which he was to lodge a notice of appeal has lapsed. Citing the case of *Peter Wanjobi Mathenge v Dancun Gichane Mathenge* [2013] eKLR, the applicant invoked this court’s discretion under rule 4 of the *Court of Appeal Rules*, 2022. The applicant pointed out that the reason for the delay was that he was 71 years old and did not know the timelines required to file a notice of appeal, and his then-counsel did not inform him of the said timelines. He also stated that he had financial constraints because he was a retired businessman and his son who was paying legal fees could no longer do so due to the effects of the Covid-19 pandemic. The applicant relied on the case of *Peter Wafula v Mansukhalal Jesang Maru* [2020] eKLR in support of his submission that the delay was not inordinate in the light of the reasons given.
7. The applicant submitted further that he had an arguable appeal based on the grounds in the draft memorandum of appeal. The applicant was of the view that since some of the respondents were already in occupation of the suit land, they did not stand to suffer any prejudice if the orders sought were granted.



8. Opposing the application, the respondents relied on the case of *Muringa Co. Limited v Arch-Diocese of Nairobi Registered Trustees* [2020] eKLR in submitting that financial constraint as cited by the applicant is not a justifiable reason for the delay as it costs less to file a notice of appeal compared to filing an application for an extension of time. They contended that the applicant had 5 acres of productive land and that he was able to engage two law firms hence he cannot claim that he had financial difficulties.
9. The respondents pointed out that the applicant had filed a similar application in Nakuru Civil Application E083 of 2022 in which he cited lack of notice as the reason for the delay. They were of the view that the issue of finances was an afterthought. In any event, the court delivered a ruling in Nakuru Civil Application E083 of 2022, and granting the prayers sought in the instant application would amount to the court sitting on appeal of its own decision. They submitted that the application lacks merit and it ought to be dismissed with costs.
10. I have carefully considered the application, grounds, and affidavit in support thereof, as well as the replying affidavit, written submissions, authorities cited, and the law. The issue for determination is whether the application is deserving of the orders sought.
11. Rule 4 of the Court of Appeal Rules does not outline the factors that the court should consider when evaluating an application for an extension of time. However, the courts have developed appropriate principles to ensure a fair decision is made based on the circumstances of each case. The Rule states that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
12. In the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, the court held that:

“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.”
13. The issues I am called upon to consider are both discretionary and non-exhaustive as was addressed by this Court in the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR where the court rendered itself as follows:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”



14. In the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, (supra), the court observed as follows:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

15. It follows therefore that there is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant to leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

16. The applicant conceded that he did not file a notice of appeal within 14 days. The delay in filing the present application was about 13 months. The applicant attributed the delay in filing a notice of appeal to financial constraints and not being aware of such timelines; and also because of being unaware of the date when the impugned judgment was delivered. In the case of *Joseph Maina Njoroge & 2 Others v Paul Chege Mubabi* [2007] eKLR, the main and only reason for the delay in filing the intended appeal on time was that the applicants, jointly and severally, were financially unable to raise the money required for an advocate to represent them in filing and prosecuting the intended appeal. The Court in declining the application stated that:

“Rule 112 of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security.”

17. The applicant has not demonstrated that he moved the court to be exempt from paying legal fees. In *Francis Mwai Karani v Robert Mwai Karani*, Civil Application No. NAI. 246 of 2006, the learned Judge held that:

“Lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of rule 112 of this Courts Rules. I do not accept the applicant’s explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”



18. In the result, I find that the applicant has not advanced any plausible reason for the delay in filing the present application and also in filing the notice of appeal.
19. As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. In *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”
20. The applicant has also not demonstrated the prejudice he will be likely to suffer in the event the application is not allowed, the respondents have also not established the prejudice they will suffer if the application is allowed. In the circumstances, no prejudice will be occasioned to either party.
21. However, as the applicant has not provided a plausible reason for the delay, I hold the considered view that the lack of prejudice to the respondents cannot be reason enough to allow the applicant to appeal out of time.
22. In the result, I find that the application lacks merit and it is hereby dismissed with costs to the respondents.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 8<sup>TH</sup> DAY OF MARCH, 2024.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

