



REPUBLIC OF KENYA



**Mosonik v Mariandany (Civil Application E032 of 2023)
[2024] KECA 264 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 264 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E032 OF 2023
FA OCHIENG, JA
MARCH 8, 2024**

BETWEEN

EMILY MOSONIK APPLICANT

AND

JOHNSTONE KIMUTAI MARIANDANY RESPONDENT

(An application for extension of time to file an appeal out of time from the decision of the Environment & Land Court of Kenya at Nakuru (D.O. Ohungo, J.) dated 28th February 2022 in ELC Case No. 595 OF 2016)

RULING

1. Before me is an application dated 22nd 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 draft notice of appeal be deemed as properly filed.
 - c. Costs be provided for.”
2. The application is premised on the following grounds:
 - a) The respondent did not communicate the terms of the judgment to the applicant.
 - b. The applicant has never been served with the decree arising from the impugned judgment.
 - c. The applicant was to vacate the suit land within six (6) months of the impugned judgment.
 - b. The court did not email the impugned judgment to the applicant.
 - e. The applicant became aware of the judgment when the respondent filed an application seeking police assistance.



- f. The applicant is desirous of filing an appeal but cannot do so without leave of court.
- g. It is in the interest of justice that the application is allowed as it involves a land dispute.
- h. The applicant has been in occupation of the suit land since 1996.”
3. The application was further supported by the applicant’s affidavit sworn on 22nd March 2023 in which she reiterated the grounds on the face of the application.
4. There was no response from the respondent.
5. The applicant relied on her written submissions, which were very poetic for instance, she reminded us that “the soil kills; grabbed land destroys ones generation even upto the fourth generation.”
6. I have carefully considered the application; grounds; the affidavit in support thereof; the written submissions; and the law. The issue for determination is whether the application is deserving of the orders sought.
7. Rule 4 of the *Court of Appeal Rules* does not specify the factors that need to be considered while making an application for an extension of time. However, the court has devised various principles that can be applied to ensure a just decision in 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.”
8. In the case of *LeoSilaMutisovHellen WangariMwangi* [1999] 2 EA 231, the court stated 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.”
9. The matters that I am required to address are discretionary and are not limited; as was addressed by this Court in the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR where the court held that:
- “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.”



10. In the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 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.”

11. It is well-known that there are no legally established maximum or minimum time limits for granting leave. However, if the delay is excessively long and unreasonable, the applicant will likely be denied the leave. Additionally, the reasons behind the delay must be rational and convincing. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“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.”

12. It is common ground that the applicant did not file a notice of appeal within 14 days as provided for by the law. The delay in filing the present application was about 13 months.

13. The applicant attributed the delay in filing a notice of appeal to being unaware of the date when the impugned judgment was delivered, the respondent failing to serve her with the judgment, and the court failing to email her the judgment. In the case of *Bi-Mach Engineers Limited v James Kaboro Mwangi* [2011] eKLR the court held inter alia that:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”

14. The applicant was represented by counsel before the trial court. She went to court for the hearing of the suit, testified, and was given a date for judgment. It was not the duty of the respondent to notify the applicant of the judgment date as she was in court with her counsel when the date was given. In any event, the applicant ought to have exercised due diligence and followed up on the matter, to know the outcome.

15. In the result, I find that the applicant has not advanced any plausible reason for the delay in filing the present application and the notice of appeal.



16. 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’.”

17. Both the applicant and respondent have not proven any potential harm that they will experience if the application is either accepted or rejected. Hence, no prejudice will be caused to either of them.

18. In the result, I find that the application lacks merit and hereby dismiss it with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 8TH 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

