



Trustees of Legions of Mary & 2 others v Ngimichurus & another (Civil Application E033 of 2023) [2024] KECA 265 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 265 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E033 OF 2023
FA OCHIENG, JA
MARCH 8, 2024**

BETWEEN

THE BISHOP LEGIONS OF MARY 1ST APPLICANT

THE TRUSTEES OF LEGIONS OF MARY 2ND APPLICANT

THE BISHOP LEGIONS OF MARY 3RD APPLICANT

AND

JOSEPH KEBO NGIMICHURUS 1ST RESPONDENT

JOSEPH KEBO NGIMICHURUS 2ND RESPONDENT

(An application for extension of time to file a notice of appeal and record of appeal out of time from the decision of the Environment & Land Court at Kitale, (Dr. IUR Fred Nyagaka, J.) dated 29th March 2023 in ELC Appeal No. 5 (E004) of 2021)

RULING

1. Before me is an application dated 4th July 2023. The applicant prays for orders that:

- “ a) The court be pleased to extend the time to allow the applicants to file and serve a notice of appeal and record of appeal out of time.
- b) Costs abide the outcome of the appeal.”

2. The application is premised on the following grounds:

- “ a) Judgment was delivered without notice to the applicants or their advocates.
- b) The applicants became aware of the judgment on 5th June 2023, and by then the time for lodging an appeal had lapsed.



- c) The applicants were aggrieved by the judgment, yet they have been denied their right of appeal by the failure of the court to give notice of judgment.
 - d) The intended appeal raises pertinent issues of law which ought to be adjudicated upon.
 - e) The application has been filed without delay and in good faith.
 - f) The applicants will be prejudiced if the application is not allowed.”
3. The application was further supported by the affidavit of Jeremiah Ongeru Samba, learned counsel, and sworn on 4th July 2023. Counsel stated that:
- e) The judgment was sent to his firm’s email on 5th June 2023 after a follow-up with the registry. Upon perusal of the judgment, he noticed that the judgment had been delivered on 29th March 2023.
 - f) The delay in filing the -notice of appeal was not deliberate.
 - g) The respondent will suffer no prejudice if the application is allowed.”
4. In response, the respondent through the affidavit of his counsel, Joseph C.K. Cheptarus sworn on 31st July 2023 stated that:
- “ a) Parties were informed on 6th February 2023 that judgment would be delivered via electronic mail on 29th March 2023.
 - b) Judgment was delivered on the said date as directed by the court and an email sent to them.
 - c) He learned of the present application through the court’s letter dated 7th July 2023 as his client had not been served with the application.
 - d) All the parties including the applicants received the judgment electronically on 29th March 2023.
 - e) The delay in making inquiries on the judgment from March to May 2023 was deliberately caused by the applicants.
 - f) The application is in bad faith to deny the respondent the enjoyment of the judgment.
 - g) The respondent will suffer irreparable loss due to the long history of the case (which began in 2007) if the application is allowed.”
5. Parties relied on their respective written submissions.
6. Citing the cases of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 and *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2015] eKLR, the applicants invoked this Court’s discretion and jurisdiction under Rule 4 of the Court of Appeal Rules.
7. They pointed out that the court had in the case of *Muchungi Kiragu v James Muchungi Kiragu & Another* [1998] eKLR granted an extension of time on the basis that the intended appeal was arguable. They submitted that their appeal raises weighty issues of law and fact with high chances of success.



8. The applicants emphasized that they had a right of appeal, and relied on the case of *Vaisbya Stone Suppliers Co. Ltd v RSR Stone* (2006) Limited [2020] eKLR to buttress this submission.
9. Opposing the application, the respondent submitted that allowing the application would cause him undue prejudice. He relied on the cases of *Imperial Bank Ltd (in receivership) & Another v Alnasir Popat & 18 Others* [2018] eKLR and *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR in support of this submission.
10. I have carefully considered the application, grounds, and affidavit in support thereof, 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 specify 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:
 12. In the case of *Leo Sila Mutiso v Hellen Wangari Mwangi*, (*supra*), 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, (possible) 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 applicants conceded that he did not file a notice of appeal within 14 days. The applicants attributed the delay in filing a notice of appeal to the failure of the court to notify them when the judgment was delivered. The respondent challenged this assertion and stated that judgment had been sent to all the parties via email. In the case of *Mukabi v Mukabi* [2004] eKLR, the court stated as follows:

“The Court has unfettered discretion in an application such as the one before me, it having been brought under rule 4 of the Court of Appeal Rules. It is now settled law, however, that such discretion must be exercised judiciously upon reason. In this application, the main explanation given for the delay is that the file got lost immediately after the applicant had applied for copies of proceedings and judgment. That explanation has not been challenged and there is no replying affidavit filed by the respondent. There are exhibits namely correspondences between the applicant, his counsel and the then Chief Justice, and the Registrar on the matter, as I have already stated hereinabove.”

17. As the respondent stated that the judgment was emailed to all parties, including the applicant, I would have expected him to provide the court with the requisite proof. However, the respondent failed to provide proof that the applicant was provided with the judgment through email or at all.

18. It follows therefore that since the respondent has not controverted the applicants’ assertion concerning non-service of the judgment on 29th March 2023, the logical assumption is that the applicants only became aware of the judgment on 5th June 2023. In any event, the respondent’s annexure “JCKC2” shows that the judgment was only sent to the respondent.

19. In the result, I find that the applicants have advanced a plausible reason for the delay in filing the present application and the notice of appeal.

20. 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.”

21. The respondent has not demonstrated the prejudice he will suffer if the application is allowed because merely stating that litigation has taken long is not sufficient. In the circumstances, I find that no prejudice will be occasioned to the respondent if the applicants are granted the opportunity to appeal.

22. In the result, I find that the application has merit and it is hereby allowed.

23. The applicants are allowed seven (7) days to file and serve the notice of appeal. The record of appeal shall be filed and served within 30 days of the notice of appeal.



24. Costs of the application shall abide by the outcome of the substantive appeal. If for any reason the appeal is not successful, the costs of this application shall stand awarded to the respondent. On the other hand, if the appeal is successful, the costs of this application shall stand awarded to the applicants.

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

