



Tengeye & another v County Government of Bungoma & 4 others (Civil Application E116 of 2023) [2024] KECA 397 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KECA 397 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E116 OF 2023
HA OMONDI, JA
APRIL 19, 2024**

BETWEEN

WILLIAM MAKOKHA TENGEYE 1ST APPLICANT

FRIDAH KHAOMA NYONGESA 2ND APPLICANT

AND

COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION 2ND RESPONDENT

NG-CDF KIMILILI CONSTITUENCY 3RD RESPONDENT

ATTORNEY GENERAL REPUBLIC OF KENYA 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

(Being an application for extension of time to lodge Appeal from the decision of the Environment and Land Court (B. N. Olao, J.) dated 2nd March 2023 in ELC Petition E002 of 2002)

RULING

1. The application dated 23rd August 2023, brought pursuant to Rule 4 Court of Appeal Rules, 2010 seeks that the time within which to file and serve the notice of appeal, record of appeal and memorandum of appeal be extended; the Notice of Appeal filed on 7th March 2023 be deemed as properly filed; and costs abide the outcome of the intended appeal. The application is supported by a supporting affidavit of even date sworn by Fridah Nyongesa.
2. The background to this application begins with the applicants filing a petition Bungoma No. E002 of 2022 before the Environment and Land Court (Olao, J.), in which they sought compensation for land compulsorily acquired from their late father, Nicasio Tengenye Makokha, by the colonial government for purposes of setting up several government institutions within Kimilili Town. The



learned trial judge who was then on transfer to Busia County, indicated that judgment would be on notice. Eventually, judgment dismissing the claim, was entered on 2nd March 2023 by electronic mail.

3. Aggrieved by the outcome, the applicants lodged the Notice of Appeal on 3rd March 2023; and served it on counsel for the respondents on two occasions 5th and 12th April 2023. That the applicants paid for and requested for typed and certified proceedings on 7th March 2023; but this letter was only received on 3rd April 2023, as the original file was still in Busia; and a skeleton file had to be constructed.
4. That the applicant has faced several challenges in receiving the said typed proceedings to prepare the record of appeal and they were only obtained on 14th September 2023, courtesy of the trial judge having been transferred to Busia before delivery of judgment. The applicants explain that the delay in filing the record was not deliberate, but was as a result of not being able to procure the proceedings in a timely manner, following as the transfer of the learned judge who had the file in Busia, yet administratively, all activities relating to availing the proceedings could only be dealt with administratively in Bungoma. Once the file got back to Bungoma, there was a further delay as the typing had to join the waiting queue at the registry.
5. Due to the foregoing events, the applicants were unable to file and serve the record of appeal and memorandum of appeal within the required 60 days, leading to the present application for extension of time. I take note that there is no Replying Affidavit on record, or written submissions filed by the respondents.
6. Rule 4 of the *Court of Appeal Rules* gives this Court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso vs Rose Wangari Mwangi* Civil Application No. Nai. 255/97 (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka vs Waruguru Kithaki & 2 Others* (2013) eKLR.
7. In the case *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No.190 of 2019 observed that:

“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.”
8. The delay in this instance was for a period of six months. What was the reason? From the trail of activities, the applicants followed up on the preparations, but an odd cluster of administrative hurdles beyond their control inhibited their progress. There is no maximum or minimum period of delay set out under the law, but, the reason or reasons for the delay must be reasonable and plausible. In *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.”

9. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat vs IEBC* [2014] eKLR sets down these principles as follows: -
- i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
 - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
 - iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the Respondent if extension is granted.
 - vi. Whether the application has been brought without undue delay.
 - vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of *Julius Kamau Kitbeka* (*supra*) is whether prima facie the intended Appeal/Appeal has chances of success or is a mere frivolity.

10. From the forgoing, I find that the applicant has explained the cause of delay in serving the record of appeal and memorandum of appeal. I note that the Notice of Appeal and the letter bespeaking proceedings prepared timeously, but could not be filed on time due to the administrative hiccups.
11. This court takes judicial notice of the fact that there are times when proceedings are delayed due to the volume of work pending typing as compared to the hands available to do the work. The applicants have also annexed letters to the supporting affidavit evidencing the request for the typed proceedings as well as the follow up on the same.
12. In my view I think what the applicants have presented cannot be wished away as being flippant arguments. In any event the respondent has not approached the court to have the appeal struck out for want of filing the record of appeal within the prescribed time.
13. It is noted that the applicants are now in possession of the certified typed copies and can file the record as soon as is possible granted permission from this court.
14. The applicants have met and satisfied the principles set out for this Court to exercise its discretion in his favor and grant the extension. The delay in serving the Record of Appeal has been explained satisfactorily for this court to exercise its discretion in the applicants' favor. I make the following orders:
- i. That the time within which to serve the respondents with the Notice of Appeal; the Record of Appeal and the Memorandum of Appeal be and is hereby enlarged;
 - ii. That the Notice of Appeal filed on 7th March 2023 be deemed as properly filed shall be served on all the respondents within 7 (seven) days from the date of this ruling.
 - iii. Costs of this application to abide by the outcome of the appeal.

DATED AND DELIVERED AT KISUMU THIS 19TH, DAY OF APRIL, 2024.



H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

