



ACL v WKL; Kenya Electricity Transmission Company Ltd (Interested Party) (Civil Application E105 of 2023) [2024] KECA 387 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 387 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E105 OF 2023**

**WK KORIR, JA
APRIL 12, 2024**

BETWEEN

ACL APPLICANT

AND

WKL RESPONDENT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LTD INTERESTED PARTY

(Being an application for extension of time to file a notice of appeal and appeal out of time to the decision of the High Court at Nakuru (M. Matheka, J.) dated 30th March 2023 in Matrimonial Property Cause 7 of 2016)

RULING

1. ACL , the applicant herein, has moved the Court through the notice of motion dated 22nd November 2023 brought under sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 4, 44 & 45 of the [Court of Appeal Rules](#), 2022. She seeks an order of extension of time for filing a notice of appeal and the record of appeal against the judgment delivered on 30th March 2023 by M. Matheka, J. in Nakuru High Court Matrimonial Cause No. 7 of 2016. She also prays that the costs of the application be borne by the respondent, WKL . The application is premised on the grounds on its face as well as those deposed upon in the applicant's affidavit sworn on 22nd November 2023.
2. The applicant's case is that being dissatisfied with the judgment of the trial court, she instructed her erstwhile advocates to lodge an appeal against it and request for typed proceedings but the instructions were not acted upon. She avers that she only got to know of the failure on the part of her former advocates on 21st November 2023 when a surveyor showed her a consent letter signed by her advocates



- paving way for the execution of the decree arising out of the judgment. She places the blame for the delay at the doorstep of her erstwhile advocates. She avers that the intended appeal is arguable and that she will suffer prejudice if leave is not granted.
3. The respondent opposed the application and averred that the exclusion of all the interested parties from these proceedings by the applicant is prejudicial to the rights of those parties. He deposes that the application has been brought after an inordinate delay of 225 days. The respondent also opposed the application on the grounds that the applicant did not tender any evidence to prove that she was not indolent. Further, that the applicant's former advocate bears no blame as he was always in attendance at the trial court during the post-judgment proceedings and even recorded a consent. According to the respondent, the applicant is not deserving of the exercise of this Court's discretion in her favour having known of the consent in May 2023 only to file this application in November 2023. Finally, the respondent deposed that the intended appeal is not arguable and consequently urged the Court to dismiss the application with costs.
 4. Likewise, the interested party, Kenya Electricity Transmission Company Ltd, filed an affidavit sworn on 22nd December 2023 by Lydia Wanja in opposition to the application. The interested party opposed the application on the grounds that no sufficient reasons were advanced by the applicant to explain the delay of about 7 months and 20 days. Further, that the suit property no longer exists and the ruling declaring that the suit property was a matrimonial property was never appealed hence the intended appeal is moot and raises no arguable issues. The interested party consequently prays for the dismissal of the application.
 5. When this matter came up for hearing on 9th February 2023, all parties had filed their written submissions. The firm of Odhiambo Opar & Co. Advocates filed submissions dated 13th December 2023 urging the applicant's case. Counsel referred to *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR to highlight the principles that guide courts in determining applications for extension of time. Counsel submitted that the applicant has tendered sufficient reasons to explain the failure to lodge the notice of appeal within the prescribed time and that the mistake of counsel should not be visited upon her. To buttress these arguments, counsel relied on the case of *Catherine Njoguini Kenya & 2 others v. Commercial Bank of Africa Ltd*, Nai Civ. Appl. No. 366 of 2009. It was also counsel's submission that the intended appeal is arguable. In conclusion, counsel urged the Court to invoke its inherent powers and allow the applicant to exercise her right of appeal.
 6. The firm of Kiplenge, Andama & Makau Advocates filed submissions dated 4th January 2024 on behalf of the respondent. In a nutshell, counsel reiterated the averments in the respondent's replying affidavit in opposition to the application. Counsel submitted that no plausible explanation has been tendered by the applicant to warrant enlargement of time. Further, that the intended appeal does not raise any arguable issues. In the end, counsel urged that the application be dismissed with costs.
 7. Similarly, learned counsel Walter Akwabi Chiboli for the interested party filed submissions dated 23rd January 2024 in opposition to the application. Counsel referred to the decision in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR to point out the principles underpinning the exercise of discretion to extend time. Counsel submitted that the applicant has not tendered any plausible reasons for the delay hence an order of enlargement of time should not issue. It was also counsel's submission that the intended appeal does not raise any arguable issues and that the subject matter had already been rendered moot. Counsel therefore prayed that the application be dismissed with costs.



8. In determining an application such as the one before me, I am guided by certain well-established principles. Some of those principles were expressed in *Imperial Bank Limited (In Receivership) & Another v. Alnashir Popat & 18 others* [2018] eKLR as follows:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal.”

9. The present application is omnibus as it seeks disparate orders. However, the only jurisdiction available to me is that of enlargement of time and I will therefore restrict myself to determining the prayer for enlargement of time. In determining this application, the issues arising are whether the applicant has sufficiently explained the delay and whether the respondent will be prejudiced if the application is allowed.

10. The impugned judgment was delivered on 30th March 2023.

Under Rule 77(2) of the *Court of Appeal Rules*, 2022, the applicant ought to have lodged the notice of appeal by 14th April 2023 being the last of the fourteen days from the date the decision intended to be appealed was delivered. The present application is dated 22nd November 2023 hence the delay is of about 220 days. The applicant blamed her former advocates for the delay. She averred that she gave instructions to them to appeal against the impugned decision and only came to learn of the failure of her former advocates on 21st November 2023 when she was confronted by surveyors who showed her a consent entered between her advocates and the respondent’s advocates to pave way for the execution of the impugned decision.

11. On mistakes of counsel, the Court has previously in *Mohamed Shally Sese (Shah Sese) v. Fulson Company Ltd & another* [2006] eKLR held that:

“A litigant must be vigilant in the conduct of his affairs and the applicant should have made efforts to find out the progress of his case from his advocate. After all, extension of time is essentially equitable [See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. NAI. 255 of 1997] and equity aids the vigilant and not the indolent.”

12. Similarly, in *Sokoro Savings and Credit Co-operative Society Ltd v. Mwamburi* [2023] KECA 381 (KLR) the Court held that:

“Mere allegation of counsel’s indolence is not enough to warrant grant of extension of time. It must also be seen that parties on their part were not careless...”

13. In this application, I do not find the applicant’s averments plausible. The applicant has not placed before me any proof to show that she was not indolent. There is also no evidence that the applicant was keen on pursuing her intended appeal or that she ever followed up on her instructions to her erstwhile



advocates. The closest the applicant has attempted to prove that she was not indolent is through the averment at paragraph 5 of her supporting affidavit that she kept following up on the matter with her previous advocates who assured her that everything was under control. However, within the same paragraph she discloses that she was aware that the title deed to the suit property was set to be released and that her erstwhile advocates were in communication with the respondent's advocates. This was upon her visit to the offices of her former advocates on 30th May 2023. In my view, the events of 30th May 2023 can only lead to the conclusion that the applicant was aware of the post-judgment proceedings or that she was indolent. Additionally, were the applicant keen and intent on following up on her appeal, she would have known of the alleged mistake of her previous counsel on that date or soon thereafter. From the prevailing circumstances, I find that the applicant is guilty of delay and has not proffered plausible reasons for the delay.

14. Counsel also urged that the intended appeal is arguable. In this regard, it is my view that timelines and timeliness are the bedrock of the administration of justice and a good appeal remains just that unless the same is filed within the prescribed period. The fact that an appeal is arguable though a factor to be taken into account in the determination of an application for extension of time cannot supersede the need to provide plausible reasons for any delay. Without a satisfactory explanation for the delay, an arguable appeal cannot automatically result in the extension of time. Thus, in *Reliance Bank Ltd (In Liquidation) v. Grandways Ventures Ltd & 2 Others & Another* (2007) eKLR the Court stated that:

“It may well be that the Applicant has a good appeal but even good appeals must be filed within the prescribed periods and when that is not done, some explanation must be given in explanation of the delay.”

15. In the end, this application lacks merit. This Court cannot therefore exercise its discretion as prayed by the applicant for want of satisfactory reasons to explain the delay in the filing of the notice of appeal. The notice of motion dated 22nd November 2023 is hereby dismissed. Considering the relationship between the applicant and the respondent, the parties are directed to meet their own costs in respect to the application.

16. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

