



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Bogonko v Ndege (Civil Application E002 of 2021)  
[2024] KECA 351 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 351 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E002 OF 2021**

**KI LAIBUTA, JA**

**APRIL 12, 2024**

**BETWEEN**

**JOSEPH NYANGAU BOGONKO ..... APPLICANT**

**AND**

**PENINAH NDEGE ..... RESPONDENT**

*(Being an application for extension of time to appeal out of time from the Judgment and Decree of the Environment and Land Court of Kenya at Machakos (C. Kariuki, J.) delivered on 20th February 2015 in ELC Case No. 17 of 2011 Currently Kajiado ELC Case No. 113 of 2018)*

**RULING**

1. I render this ruling with deep regret that it should come so late in the day despite the fact that it was ready for delivery the day after placement before me for determination on 15<sup>th</sup> February 2023, but for the inadvertent misplacement and the consequent omission from the batch of decisions scheduled for delivery on the due date. For this I wish to extend to the parties the Court's sincere apologies on our own behalf and on behalf of the Registrar. Indeed, when the reigning imperfections of the human race knock at one's door bearing gifts robed in administrative infractions, none can rightfully claim perfection in this system of things.
2. When the applicant's Notice of Motion dated 10<sup>th</sup> March 2021 was placed before me for determination on 15<sup>th</sup> February 2023, it was accompanied by the applicant's supporting affidavit sworn on 10<sup>th</sup> March 2021 essentially deposing to the grounds on which it was anchored, namely: that the impugned judgment was delivered on 20<sup>th</sup> February 2015 dismissing the respondent's suit and the applicant's counterclaim; that several applications (whose nature is undisclosed in the record as put to me) ensued thereby delaying preparation of the requisite proceedings to facilitate the intended appeal; that, when the proceedings were availed (also on an undisclosed date), the country was hit by the Corona virus pandemic, which resulted in partial lockdown of courts and court operations; that, upon re-opening



- of the courts, the applicant had to source for funds to instruct his advocates, and was therefore unable to file his appeal on time; and that the respondent will not suffer any prejudice as, the court having dismissed his case, he has never moved on appeal.
3. It is on the grounds aforesaid that the applicant sought, inter alia, that leave be granted to appeal out of time against the judgment and decree of the ELC (Charles Kariuki, j.) delivered on 20<sup>th</sup> February 2015 in ELC Case No. 17 of 2011 (now Kajiado ELC Case No. 113 of 2018); and that the costs of the Motion abide the outcome of the intended appeal.
  4. Learned counsel for the applicant, M/s. Odawa & Company, filed written submissions dated 6<sup>th</sup> February 2023 citing no judicial authorities. According to counsel, the delay in lodging the appeal was occasioned by transfer of the suit from Machakos to the Ngong Circuit Court and, finally, to the ELC at Kajiado as ELC No. 113 of 20113; and that, if leave to appeal out of time is not granted, the applicant will suffer substantial loss as he will have no opportunity to get judicial recognition of his Agreement for sale of the suit property.
  5. Though duly served with the hearing notice on 3<sup>rd</sup> February 2023, the respondent did not file any affidavit in reply or submissions in opposition to the applicant's Motion.
  6. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.
  7. The four basic factors to be considered in exercise of the Court's discretion in determination of applications under rule 4 were enunciated in *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA p231. In determining whether to extend time, the Court takes into account: (i) the length of the delay; (ii) the reason for the delay; (iii) the chances of the appeal succeeding if the application is granted; and (iv) the degree of prejudice to the respondent if the application is granted. In principle, the discretion is unfettered, and there is no limit to the number of factors the court would consider so long as they are relevant.
  8. In the same vein, the Court of Appeal in *Fakir Mohammed vs. Joseph Mugambi and two Others* [2005] eKLR considered additional factors that may be considered in appropriate cases, namely: the effect of delay on public administration; the importance of compliance with time limits; the resources of the parties; and whether the matter raises issues of public importance, all of which the Court viewed as relevant, but not exhaustive.
  9. The Applicant's Motion for extension of time to file an appeal turns on the four basic factors enunciated in *Leo Sila Mutiso vs. Helen Wangari Mwangi* (supra). It is instructive, though, that I am mandated to exercise my discretion pursuant to rule 4 of this Court's Rules subject, however, to being satisfied that a notice of appeal, which is a jurisdictional pre-requisite, has been duly lodged. Only then do I have the jurisdiction to consider whether the applicant's intended appeal is arguable with a probability of success; the length of the delay in lodging the appeal; whether the delay has been sufficiently explained; and whether the respondent would be unduly prejudiced by grant of the orders sought.
  10. It is noteworthy that, apart from a copy of the proceedings, the impugned judgment, the decree and a certificate of delay issued on 6<sup>th</sup> February 2020, the record as put to me does not contain the requisite notice of appeal on the basis of which this Court assumes jurisdiction.



11. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in *University of Eldoret and another vs. Hosea Sitienei and three others* [2020] eKLR observed at para 36:
 

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”
12. On the authority of the University of Eldoret and Sitienei case (ibid), it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to express its intention to appeal. Citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 7 Others* [2014] eKLR, this Court had this to say in *Apungu Arthur Kibira vs. Independent Electoral and Boundaries Commission and 2 Others* [2018] eKLR:
 

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”
13. In so far as a notice of appeal is a jurisdictional pre-requisite, nothing flows from a non-existent notice to invoke this Court’s jurisdiction to grant the orders sought pursuant to Rule 4 or any other Rule. In effect, its hands are tied, so to speak. I so hold cognisant of the general principle that it is only in exceptional circumstances that this Court would raise its hand to slam shut the door to justice on the face of a litigant despite the constitutional guarantee of access to justice as enshrined in Article 48.
14. In addition to the foregoing, I must also add that the jurisdictional pre-requisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of Article 159 (2) (d) of the *Constitution*, which mandates courts to administer justice without undue regard to technicalities of procedure, and which I have taken to mind.
15. In this regard, the cases of *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others vs. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe vs. IEBC & 4 Others* [2015] eKLR, among others, are a constant reminder that Article 159 (2) (d) is not a panacea for all procedural ills even though “the exercise of the jurisdiction under Article 159 of the *Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that Article 159(2) (d) of the *Constitution* is not a panacea for all procedural ills ....”
16. I hasten to observe that it matters not that the overriding objectives set out in sections 3A and 3B of the *Appellate Jurisdiction Act* (Cap. 9) confer powers on this Court to dispense justice with greater latitude (see *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited* Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008) (Unreported).
17. Having found that there is no notice of appeal properly on record, I find and hold that I have no jurisdiction to determine the applicant’s Motion or grant any of the orders sought.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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

Signed



DEPUTY REGISTRAR.

