



**Chelagatt v Nderi & 8 others (Civil Application E100 of 2023)
[2024] KECA 456 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 456 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E100 OF 2023
WK KORIR, JA
APRIL 12, 2024**

BETWEEN

LOYCE JEROP CHELAGATT APPLICANT

AND

HERMAN MARINE NDERI 1ST RESPONDENT

VIOLA NGERINGWONY KIPTOO 2ND RESPONDENT

JOEL KIBET KIPTUM 3RD RESPONDENT

BRIAN KIPRONO ROP 4TH RESPONDENT

AGNES CHEPCHUMBA CHESIRE 5TH RESPONDENT

KIPKOECH ERASTUS CHEPKURGAT 6TH RESPONDENT

TABITHA CHEPKEMOI KISOMBE 7TH RESPONDENT

GABRIEL KIPRUTO CHEROP 8TH RESPONDENT

CHIEF LAND REGISTRAR 9TH RESPONDENT

(Being an application for extension of time to file a notice of appeal out of time to the decision of the Environment and Land Court at Nakuru (Mwangi Njoroge, J.) dated 22nd September 2023 in ELC Case No. 187 of 2016)

RULING

1. This application was initiated vide a notice of motion dated 14th November 2023 wherein the applicant, Loyce Jerop Chelagatt, in her main prayer sought an order enlarging time for the service upon the respondents of the notice of appeal dated 2nd October 2023. In the alternative, the applicant prayed that the said notice of appeal which was served upon the respondents on 14th November 2023



- be deemed to have been duly served. The application is brought under Articles 159, 259(1) of the Constitution and rules 1(2), 4 and 77 of the Court of Appeal Rules. The application is based on the grounds illustrated on its face and supported by the averments of the applicant's counsel, Dorothy Jemator, in her affidavit sworn on 14th November 2023.
2. The applicant's case is that upon the delivery of the impugned judgment, she instructed her advocates on record to file an appeal and a notice of appeal was indeed filed on 3rd October 2023. However, the notice was not served on the respondents until 14th November 2023. She avers that the inadvertent error in serving the notice of appeal within the requisite 7 days was occasioned by the advocate's clerk who proceeded on annual leave without notifying the advocate that the notice of appeal had not been served. The applicant therefore pleads that the mistake was solely of the advocate and should not be visited upon her. She deposes that she has an arguable appeal and will be prejudiced if time is not enlarged so that she can pursue the appeal.
 3. The application is opposed vide a replying affidavit sworn on 1st December 2023 by the 8th respondent, Gabriel Kipruto Cherop, on behalf of the 2nd to 8th respondents. The deponent avers that he is the secretary of Dodeka Investment Club and the 2nd to 7th respondents are its members. He confirms that they received the applicant's notice of appeal on 14th November 2023. According to the respondents, the service violated the rules of this Court which requires a notice of appeal to be served within 7 days from the date of its filing. The 2nd to 8th respondents oppose the application on the ground that the reason tendered by the applicant for the failure to serve the notice of appeal is not justifiable. They also aver that they will be prejudiced if the application is allowed. They therefore pray for the dismissal of the application with costs.
 4. When the matter came up for hearing on 9th February 2023, counsel for the applicant and that for 2nd to 8th respondents had filed their written submissions. The 1st respondent and 9th respondent did not participate in the application.
 5. For the applicant, the firm of Chepkuto Advocates filed submissions dated 11th December 2023. Therein, reference was made to the case of Njoroge v. Kimani [2022] eKLR to urge that an applicant seeking an extension of time must show good and substantial reasons for the delay. Counsel submitted that the delay in serving the notice of appeal was occasioned by an inadvertent error by counsel who had instructed the clerk to serve the notice within the statutory period but the clerk proceeded for his annual leave before serving it. Counsel further pointed out that the delay of 42 days was not inordinate. To buttress this point, counsel relied on the case of Ngei v. Kibe & Another [2021] KECA 243 (KLR) where the Court found a delay of one year not inordinate. Counsel referred to the case of Vishwa Stone Suppliers Company Limited v. RSR Stone [2006] Limited [2020] eKLR to urge that since counsel had admitted the mistake, the applicant should not be punished. Additionally, counsel submitted that the intended appeal is arguable and no prejudice will be suffered by the respondent if the leave sought is granted. Counsel consequently urged that the application be allowed.
 6. The firm of Omwenyo & Co. Advocates filed submissions dated 13th December 2023 in support of the 2nd to 8th respondents' case. Counsel reiterated the contents of the replying affidavit and submitted that the reason advanced by the applicant for the failure to adhere to the timelines is not satisfactory and should not be accepted by the Court. Counsel also argued that the respondents will be prejudiced as they have been waiting for the last 7 years to utilize the suit property hence the appeal will subject them to a further waiting period. Counsel subsequently prayed for the dismissal of the application.
 7. In determining an application brought under rule 4, I am required to exercise my discretion judiciously and upon reason and not capriciously or whimsically. Some of the principles that govern the exercise



of discretion in an application for extension of time were stated 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.”

8. The principles above are not exhaustive and not all of them must be considered in each and every application - see *Margaret Muthoni Muchiga v. Esther Kamori Gichobi* [2010] eKLR. Having considered the motion, the affidavits and submissions by the parties, the issues for determination are whether the applicant has satisfactorily explained the delay in filing the notice of appeal and whether the respondents will be prejudiced if the application is allowed.
9. The impugned judgment was delivered on 22nd September 2023. It is observed that although the applicant complied with rule 77(2) by lodging the notice of appeal within time, the delay in issue relates to service of the notice of appeal within the time prescribed under rule 79(1) which required that the notice of appeal once filed should have been served on the respondents within 7 days. The applicant therefore seeks to regularize this lapse by having the time for service enlarged.
10. The notice of appeal was filed on 2nd October 2023. It therefore ought to have been served by 9th October 2023 but it was served on 14th November 2023. The period of delay therefore is for about 35 days. The applicant’s explanation for the delay is that the mistake was that of counsel. The supporting affidavit was sworn by counsel on record who acknowledged having committed the mistake occasioning the delay. When dealing with an alleged mistake of advocate, the Court in *Itute Ingu & another v. Isumael Mwakavi Mwendwa* [1994] eKLR held as follows:

“Since the amendment to this Court’s rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.”

11. In my view, considering that the delay was for about 35 days and the fact that counsel has conceded to having committed the mistake, it is only fair that the applicant is not penalized. I therefore find the reason adduced by the applicant to be plausible and satisfactory. Furthermore, the applicant’s counsel moved the Court timeously.
12. Additionally, considering the documents placed before me, I find the intended appeal to be arguable as the issues raised relates to the question of the ownership of the suit property. In that case, I do not find that the respondents stand to suffer any prejudice as alleged. I find so because leave to file an appeal out of time, just like a notice of appeal, does not act as a stay barring the respondents from enjoying the fruits of a judgment entered in their favour. Furthermore, the Court is always called upon to balance the interests of both the applicant’s right to appeal and the respondent’s right to enjoy the fruits of



judgment. In this regard, I find that the applicant should be allowed to scale the judicial ladder before a final determination on the ownership of the suit property is delivered.

13. The upshot of the foregoing is that the notice of motion dated 14th November 2023 has merit and is hereby allowed so that time is enlarged with the consequence that the applicant's notice of appeal filed on 2nd October 2023 and served on 14th November 2023 is deemed to have been properly served. The costs of the application shall abide the outcome of the intended appeal.

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

