



**Mugo v Obengo & 4 others (Civil Application E048 of 2023)
[2024] KECA 459 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 459 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E048 OF 2023**

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

BETWEEN

STEPHEN N MUGO APPLICANT

AND

PAMELA ADHIAMBO OBENGO 1ST RESPONDENT

THE ADJUDICATION OFFICER, KERICHO 2ND RESPONDENT

THE LAND REGISTRAR, KERICHO 3RD RESPONDENT

**THE CHIEF EXECUTIVE COMMITTEE MEMBER (CECM) IN CHARGE OF
LANDS 4TH RESPONDENT**

RESPONDENT COUNTY GOVERNMENT OF KERICHO ... 5TH RESPONDENT

*(Being an application for extension of time to file an appeal out of
time against the decision of Environment and Land Court at Kericho
(M.C. Oundo, J.) dated 2nd March 2023 in ELC Case No. 3 of 2019)*

RULING

1. The notice of motion dated 2nd June 2023 invokes the Court’s jurisdiction under sections 3A and 3B of the *Appellate Jurisdiction Act* and rule 4 of the *Court of Appeal Rules*. The applicant, Stephen N. Mugo, seeks extension of time for filing his record of appeal. The application is based on the grounds listed on its face and supported by an affidavit sworn by the applicant’s counsel, Elizabeth Wangari Mukira. The application is further supported by a supplementary affidavit sworn on 16th August 2023 by the applicant’s counsel.
2. The applicant’s case is that the judgment he intends to appeal was delivered in favour of the 1st respondent, Pamela Adhiambo Obengo, on 2nd March 2023. That being dissatisfied with the



impugned judgment, he lodged a notice of appeal on 9th March 2023. The applicant states that although the record of appeal ought to have been filed by 23rd May 2023, his counsel on record concentrated in pursuing an application for stay before the trial court and forgot to file the appeal. Further, that there was also a delay in securing the applicant's file from his former advocates. According to the applicant the delay occasioned was only for a period of 8 days and the explanation tendered is sufficient. It is the applicant's averment that since the delay is attributable to his counsel, the mistake should not be visited on him. The applicant also avers that the record of appeal is ready for filing and that the intended appeal is arguable. In conclusion, the applicant deposes that if the prayer sought is declined, he will be greatly prejudiced whereas the respondent will suffer no prejudice if time is extended.

3. The application is opposed through an affidavit sworn by the 1st respondent on 4th August 2023. It is her position that the reasons for the delay advanced by the applicant have not been substantiated or proved. She deposes that the applicant has not attached any evidence to support the allegation that he had difficulties in retrieving the file from his former advocates. According to her, the explanation is an excuse for the advocate's indolence and the applicant cannot be spared the consequences of delay. She also asserts that the intended appeal is not arguable and that the applicant will not suffer any prejudice if the orders are not granted. She maintains that the reasons given by the applicant are not satisfactory at all. Further, that she will be prejudiced if leave to appeal is granted as the applicant only seeks to elongate the court battle which started in 2019. She consequently prays that the application be dismissed with costs.
4. This application came up for hearing in chambers by way of written submissions. The 2nd, 3rd, 4th and 5th respondents did not participate in the application. For the applicant and the 1st respondent, their respective counsel filed written submissions dated 16th August 2023 and 22nd August 2023.
5. For the applicant, the firm of Elizabeth Wangari & Co. Advocates reiterated the grounds in support of the application and submitted that the delay was 8 days only and is excusable based on the explanation tendered by the applicant. Counsel submitted that the delay was occasioned by both the pending application for stay before the trial Court and the process of securing the file from the applicant's former advocates. Counsel asserted that the record of appeal is ready and if leave is granted, the appeal will be filed forthwith. Counsel relied on the case of *Philip Keipto Chemwolo & Another v. Augustine kubende* [1986] eKLR to argue that mistake attributable to counsel should not be visited upon the litigant. Counsel also submitted that the fact that the intended appeal is arguable is discernable from the memorandum of appeal annexed to the supporting affidavit. According to counsel, the respondent stood to suffer no prejudice save for the delayed enjoyment of the fruits of the judgment. Counsel therefore urged the Court to allow the application.
6. The firm of AMA Advocates LLP filed submissions on behalf of the 1st respondent urging that the reasons tendered by the applicant for the delay are not satisfactory as the alleged erstwhile advocate had not sworn an affidavit in support of the applicant's allegation that failure by the applicant's current counsel to secure the applicant's file from the former advocates was one of the reasons for the delay. Counsel cited *Aviation Cargo Support Ltd v. St. Marks Freight Services Ltd* [2014] eKLR where an application for extension of time was dismissed for failure to satisfactorily explain the delay and urged that the instant application should meet the same fate because no satisfactory explanation has been given for the delay. Relying on *Rebecca Moraa Ongaki v. Juvinalis Onsando Ogumbo* [2021] eKLR, counsel submitted that an application for enlargement of time should be declined where the applicant has not established an arguable appeal. According to counsel, the applicant has no arguable appeal and his application for extension of time should be declined. Finally, counsel submitted that allowing the application would be prejudicial to the 1st respondent as the case has been in the judicial system for



over 5 years and the applicant simply seeks to elongate that period hence denying the respondent an opportunity to enjoy peaceful possession of the suit property. Counsel therefore urged the Court to dismiss the application with costs.

7. The applicant has called upon the Court to exercise the discretion provided under rule 4 of the [Court of Appeal Rules](#) and grant him leave to file an appeal out of time. As has been held in several decisions of the Court, the discretion to enlarge time is unfettered but must be exercised not on whim or sympathy but judiciously and in consideration of well-established principles emanating from the previous decisions of the Court. In regard to the principles that a court should consider in exercising the discretion to extend time, it is sufficient to refer to the Supreme Court pronouncement on the subject in [Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR where it was stated that:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
7. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
8. The above-mentioned principles are to be applied on a case by case so that a court faced with an application for extension of time will ordinarily be at liberty to determine which of the principles are applicable and judiciously determines the application before the court. Applying the stated principles to this case, I find that the only issues for determination are whether the applicant has tendered satisfactory reasons for the delay and whether the respondent will suffer any prejudice if the applicant is granted leave to appeal out of time.
9. The judgment the applicant intends to appeal was delivered on 2nd March 2023 and a notice of appeal filed by the applicant on 9th March 2023. As conceded by the applicant, rule 84(1) of the [Court of Appeal Rules](#) required him to have filed the record of appeal within 60 days of filing the notice of appeal on 9th March 2023 and that should have been on or before 9th May 2023. The present application is dated 2nd June 2023. There was therefore a delay of about 22 days or thereabouts and not 8 days as deposed by the applicant.
10. The applicant has tendered two reasons for the delay. First, that there was a pending application before the trial Court which the present advocate was pursuing and also that there were hitches in securing



the applicant's file from his previous advocates. When dealing with an alleged mistake of an 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. The supporting affidavit in this matter has been sworn by the advocate currently on record for the applicant and in which counsel has outrightly admitted that she is to blame for the delay in filing the appeal. This alone sufficiently explains why the record of appeal was not filed in good time and the 1st respondent’s contention that the advocate previously on record ought to have sworn an affidavit makes no difference. In any case, would an advocate who has held onto a client’s file thus occasioning a delay voluntarily swear an affidavit in support of the cause of the same client? I doubt. In any case, my view is that the supporting affidavit by the present advocate is sufficient to establish that which transpired between the advocates. This is therefore a classic case where the advocate’s indolence should not be visited upon the litigant. Unlike in *Itute Ingu & another v. Isumael Mwakavi Mwendwa* (*supra*), in this case, the delay is for only 22 days which has been attributed to a lapse on the part of counsel and the challenge she encountered in securing the applicant’s file from his erstwhile advocates. I therefore find the explanation tendered to be satisfactory more so when it is considered that the delay was only for about three weeks.
12. The next issue is whether the 1st respondent will suffer any prejudice if the order sought is allowed. The 1st respondent contends that this matter has been in the court corridors for the past 5 years and that the applicant is only seeking to elongate that time by pursuing an appeal which is not arguable hence denying her the chance to enjoy peaceful possession of the suit property. I have looked at the annexed memorandum of appeal, and all I can state is that the intended appeal raises issues deserving of the Court’s determination. Both the applicant and the 1st respondent are entitled to justice and a balance must be struck between the 1st respondent’s right to enjoy the fruits of the judgment already entered in her favour and the applicant’s right to have his day before an appellate Court. In my view, I don’t find that the prejudice that the 1st respondent will suffer by waiting a little longer outweighs the applicant’s right to appeal. If anything, if the applicant loses the intended appeal, the 1st respondent will still have the suit property and costs, if awarded, and that will be sufficient to compensate her for the delayed enjoyment of the fruits of judgment.
13. In summary, the notice of motion dated 2nd June 2023 has merit and is hereby allowed. As the applicant has indicated that the record of appeal is ready, he is directed to file and serve his appeal within 14 days from the date of the delivery of this ruling.
14. Having allowed the application, 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

