



**Lagagen (Suing as the legal representative of Kumin Kimining) v Kimining & another  
(Civil Application E067 of 2023) [2024] KECA 457 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 457 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E067 OF 2023**

**WK KORIR, JA**

**APRIL 12, 2024**

**BETWEEN**

**EUNICE LAGAGEN (SUING AS THE LEGAL REPRESENTATIVE OF KUMIN  
KIMINING) ..... APPLICANT**

**AND**

**JACOB KOMEN KIMINING ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file a notice and record of  
appeal out of time to the decision of Environment and Land Court at  
Nakuru (A.O. Ombwayo, J.) dated 12th July 2023 in ELC No. 21 of 2020)*

**RULING**

1. The applicant, Eunice Lagagen (suing as the legal representative of Kumin Kimining), has through the notice of motion dated 4<sup>th</sup> August 2023 brought pursuant to sections 3A, 3B and 7 of the [Appellate Jurisdiction Act](#) and rules 4, 20(2) and 77 of the [Court of Appeal Rules, 2022](#) sought the enlargement of time for filing a notice of appeal against the judgment of A. O. Ombwayo, J delivered on 12<sup>th</sup> July 2023 in Nakuru Environment and Land Court (E&LC) Case no 21 of 2020. She prays that the costs of the application abide the outcome of the intended appeal.
2. The application is based on the grounds enumerated on the face of the motion as well as those contained in the supporting affidavit sworn on 4<sup>th</sup> August 2023 by Samson Matoke Nyagaka, the applicant's counsel. The applicant's case is that she is aggrieved by the judgment of the trial Court and intends to lodge an appeal. The applicant avers that she was born in 1954 and upon the delivery of the judgment she broke down inconsolable and was granted time to recover. Her counsel was therefore not able to get instructions to file the notice of appeal within the stipulated 14 days. It is only on 3<sup>rd</sup> August 2023 that she managed to instruct counsel to lodge an appeal. According to the applicant, her



intended appeal is arguable and no prejudice will be suffered by the respondents if leave to appeal out of time is granted.

3. The 1<sup>st</sup> respondent, Jacob Komen Kimining swore a replying affidavit on 13<sup>th</sup> September 2023 in opposition to the application.

It is the 1<sup>st</sup> respondent's position that the application is frivolous, lacks merit and is brought as an afterthought. He avers that the applicant has not tendered any viable explanation to warrant enlargement of time. He asserts that the applicant has not attached any medical evidence in support of the claim that she was unwell and not able to instruct counsel. He is therefore of the view that the application does not merit the exercise of the discretion by this Court to enlarge time and prays for its dismissal with costs.

4. This application was disposed of through written submissions on 8<sup>th</sup> December 2023. For the applicant, M/s Nyagaka S.M. & Co. Advocates filed submissions dated 19<sup>th</sup> September 2023 urging that the application has merit and should be allowed. Counsel submitted that a combination of the applicant's breakdown upon the delivery of the impugned judgment and her old age could not allow her to immediately instruct counsel to file an appeal. It is counsel's view that those are sufficient reasons to warrant enlargement of time. Counsel submitted that the delay of about 8 days is excusable. Counsel argued that the respondents have not hinted at any prejudice that they would suffer if time is enlarged. Counsel relied on *Sokoro Savings & Credit Co-operative Society Ltd v Mwamburi* [2023] KECA 381 (KLR) to urge that the application ought to be allowed and that the costs should abide the outcome of the intended appeal.

5. In opposition to the application, counsel Kipkoech B. Ng'etich filed submissions dated 26<sup>th</sup> September 2023. Counsel submitted that the applicant has failed to tender satisfactory explanation for the delay in filing the notice of appeal. Counsel asserted that the averment made by counsel for the applicant as to the applicant's sickness was not supported by any documentary proof. Counsel added that the fact that an applicant is elderly does not warrant the exercise of this Court's discretion to extend time. Counsel referred to the cases of *Sam Kiplagat & Another v Charles Wanjohi Watbuku* [2017] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR as establishing the conditions for enlargement of time and submitted that the instant application does not meet those conditions and should therefore be dismissed. Further, counsel contended that since no memorandum of appeal was attached to the application, there is no basis for finding that the intended appeal is arguable. It was counsel's ultimate submission that the application ought to be dismissed with costs to the 1<sup>st</sup> respondent.

6. The power to enlarge time is a discretionary one and is donated by rule 4 of the *Court of Appeal Rules, 2022* which states that:

“The Court may, on such terms as may be just, by order, 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

7. In numerous decisions of this Court, certain principles have been established to guide the Court whenever called upon to exercise the discretion under rule 4. Some of the considerations include the period of delay; the reasons for the delay; whether the whole period of delay has been explained; whether the respondent will be prejudiced if time is enlarged; and the public interest involved, if any.



In that regard, it is sufficient to quote W. Ouko, (P) (as he then was) in *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR where he stated 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. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

8. The factors to be considered being diverse, this Court has similarly pointed out that there is no specific requirement that all these factors be considered. A Judge seized of the matter, and based on the circumstances of the case, is at liberty to assess which considerations are applicable to the application before him or her. (See *Margaret Muthoni Muchiga v Esther Kamori Gichobi* [2010] eKLR). Having reviewed the motion, the affidavits, submissions and authorities relied upon by the parties, I discern that the main issue for determination in this matter is whether the applicant has satisfactorily explained the delay occasioned in lodging the notice of appeal.
9. The judgment which the applicant intends to appeal was delivered on 12<sup>th</sup> July 2023 and the notice of appeal ought to have been lodged by 26<sup>th</sup> July 2023. This application is dated 4<sup>th</sup> August 2023. The delay occasioned is 8 days. Ordinarily, a delay of 8 days cannot be said to be inordinate and is excusable. However, as was pointed out in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, the whole period of delay should be declared and sufficiently explained. The question is whether the applicant has tendered satisfactory reasons to explain the delay of 8 days.
10. According to the applicant, upon the delivery of the impugned judgment, she broke down and was not in a position to instruct counsel to file a notice of appeal. It was only on 3<sup>rd</sup> August 2023 that the applicant issued instructions to counsel to appeal. It is also the applicant’s case that she is aged having been born in 1954, and according to her, this explains the breakdown she suffered as a result of the adverse judgment. The respondent has, however, raised issues with the explanation fronted by the applicant arguing that the averments were made by counsel and no medical documents were annexed to support the averment that the applicant broke down. I, however, note that the respondent has not challenged the fact that the applicant is approximately 70 years old but only submits that advanced age is not a ground for extension of time.
11. The age of an applicant is a factor that the Court has considered previously in similar applications. For example, in *Rosemary Makena Mwangi & another v Mwangi Harun & Another* [2008] eKLR, the Court while dismissing the application where there was a delay of 28 years expressed itself as follows:

“Over and above the reasons given above, I feel inclined to take into consideration other relevant facts, such as the ages of the parties to this dispute as they have the evidence of what happened. Further, that some of them namely, John Chege has since died, a fact that might affect the continued litigation in this matter though he has been substituted by his wife. Both the first applicant and the first respondent are well advanced in age, i.e. 90 and 83 years old, respectively. Is it really proper that they should continue with litigation which started



on 18<sup>th</sup> September 1978? I think not. There is also the possibility of prejudice to Flora, the 2<sup>nd</sup> respondent who has lived on the suit premises since the judgment was granted in favour of her late husband.”

12. Similarly, in *Rhoda Ndululu Sengete & another v Tabitha Kavenge Matolo* [2019] eKLR, the question of age arose with respect to the respondent. In dismissing the application, the Court relied on the evidence of the respondent’s advanced age in finding that she would be prejudiced.
13. That age is a factor in the affairs of the people of Kenya is also recognized in Article 57 of the *Constitution* which obligates the State to ensure that older members of society live in dignity and are assisted by their families and the State to attain such status.
14. The present case is peculiar. It is apparent that the issue of the applicant’s breakdown was not raised as a medical condition and the applicant may therefore not have had medical documents to exhibit to the Court. Considering the age of the applicant and that the subject matter of the suit is land, I find it probable that the adverse outcome of the judgment may have indeed overwhelmed the applicant. It is also important to appreciate that the present application was brought after a short period of delay. I am therefore inclined, which I hereby do, to find that the reason advanced by the applicant is satisfactory when considered in light of the period of delay. In so finding, I wish to associate myself with the persuasive words of the South African Labour Court in *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22 where it held on the importance of plausible explanation that:  

“These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong.... There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial...”

(Emphasis mine).
15. With regard to the question of prejudice, I find no prejudice that will be suffered by the respondents if the orders sought are granted. It is actually the applicant who is likely to be prejudiced if her application is declined as her right to appeal will be curtailed.
16. As a result of the foregoing analysis, I find that the applicant has proffered satisfactory reason for the delay in filing the notice of appeal. Therefore, the notice of motion dated 4<sup>th</sup> August 2023 has merit and is allowed.
17. As for the costs of the application, the proper order is to direct that they abide the outcome of the intended appeal.
18. The final orders of the Court will therefore be as follows:
  - a. Time for filing the notice of appeal is hereby extended for the applicant to file her notice of appeal.
  - b. The notice of appeal dated 3<sup>rd</sup> August 2023 be and is hereby marked as duly filed.
  - c. The time for all the other activities consequent to the filing of a notice of appeal shall be in accordance with the Court of Appeal Rules and time will run from the date of this ruling; and
  - d. The costs of the application to abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> 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**

