



REPUBLIC OF KENYA



KENYA LAW
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**Odongo & another v Investments & 3 others (Civil Application
E083 of 2023) [2024] KECA 375 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 375 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E083 OF 2023**

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

BETWEEN

FRANCIS ODONGO ODIYO 1ST APPLICANT

NORAH DACHA ODONGO 2ND APPLICANT

AND

RARAM INVESTMENTS 1ST RESPONDENT

HOUSING FINANCE CO. LTD 2ND RESPONDENT

NAKURU DISTRICT LAND REGISTRAR 3RD RESPONDENT

PETER KAMURU KIBERA 4TH RESPONDENT

(Being an application for an extension of time to file an appeal out of time against the judgment of the High Court at Nakuru (R. Ngetich, J.) dated 9th June 2022 in HCC No. 302 of 2021)

RULING

1. The notice of motion dated 2nd October 2023 is brought under rule 4 of the Court of Appeal Rules and seeks leave to file a notice of appeal and a record of appeal out of time against the judgment of R. Ngetich, J delivered on 9th June 2022 in Nakuru HCCC No. 302 of 2021. The application is based on reasons that the delay is not inordinate and was occasioned by the mistake of the counsel on record who failed to notify the applicants (Francis Odongo Odiyo and Norah Dacha Odongo) on time about the delivery of the judgment or lodge a notice of appeal within the prescribed 14 days. Further, the applicants assert that the intended appeal is arguable and that the present application follows an omnibus notice of motion dated 15th November 2022 and withdrawn on 30th May 2023 which was serialized as Kisumu Civil Application No. E082 of 2022. The application is also supported by the affidavit of the 1st applicant sworn on 2nd October 2023.



2. The 4th respondent, Peter Kamuru Kibera, filed a replying affidavit sworn on 17th November 2023 opposing the application. He avers that the delay occasioned herein is inordinate as it is about 420 days and that the explanation tendered is not satisfactory.
3. The matter was disposed of by way of written submissions. The applicants on the one hand and the 1st respondent and (Housing Finance Co. Ltd) and the 2nd respondent (Raram Investments) on the other hand filed their respective written submissions.
4. For the applicants, the submissions are dated 13th December 2023. Counsel submitted that the length and delay occasioned in filing the notice of appeal is excusable. Counsel reiterated the averments in the supporting affidavit and urged that the mistake was of the applicants' former advocates and the mistake should not be visited upon the applicants. Counsel also urged that the intended appeal was arguable and that it was in the interest of justice that time be extended to allow the applicants ventilate their grievances on appeal.
5. In opposition to the application, counsel for the 1st and 2nd respondents filed submissions dated 15th December 2023. Counsel highlighted four reasons why the application should not be allowed. First, counsel submitted that the applicant had not explained the whole period of delay. Counsel referred to the case of *County Government of Mombasa v. Kooba Kenya Ltd* [2019] eKLR on the necessity of explaining the whole period of delay. Second, counsel submitted that the explanation tendered by the applicants was not plausible as there was no evidence to support the claim that the previous counsel was indolent and that the applicants did not contribute to the delay. Counsel relied on the case of *Rajesh Rughani v. Fifty Investments Ltd & Another* [2016] eKLR in support of the assertion that an applicant cannot simply blame their advocates but must also show that they were not indolent. Third, counsel relied on the case of *Reliance Bank Ltd (In Liquidation) v. Grandways Ventures Ltd & 2 others* [2007] eKLR to urge that an arguable appeal is futile if not filed on time. And fourth, that the applicants will suffer prejudice if the application is allowed. He urged that the application be dismissed.
6. Applications brought under rule 4 of the *Court of Appeal Rules* are always determined through the exercise of discretion. The discretion should, however, be exercised judiciously. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR outlined the principles that guide the consideration of an application for extension of time by stating 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
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
7. 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. In my view, two issues are for determination in this application. The first issue is whether the application has been brought without undue delay, and the second is, whether the applicants have tendered satisfactory reasons for the delay.
9. In addressing the first issue, it is a fact that the impugned judgment was delivered on 9th June 2022. The notice of appeal therefore ought to have been filed on or before the 23rd June 2022. The applicant’s initial application which was omnibus was dated 15th November 2022 and withdrawn on 30th May 2023. Thereafter, this application was filed on 2nd October 2023. From the face of it, the delay would be from 23rd June 2022 to 2nd October 2023 which is approximately 1 year and 4 months. In my view, if not satisfactorily explained, the delay would be inordinate.
10. The finding above then leads to the second limb. Two principles guide the deliberations on this issue. First, as pointed out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* (*supra*), the applicant bears the burden of laying a basis for enlargement of time to the satisfaction of the court. Additionally, as pointed out by the Supreme Court 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.
11. In this case, I would excuse the period between 15th November 2022 and 30th May 2023 as this is the period when there was a subsisting application which was eventually withdrawn for being omnibus. Upon discounting the said period, there are other two periods of delay, namely, the period between 22nd June 2022 to 15th November 2022 and that between 30th May 2023 and 2nd October 2023 which the applicants are required to account for. With regard to the delay between 22nd June 2022 to 15th November 2022, the applicant averred that the same was occasioned by their erstwhile advocates who did not inform them of the delivery of the judgment and the procedure for filing an appeal. They deposed that it was not until they instructed the present advocates that they learned of the delivery of the judgment on 27th August 2022. Further, the two firms of advocates entered a consent dated 29th August 2022 and filed on 30th August 2022 in respect of the takeover of the matter from the previous advocates by the current law firm. There is however no indication when the consent was adopted and formalized as an order of the Court giving way for the new advocates to come on record.
12. The applicants have not tendered any documentary proof revealing how they followed up on the case with their former advocates. As was held in *Rajesh Rughani v. Fifty Investments Ltd & Another* (*supra*), it is not enough for the applicants to blame their advocates because parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel. Additionally, the applicants have not explained what occasioned the further delay from 30th August 2022 when the consent was filed and 15th November 2022 when their initial application was filed. I therefore find that no satisfactory explanation has been offered for the first period of delay.
13. As for the delay of 4 months between 30th May 2023 when the omnibus application was withdrawn and 2nd October 2023 when the instant application was filed, the applicants have not tendered any reason at all. At this juncture, I refer to the words of the Court in *Kenya Railways Corporation v. Quicklubes E.A. Limited* [2015] eKLR that:

“It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal....



A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised.”

14. In the end, I find that the applicants’ explanation for the delay unsatisfactory and considering the length of the delay, the same is found to be inordinate.

15. Counsel also urged that the intended appeal is arguable. In this regard, it is my view that timelines and timeliness contribute to fair 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 cannot supersede the onus placed on an applicant to give plausible reasons for the delay. Without a satisfactory explanation for the delay, an arguable appeal does not result in perfunctory extension of time. To this end, the words in *Reliance Bank Ltd (In Liquidation) v. Grandways Ventures Ltd & 2 others* (*supra*) rings a bell thus:

“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.”

16. In the penultimate, the notice of motion dated 2nd October 2023 is without merit and is hereby dismissed. The 1st, 2nd and 4th respondents having answered the applicants’ call to defend the motion are awarded the costs of the application against the applicants.

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

