



REPUBLIC OF KENYA



**Wambuye v GH Tanna & Sons Holding Ltd & another (Civil Application
E065 of 2023) [2024] KECA 449 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 449 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E065 OF 2023**

WK KORIR, JA

APRIL 12, 2024

BETWEEN

ANDREW BIKETI WAMBUYELE APPLICANT

AND

G.H TANNA & SONS HOLDING LTD 1ST RESPONDENT

FG NJUGUNA T/A FEMFA AUCTIONEERS 2ND 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 Kitale (F. Nyagaka, J.) dated 17th October 2023 in ELC Appeal E006 of 2022)

RULING

1. This application was initiated *vide* a notice of motion dated 29th November 2023 and brought pursuant to Articles 48 and 50(1) of the [Constitution](#) and rules 4, 41(1) (a) (i), 43, 45(3)(a) and 49(1) of the [Court of Appeal Rules](#). The applicant, Andrew Biketi Wambuye, seeks orders for the extension of time to file and serve a notice of appeal and a record of appeal against the judgment delivered on 17th October 2023 by F. Nyagaka, J of the Environment and Land Court (E&LC) in Kitale E&LC Case no E006 of 2022. The application is premised on the grounds on its face as well as the averments of the applicant's counsel, Evelyn Koki Mbulu, in her affidavit sworn on 29th November 2023.
2. In support of the application, the applicant states that on 17th October 2023 the learned trial Judge intimated in open Court that the impugned judgment would be delivered on notice through counsel's email addresses. That contrary to the directions, neither a notice nor a judgment was delivered to the email address of the applicant's counsel. The applicant only became aware of the judgment after G.H Tanna & Sons Holding Ltd (the 1st respondent) and F. N. Njuguna T/A Femfa Auctioneers (the 2nd respondent) started disposing of the applicant's distrained goods and that is when counsel discovered that the judgment was emailed on 7th November 2023 to her assistant's email address. The applicant



therefore asserts that the delay occasioned herein is not of his own fault and that he stands to suffer prejudice as he will be denied an opportunity to ventilate his intended appeal on merits. He avers that it is in the interest of justice and equity that time be enlarged to allow him pursue the intended appeal as it is arguable and that the present application has been filed without undue delay.

3. The respondents did not reply to the application. However, when this matter came up for hearing on 9th February 2024, both sides had filed submissions.
4. For the applicant, the firm of Koki Mbulu & Co. Advocates filed submissions dated 29th January 2024. Counsel commenced by appreciating the discretionary power of the Court under rule 4 of the *Court of Appeal Rules* and referred to the cases of *Karny Zabrya & another v Shalom Levi* [2018] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR to highlight the principles that guide courts in determining an application for extension of time. Counsel reiterated the grounds in support of the application and submitted that the delay was squarely caused by the Court and not the applicant. Counsel submitted that upon learning of the delivery of the judgment, the applicant timeously moved the Court for enlargement of time. Counsel also submitted that the respondents would suffer no prejudice if time is enlarged as prayed. Counsel referred to the case of *Abdul Aziz Ngoma v Mungai Mathayo* [1976] eKLR to urge that where sufficient reasons for the delay have been proffered, any prejudice likely to be suffered by the respondent takes a back seat. In the end, counsel urged that the application be allowed.
5. The firm of Kidiavai & Co. Advocates filed submissions dated 10th February 2024 in support of the respondent's opposition to the application. Counsel submitted that the Court's discretion in extending time is only available upon establishment of sufficient reasons for the delay. Counsel argued that the applicant had not tendered any explanation for the delay in lodging the notice of appeal. According to counsel, the matter was mentioned several times before it was indicated that judgment would be delivered on 17th October 2023 and during all the mention dates, counsel for the applicant was present and further that the Court was explicit that the judgment would be delivered electronically. Additionally, counsel urged that the email address used by the Court to deliver the judgment was the known email address of the applicant's counsel. Counsel finally submitted that the respondents will suffer prejudice as they will be denied an opportunity to enjoy the fruits of the judgment, as well being subjected to continued mental anguish. Counsel subsequently asked for the dismissal of the application with costs.
6. In determining an application brought under rule 4, I am required to exercise my discretion judiciously and upon reason and not capriciously or whimsically. Several principles have been established through case law to guide the courts in the disposal of applications for enlargement of time. The considerations include the period of the delay, the reasons for the delay and any prejudice to be suffered by the respondent were the application to be allowed. These principles are neither exhaustive and not all of them must be considered in each and every application. A court seized of an application is at liberty to determine which principles or factors determine an application before it - see *Margaret Muthoni Muchiga v Esther Kamori Gichobi* [2010] eKLR.
7. Having duly considered the motion, the supporting affidavit and the submissions by both parties the issues that emerge for determination are whether the applicant has satisfactorily explained the delay in filing the notice of appeal and whether the respondents will suffer any prejudice if the application is allowed.
8. The impugned judgment was delivered on 17th October 2023 while the present application is dated 29th November 2023. The applicant was required to have lodged his notice of appeal by 30th October 2023. The delay was therefore for period of 29 days or thereabouts. The applicant however avers that



he became aware of the judgement on 7th November 2023. He deposes that the judgment was to be delivered on notice but his counsel was not notified of the delivery of the judgment.

9. In my view, the delay has an intervening period when the applicant was not aware of the judgment. I therefore find the reason tendered by the applicant for the delay satisfactory. Even though the respondents have submitted strongly in opposition to the given reason, I do not find the delay inordinate. As was held in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibe* [2018] eKLR:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. 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 exercisable.”

10. Ordinarily, parties should always be notified of the delivery of the judgment. No evidence has been adduced to confirm that indeed the applicant’s counsel was notified of the delivery of the said judgment. All I have on record are the respondents’ submissions in opposition. Those submissions cannot be treated as evidence. A proper answer to the application ought to have come through an affidavit. I therefore find in favour of the applicant that the delay was not of his making but that of the Court. The reason tendered is therefore satisfactory in my view.
11. The other period of delay is of about 21 days between 7th November 2023 when the applicant knew of the judgment and 29th November 2023 when this application was lodged. I do not find such a period inordinate considering that counsel had to take instructions and prepare the application for filing.
12. As to whether allowing the application will be prejudicial to the respondents, I note that the respondents have submitted that they will be prejudiced because they will be denied an opportunity to enjoy the fruits of a judgment already entered in their favour. On this, I note that an order extending time, just like the filing of a notice of appeal, does not act as a stay of execution of judgment. Nothing therefore bars the respondents from executing the judgment unless there is an order of stay pending appeal. In any event, a balancing of the applicant’s right to appeal and the respondents’ right to enjoy the fruits of judgment will show that the applicant should carry the day. If the application is declined, the applicant will forever be denied an opportunity to test the correctness of the decision of the trial court. On the other hand, allowing the application will only delay the respondents’ enjoyment of the fruits of judgment with the only unpredictability being the fact that the intended appeal could eventually succeed.
13. The upshot of the foregoing is that the notice of motion dated 29th November 2023 has merit. The same is allowed. The applicant is granted leave to file and serve a notice of appeal within 14 days from the date of this ruling. Thereafter, time shall run as scheduled in the *Court of Appeal Rules, 2022*. The costs of this application shall abide the outcome of the main appeal.
14. It is so ordered.

Dated and Delivered at Nakuru this 12th day of April, 2024

W. KORIR

.....

JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

