



**Yusuf & another v Muhamudo & another (Civil Application  
E102 of 2023) [2024] KECA 1043 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KECA 1043 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E102 OF 2023  
J MOHAMMED, JA  
MAY 28, 2024**

**BETWEEN**

**HUSSEIN JUMA YUSUF ..... 1<sup>ST</sup> APPLICANT**

**MALIWAZA JUMA YUSUF ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FATUMA GATTU MUHAMUDO ..... 1<sup>ST</sup> RESPONDENT**

**ZUBERI ABDALLA HASSAN ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file an appeal out of  
time against the decision of Environment and Land Court in Meru (C.  
K.Nzili, J.) dated 19th April 2023 in ELC Case No. 35 of 2019 (OS))*

**RULING**

**Background**

1. Hussein Juma Yusuf (the 1<sup>st</sup> applicant) and Maliwaza Juma Yusuf, (the 2<sup>nd</sup> applicant) filed this application by way of a notice of motion dated 13<sup>th</sup> November, 2023, expressed to be brought under Order 42 Rule 6 of the *Civil Procedure Rules*, and under Rule 5(2) (b) of the Court of Appeal Rules (this Court's Rules) and Sections 1A,1B,3 and 3A of the *Civil Procedure Act*, as well as section 68 and 69 of the *Land Registration Act*. The applicants seek orders in the main:

- a. Spent
- b. That the Court be pleased to issue an order extending the time for appealing against the application dated 16<sup>th</sup> January 2023 and delivered on 19<sup>th</sup> April, 2023 by Justice C. K. Nzili seeking to have the applicants herein enjoined as interested parties in the suit;



- c. The Court be pleased to grant any other or better order/relief as shall meet the ends of justice; and
- d. The costs of the application be provided for.”

Fatuma Gatitu Muhamudo and Zuberi Abdalla Hassan are the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

2. The application is premised on the grounds on the face of the application and an affidavit by the applicants who depose inter alia that: they were aggrieved and saddened by the ruling dated 19<sup>th</sup> April, 2023 emanating from an application dated 16<sup>th</sup> January, 2023 and have lodged an appeal against the said decision; that they have filed the memorandum of appeal and are in the process of filing the record of appeal; and that they have also prepared the notice of appeal annexed in the instant application.
3. There is no replying affidavit or written submissions on record in response to the application, despite service.

### Submissions

4. In the applicants’ written submissions, they blame their then advocate, a Mr. Omari who failed to file the appeal on time. The applicants submit that the mistake of the advocate should not be visited upon them. They rely on the decision of *Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi* [2013] eKLR in support of this proposition.

### Determination

5. The application has been expressed to be brought under Rules 4 and 5(2)(b) of this *Court’s Rules*. As a single Judge, I do not have the jurisdiction to hear and determine an application under Rule 5(2)(b). I will therefore proceed to consider and determine the application under Rule 4 of this Court’s Rules.
6. I have considered the application, grounds in support thereof, the applicant’s submissions, the authorities cited and the law. *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters to be considered in an application under Rule 4 of this Court’s Rules as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” [Emphasis supplied].

7. The matters to be considered while deciding an application of this nature are not exhaustive. In *Mwangi V Kenya Airways Ltd* KLR 486, this Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the *Court of Appeal Rules* (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”



8. There is no maximum or minimum period of delay set out under the law. Further, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR as was cited by the applicant, this Court stated:

“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.”

9. From the record, the impugned ruling was delivered on 19<sup>th</sup> April, 2023. The instant application is dated 13<sup>th</sup> November, 2023. The delay in filing the notice of appeal is therefore approximately seven (7) months. The applicants’ explanation for the delay is that their erstwhile advocate delayed in filing the notice of appeal. It is on record that the applicants have filed the memorandum of appeal and are in the process of filing the record of appeal.

10. I find that in the circumstances of this case, the delay in filing the notice of appeal is not inordinate and the reasons for the delay advanced by the applicant are plausible and satisfactory.

11. As regards the success of the intended appeal, the applicant contends that the appeal is arguable. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

12. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the ruling of the Environment and Land Court (C. K. Nzili, J.) (ELC) and is desirous of appealing against the said ruling out of time. In the case of *Richard Nchapi Leiyagu vs IEBC & 2 Others*, Civil Appeal No. 18 of 2013, this Court expressed itself as follows:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

13. From the circumstances of the instant application, the applicant has demonstrated the existence of the parameters set out in the *Leo Sila Mutiso* (supra). The notice of motion dated 13<sup>th</sup> November, 2023 is allowed.

14. Accordingly, I make the following orders:

- a. That leave be and is hereby granted to the applicants to file and serve the notice of appeal out of time within three (3) days from the date hereof;



- b. That leave be and is hereby granted to the applicants to file and serve the record of appeal and memorandum of appeal out of time within fourteen (14) days from the date hereof;
- c. That costs of this application to abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF MAY, 2024**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

