



**Bartilol & 3 others v Bartilol & another (Civil Application
001 of 2024) [2024] KECA 607 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 607 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION 001 OF 2024**

LA ACHODE, JA

MAY 24, 2024

BETWEEN

**HILLARY KIPRUTO BARTILOL 1ST APPLICANT
WINNIE CHEBET BARTILOL 2ND APPLICANT
JOYCE CHEMUTAI BARTILOL 3RD APPLICANT
ALICE CHERONO BARTILOL 4TH APPLICANT**

AND

**JAPHETH KIPROTICH BARTILOL 1ST RESPONDENT
DINAH JEPKEMBOI BARTILOL 2ND RESPONDENT**

*(Being an application for extension of time to file an appeal out time and
for stay of execution against the judgment of the High court at Eldoret (R.
Nyakundi J.), dated 28th September, 2023 in HC Succ Cause No 17 of 2001)*

RULING

1. By the Notice of Motion dated January 10, 2024 brought under rule 4, 5(2)(b), 41, 43, 47 and 49 of the [Court of Appeal Rules 2022](#) the applicants seek orders:
 - i. That there be extension of time to file an appeal against the Judgment of Hon Nyakundi J dated September 28, 2023 and provide timelines for filing of the Memorandum alongside the Record of Appeal.
 - ii. That pending the hearing and determination of this application, the honourable Court be pleased to stay execution of the Judgment delivered on September 28, 2023, as well as the Ruling delivered on December 14, 2023.



- iii. That in the alternative, pending the hearing and determination of this Application, the honourable Court be pleased to grant a temporary order of 'status quo prevailing' both on the register at the lands office and on the ground in respect of Ilula Settlement Scheme Plot No.4 Measuring Approximately 50 Acres, Ndalla Farm Kitale LR.No.5, Measuring Approximately 100 Acres, Soy Plot LR No.15074 Measuring Approximately 0.022353 Acres, Kakamega/Serg01t/147 Measuring Approximately 29.75 Acres, and on the movable properties Tractor Kum 053 and Datsun Pick Up 1200 KUJ 557.
 - iv. That the costs of this Application be provided for.
 2. It is evident from the opening paragraph and the prayers sought, that this is an omnibus application, drafted in a manner that does not align with the manner in which the jurisdiction of the Court of Appeal is deployed. In this application, the applicants are seeking extension of time under rule 4 to file an appeal out of time, against the judgment of Hon Nyakundi J. dated 28th September 2023. That is an application for determination by a single judge. However, in the same application they wish to move the Court under rule 5(2)(b) for stay of execution of the said judgment and a ruling delivered on December 14, 2023. Such an application must, by the dictates of rule 55 (2), be placed before a multiple bench.
 3. If such a matter is placed before a multiple bench whose jurisdiction is to consider the application under rule 5(2)(b), should it not suffer the penalty of being struck out, since there is no appeal deemed to be filed, when the application for expansion of time has not been heard and the orders granted? Since it has been placed before a single judge in this instance, I proceed with circumspection to sift through the grounds and submissions and deal with only that which addresses the part of the application falling under rule 4.
 4. The grounds of the application are on the face thereof. The applicants filed a supporting affidavit sworn on January 10, 2024, by Hillary Kipruto Bartilol, the 1st applicant, and deposed that the delay in pursuing the appeal after filing the Notice of Appeal on October 4, 2023, was inadvertent. They state that they were in negotiations with the first family and had maintained a cordial relationship through various meetings with the elders and correspondences between their respective advocates. The applicants aver that this application has been made without unreasonable delay, and that unless the orders prayed for are granted, they will suffer prejudice, as they will have been locked out of the seat of justice without having been heard.
 5. The backdrop of the case is that on September 28, 2023 the High court delivered a judgment in Succession Cause No. 17 of 2001 effectively distributing the estate of the late John Kiptum Bartilol and appointing Hillary Kipruto Bartilol as a co-administrator. On October 18, 2023 the respondents herein filed an application for orders that the Deputy Registrar do execute all the necessary conveyance forms after the Co- administrator, with sinister motives withheld his signature, wanting the respondents to disregard the judgment and share the estate with Edna Kangogo who is not a beneficiary.
 6. The Applicants filed an application dated October 24, 2023 for review of the judgment. By a ruling delivered on December 14, 2023 the application was dismissed and the applicants, being dissatisfied, lodged a notice of appeal dated on January 10, 2024, expressing their intention to appeal against the decision of the Court.
 7. The applicants filed written submissions dated January 26, 2024 through the firm of Cheruiyot Melly and Associates Advocates. In relation to whether the Applicants are deserving of the orders sought, specifically on leave to file appeal out of time, the applicants cited the case of [*Bank of Africa Kenya*](#)



- Limited v Put Sarajevo General Engineering Co.Ltd & 2 others* [2018] eKLR, where the Court excused an error by counsel failing to file a document in time, due to the multiple applications filed in quick succession, requiring responses. They emphasized that counsel's actions did not amount to indolence, thus warranting consideration for extension of time. They also referred to the case of *Ngei v Kibe & another* (Civil Appeal E359 of 2021), where the delay was attributed to the late receipt of proceedings.
8. In rebuttal the respondents filed written submissions dated January 30, 2024, through M/S Odhiambo and Odhiambo Advocates, and urged that failing to serve the Notice of Appeal and failing to seek leave to file it out of time, rendered the purported Notice of Appeal, incompetent and purposeless. Their reference was the Supreme Court decision in *Bookpoint Limited v Guardian Bank Limited & another* [2021] eKLR, where it was held that the absence of a valid Notice of Appeal renders any motion for extension to file an appeal out of time futile. They also referred to the case of *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR, emphasizing the jurisdictional importance of a Notice of Appeal.
 9. The main issue for determination is whether the prayer for granting of extension of time to file and serve the Notice of Appeal is deserved. The applicants cited inadvertent delay due to ongoing negotiations and counsel's error as the reasons for delay. However, the respondents argue that the judge must decide whether the delay is excusable.
 10. It is now settled that extension of time is not an automatic right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. The unfettered discretion to extend the time limited by the rules, or by any decision of the Court, is conferred by rule 4 which provides that;

....the Court may, on such terms as it thinks 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 that act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.
 11. In the exercise of discretion under rule 4, the Court takes into account various factors, as demonstrated in *Paul Wanjobi Methane v Duncan Gichane Mathenge* [2013] eKLR where the Court stated that :

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
 12. The Supreme Court settled the principles that guide in the exercise of discretion to extend time in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR as follows:
 - i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
 - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.



- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the Respondent if extension is granted.
 - vi. Whether the application has been brought without undue delay.
 - vii. Whether in certain cases public interest should be a consideration for extension of time.
13. In regard to whether the delay was reasonable or excusable, the applicants submitted that the notice of appeal was filed on 4th October, 2023, six days after delivery of the judgment on September 28, 2023 in compliance with rule 75(2) of the *Court of Appeal Rules*. They blamed the failure to serve the Notice of Appeal in the time required under rule 77(1) of the *Court of Appeal Rules*, on an inadvertent mistake that they regret and that it was not deliberate. They explained that, at the time service ought to have been done, their counsel was before the court actively prosecuting twin applications dated October 17, 2023 and October 24, 2023 and it escaped his mind to serve the Notice of Appeal upon the Respondents in good time. The applications were determined on December 14, 2023.
 14. The applicants also urged that they were pursuing negotiations with the first family evidenced by various meetings with the elders and correspondence between their advocates. They cited the case of *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co.Ltd & 2 others* [2018] and *Ngei v Kibe & another* (Civil Appeal E359 of 2021). They therefore prayed for an extension of time to file and serve appeal.
 15. In rebuttal, and due to the omnibus nature of the appeal adverted to earlier in this ruling, the respondents' contentions dwelt mostly on the application under rule 5(2)(b).
 16. The rules do not set out the number of days that may be considered as inordinate. Each case is to be determined on its own facts, as held in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR in which the Court of Appeal stated as follows:

“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.”
 17. I have considered the period and reasons advanced for the delay. The judgment was delivered on September 28, 2023 and this application is dated January 10, 2024, more than three months later. The applicants were aware of their intention to appeal, hence the filing of the Notice of Appeal. They however went to sleep on the process of appeal and I therefore find that a delay of more than three months is not excusable.
 18. Neither the applicant nor the respondent submitted on whether the intended appeal is arguable, or whether granting of leave would prejudice the respondent. Therefore, I will not belabour those issues. I however, state once again that this Court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered. See- this Court’s decision in *Abdul Azizi Ngoma v Mungai Mathayo* [1976] Kenya LR 61, 62.



19. I have meticulously considered the present application and I am not satisfied that the applicant has provided valid reasons to warrant the extension of time to file the appeal. Therefore, I dismiss the application in its entirety and award costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

