



**Postel Housing Co-operative Society Limited v Telkom Kenya Limited & 5 others;
Ministry of Public Service, Youth and Gender Affairs & 2 others (Interested Parties)
(Civil Application E499 of 2023) [2024] KECA 588 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 588 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E499 OF 2023
LA ACHODE, JA
MAY 24, 2024**

BETWEEN

POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

TELKOM KENYA LIMITED 1ST RESPONDENT

AFTRACO LIMITED 2ND RESPONDENT

MINISTRY OF SPORTS, CULTURE AND HERITAGE 3RD RESPONDENT

THE ATTORNEY GENERAL OF KENYA 4TH RESPONDENT

THE NATIONAL LAND COMMISSION 5TH RESPONDENT

EXCLUSIVES ESTATE LIMITED 6TH RESPONDENT

AND

**MINISTRY OF PUBLIC SERVICE, YOUTH AND GENDER
AFFAIRS INTERESTED PARTY**

**MINISTRY OF INFORMATION, COMMUNICATION AND
TECHNOLOGY INTERESTED PARTY**

DALLO HOLDING LIMITED INTERESTED PARTY

*(An application for extension of time to file an appeal from the judgement
and decree of Environment & Land court at Nairobi, (Mboya Oguttu
J) delivered on 17th July 2023 in Nairobi ELC Petition NO. 11 of 2021)*



RULING

1. Before me is a Notice of Motion dated 30th October 2023 brought by Postel Housing Co-Operative Society Limited, the applicant, under Article 159(2)(d) of the Constitution, rule 4 of the Court of Appeal, Rules 2022, Section 3, 3a and 3b of the Appellate Jurisdiction Act Cap 9 Laws of Kenya. The motion substantially seeks for orders that the applicant be granted extension of time within which to file and serve the appeal and in the alternative, the Notice of Appeal dated 18th July 2023 be regularized and deemed as filed, served, and properly on record together with the attendant prayer for costs.
2. The motion is supported by the grounds on its face and the supporting affidavit of M/s John Oscar Juma the applicant's advocate, sworn on 30th October 2023.
3. This matter originates from a petition, Nairobi ELC Petition No. 11 of 2021, that the 1st and 2nd respondents in this application filed against the applicant and other parties, seeking orders for, inter alia; a declaration that the act of taking possession of the land in question by the 1st respondent was illegal and a violation of the 1st petitioner's rights; a declaration that the first petitioner is the rightful owner of the property and an order for compensation.
4. The applicant filed a response and a cross-petition and sought reliefs including: a declaration that the petitioners, (1st, 2nd and 3rd respondents and interested parties) had violated the applicant's constitutional right to property; that the compulsory acquisition by the National Land Commission was illegal and that the applicant was the lawful owner of the land in issue; that Telkom Kenya Limited do subdivide the land in issue and transfer 60 acres of the land to the applicant; the National Land Commission do provide compensation for the 60 acres of the land; and, a declaration that the deed of settlement between Telkom Kenya Limited and ATRACO Limited was illegal, unlawful, null and void.
5. The learned judge considered the matter and by a judgement dated 17th July 2023, ruled in favour of the 1st and 2nd respondents in this application.
6. The applicant was aggrieved by the judgment and being desirous of appealing against it, instructed the firm of M/s. J.O Juma & Co. Advocates on 18th July 2023, to file an appeal. The firm filed a Notice of Appeal dated 18th July 2023 on 19th July 2023 through Mr. Baraka, one of its counsel who had conduct of the matter and who later left the firm. When the applicant later sought to know the status of the matter from the advocates, it became apparent that the counsel had only requested for the typed judgement and not the proceedings. By this time, the statutory time for filing the appeal had lapsed. It is deposed that the intended appeal raises questions of law and fact and has a high chance of success.
7. In response to the application, the 1st respondent filed grounds of opposition dated 9th February 2024 and averred that the applicant had failed to justify the delay. That the alleged inadvertence of the counsel does not meet the threshold for granting orders for extension of time and that the 1st respondent will suffer prejudice if the court grants the orders.
8. The 2nd respondent filed a replying affidavit sworn by Salim Sadru (director of the 2nd respondent) on the 9th February 2024 and averred that the applicant was aware of the judgement and decree delivered. That the applicant's counsel filed a notice of appeal and failed to take further action on the matter. He averred that the applicant's reason was inexcusable as the firm and not Mr. Baraka was on record for the applicant. It was therefore, imperative for the firm to secure their client's interest and that the draft memorandum of appeal does not disclose any arguable grounds.



9. M/s J. O. Juma & Co. Advocates filed written submissions dated 20th November, 2023 on behalf of the applicant and urged that they have sufficiently satisfied the twin tests of having an arguable appeal and the appeal being rendered nugatory should the application be denied and the appeal succeeds. The applicant cited the case of *NIC Bank Limited & 2 others vs Mombasa Water Products Ltd* (2021) eKLR and urged that the grounds raised in the memorandum of appeal are arguable.
10. Counsel outlined that; the first and second grounds raise a substantive claim over LR. No. 7665, Grant 8498 and faulted the superior court for exceeding its jurisdiction; the third and fourth grounds raise a legal issue against the administration of justice and public policy for a specialized court; the fifth and sixth grounds raise a bona fide question on a claim of the subject property by the applicant; and, the seventh ground questions the inequitable and unconscionable conduct of the 1st and 2nd respondents as regards suppression of evidence and conspiracy to defraud the applicant.
11. The applicant averred that the application is well-founded both in law and on the facts and that its seriousness in pursuing the appeal has been demonstrated by the request for typed and certified proceedings from the registrar, to institute the appeal.
12. The firm of Oraro (SC) & Co. Advocates, filed written submissions dated 9th February 2024 for the 1st respondent and reiterated the particulars of the grounds of opposition. They relied on the decision in *Mwangi vs Kenya Airways Ltd* (2003) KLR to demonstrate that the applicant had failed to justify the delay. They also cited *Bains Construction Co. Ltd vs John Mzure Ogowe* (2011) eKLR to urge that the applicant should bear the consequences of its agent, and *Patrick Kiruga Kithinji vs Victor Mugira Marete* (2015) eKLR to demonstrate the incurable nature of an appeal filed out of time. They urged that the application be dismissed with costs.
13. The firm of Ahmednassir Abdullahi LLP (SC) filed written submissions also dated 9th February 2024 on behalf of the 2nd respondent and reiterated the contents of the replying affidavit. They referred to the Supreme Court decision in *Nicholas Kiptoo Arap korir Salat vs IEBC & 7 others* (2014) eKLR, which set out the considerations to guide the Court in exercising its discretion in applications of this nature. They also cited *Njoroge vs Kimani* (2022) KECA 1188, where the Court explained what constitutes inexcusable delay and *Turea Ltd (t/a) Dr. Mattress vs Mohammed* (2022) KECA 1271, where the court dismissed an application for extension of time on the grounds of inexcusable delay.
14. The authority to determine an application of this nature is bestowed on the Court by Rule 4 of the *Court of Appeal Rules 2022* 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 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.”
15. The principles that guide the Court in exercising this mandate were crystallized by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR as the length of the delay, the reason for the delay, “possibly” arguability of the intended appeal, and any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
16. Starting with the period of delay, the record indicates that the impugned judgment was delivered on 17th July 2023 and two days later on 19th July 2023, the Notice of Appeal the applicant seeks to be validated was filed. It was thus, within the statutorily stipulated time. The current application was filed on 30th October 2023, about three and a half months later.



17. In *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR the Court of Appeal addressed the question of delay and held that;
- “...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.”
18. The period of delay on its own, is not sufficient to move the Court to grant or decline to grant the extension. What requires consideration is the explanation the applicants have proffered for failing to initiate the intended appellate process within the stipulated time. The applicant averred that on 18th July 2023 it instructed the firm of M/s. J.O Juma & Co. Advocates to appeal against the impugned judgement and that the said firm did file a Notice of Appeal dated 18th July 2023. When the applicant followed up with the advocates to know the status of the matter three months later, it emerged that the counsel who had conduct of the matter had taken no further step to advance their quest for appeal before he left the firm. By that time the statutory time limit had lapsed.
19. In the foregoing circumstances I find that the delay was neither dilatory nor intentional. It was explainable and therefore excusable.
20. On the arguability of the intended appeal, the applicant has annexed a draft memorandum appeal, enumerating the ground they seek to urge on appeal. An arguable appeal is not necessarily one that must succeed upon being urged nor is the Court called upon to determine whether the intended appeal has merits or not at this point. That is an issue to be determined by the court that will deal with the merits of the appeal. That is why the requirement that the intended appeal be arguable is prefaced with the word “possibly”. See- *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* [2016] eKLR.
21. Without delving into the merits of the intended appeal lest I embarrass the bench that will be seized of it, I find that the claim over LR. No. 7665, Grant 8498 renders this appeal an arguable one. Hence, the applicant should be given a chance to argue it on merit.
22. The applicant also invoked the non-technicality principle enshrined in Article 159(2)(d) of the *Constitution* that enjoins the courts to administered justice without undue regard to procedural technicalities. Indeed, the exercise of the jurisdiction under Article 159 of the *Constitution* is unfettered when it comes to procedural technicalities impeding the administration of justice. However, Article 159(2)(d) of the *Constitution* is not a panacea for all procedural ills. See- *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR.
23. On whether the respondents stand to suffer prejudice should the relief sought by the applicant be granted, the applicant submitted that granting the application would not prejudice the respondents. The 1st respondent submitted that they would not enjoy the fruits of their judgment if the extension is granted. The 2nd respondent did not submit on this issue.
24. I have considered the rival arguments in order to balance the competing interests of the respondents who have the right to enjoy the fruits of their judgement on the one hand, and the applicants who should be accorded reasonable opportunity to address their grievances on appeal. I am satisfied that the interests of justice tilts in favour of the applicant in the circumstances of this case.
25. In light of the above analysis, I am satisfied that the applicant has satisfied the prerequisite for granting relief under Rule 4 of this Court’s Rules. I therefore proceed to make orders as follows:
- a. The applicant’s application dated 30th October 2023 is allowed.



- b. The notice of appeal dated 18th July 2023 is hereby deemed to be properly filed and served.
- c. The appeal shall be filed and served within fifteen days of this date (or of receiving the typed and certified copy of the proceedings if they have not yet been availed.)
- d. Costs of the application shall abide the outcome of the appeal.

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

