



Ngetich & 2 others (All Suing as Officials of Kondoo Trading Centre Self Help Group) v Maina & 5 others (Civil Application E003 of 2024) [2024] KECA 697 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KECA 697 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E003 OF 2024
LA ACHODE, JA
JUNE 14, 2024**

BETWEEN

**JOSEPH NGETICH 1ST APPLICANT
JOHN SINGOEI 2ND APPLICANT
PAUL GATHUO 3RD APPLICANT
ALL SUING AS OFFICIALS OF KONDOO TRADING CENTRE SELF HELP
GROUP**

AND

**JAMES MAINA 1ST RESPONDENT
DANIEL MWANGI 2ND RESPONDENT
BEN KIPLAGAT KANGOGO 3RD RESPONDENT
DANIEL CHEGE (ALL SUED AS OFFICIALS OF KONDOO TRADING CENTRE
SELF HELP GROUP 4TH RESPONDENT
THE ATTORNEY GENERAL 5TH RESPONDENT
NATIONAL LAND COMMISSION 6TH RESPONDENT**

*(Being an Application for Extension of Time to file and serve the
Notice of Appeal from the Judgment of the High Court at Eldoret
(Odeny J), dated 20th April 2022 in Eldoret ELC Case No.452 of 2013)*

RULING

1. This application is in relation to the Notice of Motion dated 1st February 2024, filed by Paul Gathuo the 3rd applicant on behalf of the other applicants, under Section 3A and 3B of the [Appellate Jurisdiction Act](#)



and Rule 1(2) 4, 41, 43, 47 and 75(2) of the Court of Appeal Rules 2022, Section 3 of the Judicature Act, Article 25(c), 48, 50(1), 159(1) and (2) and 164 (3) of the Constitution of Kenya. They seek substantive orders that time be enlarged for the Applicants to file and serve the Notice of Appeal against the judgment and decree delivered on 20th April 2022, by Hon. M.A. Odeny J, in the High Court at Eldoret, in the Environment and Land Court (ELC), Case No.452 of 2013. Upon time being enlarged the applicants be allowed to file Appeal herein out of time.

2. The application is premised on the grounds on its face and the supporting affidavit of even date sworn by the applicant. In summary it is averred that judgment was delivered on 20th April 2022 in Eldoret ELC, in the absence of the applicants and a permanent injunction was issued against their occupation of land parcel No. Uasin Gishu/kondoo Scheme/627.
3. The applicants' tardiness in filing an appeal is attributed to inability to trace their initial advocates on record, M.K. Magut & Sang Advocates, who did not inform them that the judgement had been delivered. Further that since the year 2022 the advocates had been unreachable on all modes of communication, as well as their physical offices. The applicants learnt of the said judgement when they were being served with an eviction notice in August 2023.
4. Upon changing advocates to Koech, Lelei & Co advocates currently on record, the applicants filed an application dated 19th September 2023 seeking leave to file Notice of Appeal out of time.
5. The respondents filed a replying affidavit dated 13th October 2023 and asserted that the applicant's advocates were accessible at their physical offices, in Eldoret. They practiced in the name and style of Magut Kirigo & Co Advocates, physically located along Oginga Odinga Street, Kenindia Plaza, 3rd Floor, door no-1 in Eldoret town. In addition, the advocate maintained an active telephone number and official email address. That therefore, the applicants were negligent and indolent in pursuing their case and the delay of 500 days is not excusable.
6. In a ruling dated 18th January, 2024 Hon Obaga J found that it was clear that the applicants initial advocates received the notice of judgment sent by the respondent's counsel and the date of receipt was indicated as 25th August 2023. Furthermore, the applicant's advocates maintained a phone number and if the applicants were keen, they would have traced them. Therefore, that the justification of delay due to lack of traceability of the advocates could not stand and their lack of initiative to mitigate the matter supported the averment that the applicants were negligent and careless. The learned judge dismissed the application on the basis that it lacked merit.
7. In response to the ruling, the applicants filed the current application dated 1st February 2024 in this Court seeking for extension of time based on the delay being excusable.
8. The respondents filed a Replying Affidavit dated 20th February 2024. They reiterated what they stated in their replying affidavit of 13th October 2023, that a delay of 500 days is not excusable or reasonable, as the Advocates were available and accessible. They averred that the applicants have not met the threshold for granting of leave to file an appeal out of time.
9. I have carefully perused the application, the affidavit in support of the application and the one against it. This application is brought under Rule 4 of this Court's Rules and must be considered in light of the factors set out in *Nicholas Kiptoo ArapKorir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, by the Supreme Court as follows:
 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.
 4. 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.”
10. The applicants filed written submissions dated 29th February 2024 through M/S Koech Lelei and Co. advocates laying out a basis for seeking leave to file the appeal out of time, while the respondents filed their submissions dated 22nd February 2022 through M/S Mwathi Njue and Co advocates setting out grounds for denial of leave.
 11. The applicants’ sole reason for the delay is that their advocates were not traceable on all forums of communication, or at their physical premises and did not inform the applicants of the judgment. They referred to the case of Kamlesh Mansukhalal Damki Patni vs DPP & 3 Others [2015], to lay emphasis on the exercise of judicial authority in ensuring that litigants access justice. They urged the Court to consider the risk of significant prejudice they stand to suffer should they not be granted leave to pursue their appeal, and which will have negative consequences on their livelihoods. They referred to the case of Charles N Ngugi vs ASL Credit Limited [2022] eKLR wherein the Court cited the case of Machira T/A & Co Advocates v East Africa Standard [2002] eKLR. Lastly, the applicants submitted that the intended appeal is arguable and stressed the potential irreparable harm to their businesses and homes if leave is not granted.
 12. The respondents on the other hand, submitted that the delay in bringing the application is unexplained, unreasonable and not plausible, considering that it was for a period of approximately 500 days. That it is not supported by a plausible or sufficient reason, in view of the fact that the applicants’ advocates were traceable. In reliance of the case of Nicholas Kiptoo Arap Korir Salat (supra), the respondents argued that the applicants do not meet the statutory threshold for excusable delay, therefore are not entitled to the leave.
 13. Relying on the case of David Morton Silver Stein vs Atsango Chesoni [2002] eKLR, the argued that the chances of the intended appeal succeeding are nil, for reasons that the grounds presented were not arguable. This is in view of the holding of the judgment that, there was acknowledgement that the Ministry of Land followed all due process and adhered to the law in preparation of the development plan that was in question. In addition, the justification for the delay was held to be frivolous as the applicants’ Advocates were traceable.
 14. They further argued that the application is an abuse of the court process. They cited the case of Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, and urged that the matter is Res Judicata, as the application before this Court, is the same one that was made earlier by the applicants in the superior court and which was dismissed in the ruling of 18th January 2024 by Hon Obaga J, for lack of merit.



15. The discretion under rule 4 Court of Appeal Rules of 2022 is unfettered. It however, must be exercised judiciously, and not on a whim, sympathy or caprice. The starting point is to assess whether the delay is reasonable or excusable. The delay must be unforeseeable and beyond the control of a party to constitute an excusable delay. What distinguishes a foreseeable from unforeseeable delay is essentially, the parties' actions and whether those actions contributed to the delay.
16. As stated by this Court in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR:
"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation.
Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."
The responsibility rests with the applicants to follow up on the progress and status of their case.
17. In this case, the applicants did not contest the respondents' averment that the physical address of their advocates was known, or that they had a telephone number. There is also no evidence that the applicants took any action to seek information regarding their judgment by writing or visiting the Registry. In this case the applicants did not contest the respondents' averment that the physical address of their advocates was known, or that they had a telephone number. There is also no evidence that the applicants took any action to seek information regarding their judgment by writing or visiting the Registry.
18. Therefore, the argument of lack of traceability of the said advocates does not suffice as an excusable and plausible reason for a delay that spanned 500 days.
19. Regarding whether the intended appeal is arguable, the applicants submitted that it is arguable without giving details. The respondents argued that the intended appeal is not arguable and chances of it succeeding are nil, for reasons that in the judgment it was acknowledged that the Ministry of Land followed all due process and adhered to the law in preparation of the impugned development plan.
20. However, even if the intended appeal was found to be arguable, this does not diminish the fact that it must be filed within the prescribed time. In *Odongo & another v Housing Finance Co. Ltd & 3 others* (Civil Application E083 of 2023) [2024] KECA 375 (KLR) the Court stated that:
".... 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."
21. The Court's discretion to extend time under rule 4 is invoked only after 'sufficient reason' for extending time has been established. Only then can other considerations such as the absence of any prejudice, and the prospects or otherwise of success in the appeal be considered. The doctrine of *res judicata* does not apply in this matter since the application was not determined by a court of concurrent jurisdiction.



22. Having considered the present application, I am not satisfied that the applicant has provided valid reasons to warrant the extension of time to file the appeal. The application dated 1st February, 2024 is therefore dismissed in its entirety and costs are awarded to the respondent.

23. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

