



REPUBLIC OF KENYA



KENYA LAW
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**Nyangwara v Masake (Civil Application 162 of 2023)
[2024] KECA 658 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 658 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 162 OF 2023
HA OMONDI, JA
JUNE 7, 2024**

BETWEEN

HELLEN MORAA NYANGWARA APPLICANT

AND

SIMON MASAKE RESPONDENT

(Being an appeal from the judgment at the Environment and Land Court at Kilgoris, (E. M. Washe, J.) dated 29th March, 2023 in ELC No. E003 of 2022)

RULING

1. The Notice of Motion dated 29th September, 2023 brought under Rule 1(2), 4, 5(2)(b), 14(3) and 84 of the *Court of Appeal Rules*, 2022, substantially seeks: that the Notice of Appeal and the Record of Appeal annexed to the application, be deemed to be duly filed, served and properly on record. The motion is supported by the affidavit sworn by Hellen Moraa Nyangwara.
2. The background leading to this application is that, the respondent, Simon Masake, had filed a suit against the applicant in Kilgoris ELC Case No. E003 of 2022 *Simon Masake v. Hellen Moraa Nyangwara*. Subsequently the court delivered a judgment on 29th March 2023 in favour of the respondent. The applicant being aggrieved by the said decision lodged the Notice of Appeal on the 5th April 2023, which was within the 14 days statutory period. However, when she went to make payment of the filing fees, the court registry staff informed her that there was no electricity. The applicant was eventually, issued with the receipt dated 9th May 2023.
3. Consequently, the delay in payment of court fees for the Notice of Appeal, resulted in further delay in serving the Notice of Appeal which was eventually served on the 28th April 2023. The applicant's contention is that the Notice of Appeal was lodged in time, but the payment and service was made out of time.



4. The applicant points out that before filing the present application, she had filed an application dated 29th June 2023, before the Kisumu Court of Appeal in Civil Application No. E075 of 2023 Hellen Moraa Nyangwara v. Simon Masake but upon appearing before a 3 judge bench, she was directed to file the present application seeking only the orders for extension of time as opposed to the application dated 29th June, 2023 which also sought orders for stay and injunction. It is pointed out that the applicant filed a record of appeal which she seeks to have duly deemed to have been filed; and which is cited as Kisumu Court of Appeal El62 of 2023 Hellen Moraa Nyangwara v. Simon Masake within this appeal.
5. The applicant submits that she has an arguable appeal with high chances of success, as one of the issues in contest relates to the legality and admissibility of a demarcation document.
6. In opposing the application, the respondent by his replying affidavit dated 4th December 2023, describes the application as false, deficient and misleading in terms of its contents; and meant to hoodwink the court in granting orders which have been sought therein. The respondent contends that whereas the applicant refers to a Notice of Appeal dated 30th day of March 2023 and lodged in court on the 4th day of April 2023; there is no Notice of Appeal that is capable of being duly filed, served and to be deemed as properly on record, because the said notice of appeal purportedly filed by the applicant is dated and/or lodged in court on the 4th day of March 2023; and the judgement is dated 29th day of March 2023.
7. In addition, the respondent describes the application as an abuse of the due process as it has been filed by a stranger who is requesting this Court to grant substantive orders in a vacuum contrary to Order 9 rule 9 of the *Civil Procedure Rules* Chapter 21 Laws of Kenya and rule 23(1) of the Court of Appeal Rules. The basis for this submission is that, the contested judgment was delivered on 29th of March, 2023, yet the applicant filed a Notice of Appeal at the Court's Registry at Kilgoris on 4th day of March, 2023; and the instant Notice of Appeal was served on the respondent's advocate on 28th day of April, 2023; which was after the lapse of 7 days contrary to rule 77(1) of the *Court of Appeal Rules*; that the attempt to explain the reasons why the receipt for payment is dated 9th May, 2023, is not supported by an affidavit by the Court Administrator and/or Deputy Registrar of the said court, thus rendering the explanation unsustainable. It is the respondent's further contention that the purported notice of appeal is fictitious; the notice of motion has been filed pursuant to rule 84 of the *Court of Appeal Rules* 2022, which is of no legal assistance to the applicant as it simply prescribes the contents of form P2A contained in the appeal.
8. The respondent also points out that the Record of Appeal was served on his advocate on 11th July, 2023, yet it ought to have been filed and served within a period of 60 days pursuant to rule 82(1) of the Court of Appeal Rules, and that in the absence of any proper explanation, the application should be dismissed.
9. Under rules 4 and 41 of the *Court of Appeal Rules*, this Court has unfettered discretion to grant extension of time. Rule 4 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 the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.



See *Fakir Mohammed v. Joseph Mugambi & 2 others* which was quoted in *Mukunga Njoka v. Wanjiku Njoka* (2005) eKLR.

10. It has been pointed out in various authorities by this Court that extension of time is not a right to a party, rather it is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks extension of time has the burden of laying basis to the satisfaction of the court. In considering the prayer, a court must also take into account whether there will be any prejudice suffered by the respondent if extension is granted; and whether the application has been brought without undue delay.
11. I acknowledge that indeed, the Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir Arap Salat v. IEBC* [2014] eKLR set down the guiding principles to consider in the exercise of discretion. One other consideration included by the learned Judge in the case of *Julius Kamau Kithbeka v. Waruguru Kithaki & 2 Others* (2013) eKLR is whether *prima facie* of the intended Appeal/Appeal has chances of success or is a mere frivolity.
12. In determining whether to allow for extension of time, the court has to consider, the length of the delay, reason for the delay, possible arguability of the intended appeal, and; any prejudice to be suffered by the opposite party. The notice of appeal was lodged in time but payment made late. The record of appeal ought to have been filed within 60 days after lodging of the notice of appeal on the 5th April 2023 (written 4 March 2023) effectively meaning that it ought to have been filed by 4th June 2023, but that Notice of Appeal as pointed out is at an incorrect reflection of the true state of affairs as it is dated even before delivery of judgment. If judgment was delivered on 29th March 2023, then the most probable event is that the Notice (which was lodged on 5th April, was prepared on 30th March, a day after the judgment.
13. Certainly, the date indicated on the Notice of Appeal raises eyebrows regarding the applicant's *bona fides*, yet the determinant factor in this instance is the content. Undoubtedly, the contents of the document constitute a Notice of Appeal by any standards which as provided under rule 77(1) of the *Court of Appeal Rules*, is simply a notice in writing indicating that a party to a case desires to appeal to the Court against the outcome.
14. I think what is critical at this stage is, whether reason for the delay has been adequately explained, and whether thereafter the applicant acted in a timely manner. I note, as pointed out by the respondent, that the record of appeal was filed on the 29th June 2023; when it should have been filed by at least 31st May, and in my considered view, the period of less than a month does not amount to inordinate delay. Indeed, the applicant moved with speed to file the initial application by 29th June, 2023, but this was knocked off due to its unprocedural content, hence the present application dated 29th September. It would be pretentious to ignore this fact and conclude otherwise. In the case of *Moroo Polmers Limited v. Wilfred Kosyoki Willis* [2019] eKLR a 7 days delay was deemed as not being inordinate.
15. In my view the delay has been explained as having been caused by the registry staff in issuing the receipt; and there is nothing presented to me to suggest that the receipt issued is doctored or fraudulent.
16. On whether or not the intended appeal has no chance of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of Athuman *Nasura Juma v. Afwa Mohammed Ramadhan* [2016] eKLR:

“...this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.



17. From what I have perused in her written submissions, the applicant intends to challenge the legality and admissibility of a demarcation document which would have aided in shedding light regarding the disputed property. I find that the appeal is not frivolous.
18. Ultimately, I find that the delay has been adequately explained; and I do not consider it inordinate and the applicant herein, has made the present application without undue delay; she has met and satisfied the principles set out for this Court to exercise its discretion in her favour and grant the extension. The applicant is therefore, in my view deserving of the orders sought, to the extent that leave is granted to the applicant to file and serve the Notice of Appeal, and the Record of Appeal out of time. The filed Notice of Appeal, and Record of Appeal be and are hereby deemed as properly on record. Costs shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

