



**Macharia v Muthoni (Suing as the Legal Representative of Joseph Kahonge Muthondu (Deceased))
(Civil Appeal (Application) E051 of 2024) [2024] KECA 952 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 952 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E051 OF 2024
WK KORIR, JA
JULY 26, 2024**

BETWEEN

JOHN THUO MACHARIA APPLICANT

AND

AND-ELIZABETH MUTHONI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF JOSEPH KAHONGE
MUTHONDU (DECEASED)**

(Being an application for leave to file a Notice of Appeal out of time against the judgment and decree of the Environment and Land Court at Nyabururu (Y. M. Angima, J) issued and dated 22nd September 2022 in E&LC Case No. 57 OF 2019 (Formerly Nakuru HCCC No. 112 of 2003)

RULING

1. Through the notice of motion dated 17th May 2024 brought under rules 4 and 77 of the Court of Appeal Rules, 2022, the applicant, John Thuo Macharia, mainly seeks an order to file a notice of appeal against the judgment delivered on 22nd September 2022 by Y. M. Angima J. out of time. The application is premised on the grounds contained on its face and the averments made by the applicant in the affidavit sworn in support of the application.
2. It is the applicant's case that after the delivery of the impugned judgment, the applicant's former advocates filed Nakuru Civil Application No. E065 of 2022 before this Court seeking stay of execution of the judgment of the trial court. However, the application was dismissed on 6th October 2023 on the ground that the Court was bereft of jurisdiction because there was no proper notice of appeal on record. The applicant avers that being dissatisfied with the legal advice and representation by his former counsel, he procured the services of the current counsel. The applicant deposes that he is keen on challenging the impugned judgment and he has arguable points of law with high chances of success.



It is additionally the applicant's averment that the delay in filing the notice of appeal is excusable and he stands to suffer substantial loss if time is not enlarged.

3. The respondent, Elizabeth Muthoni Kahonge (suing as the legal representative of Joseph Kahonge Muthondu (Deceased)) opposed the application through a replying affidavit sworn by her counsel, Charles Gakuhi Chege, on 11th June 2024. Counsel deposed that the delay of 1 year and 9 months is inexcusable. Further, that the impugned judgment has been fully executed and the respondent is in full occupation of the suit property. It is counsel's averment that despite the dismissal of Nakuru Civil Application No. E065 of 2022, the applicant still retained the services of the previous counsel to pursue an application for stay of execution before the trial court, which application was withdrawn after execution of the impugned judgment on 9th March 2024. According to counsel the applicant became aware of the lack of a proper notice of appeal after the respondent filed her replying affidavit in Nakuru Civil Application No. E065 of 2022, hence the delay is inexcusable.

4. The application was canvassed by way of written submissions.

For the applicant, the firm of Wairegi Kiarie & Associates filed submissions dated 21st June 2024. Counsel referred to the case of Edith Gichungu Koine v. Stephen Njagi Thoithi [2014] eKLR to point out the factors to be considered before leave to appeal out of time is granted. Counsel set out the chronology of events before submitting that the applicant was not indolent as his former counsel was wholly to blame for the delay in filing the notice of appeal. Counsel relied on Hamam Singh & others v. Mistri [1971] E.A. 122 to urge that the mistake of counsel should not be visited upon a litigant. It was also counsel's submission that the intended appeal raises cogent issues of law including the question of jurisdiction of the Environment and Land Court (E&LC) therefore deserving a hearing before the Court. Counsel also submitted that the respondent will suffer no prejudice if time is enlarged to allow the applicant to pursue his appeal. According to counsel, the applicant is keen on pursuing an appeal and has provided sufficient reasons to warrant extension of time. Counsel ultimately urged that the application be allowed in the interest of justice.

5. In opposition to the application, the firm of Gakuhi Chege & Associates filed submissions dated 10th May 2024 and reiterated the averments made in the replying affidavit. Counsel submitted that the applicant continued to be represented by the former advocates on record until 9th March 2024 and therefore the applicant's claim that the previous counsel was to blame for the delay is unacceptable. According to counsel, the delay of 1 year and 9 months is inordinate and unexplained, hence inexcusable. Counsel relied on Charles Wanjohi Wathuku v. Githinji Ngure & Another [2018] eKLR to urge that the applicant does not deserve absolution from the acts of his former advocates. Counsel asserted that the applicant will not be prejudiced as the impugned judgment has been fully executed. Counsel ultimately urged for the dismissal of the application with costs, contending that it has not met the conditions for enlargement of time as set by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral & Boundaries Commission & 7 others [2014] eKLR.

6. I have considered the pleadings and the submissions of the parties. The issue for determination is whether the applicant has met the conditions for the exercise of the discretionary power under rule 4 of the Court of Appeal Rules, 2022 for enlargement of time. The Supreme Court in Nicholas Kiptoo Arap Korir Salat (supra) laid down the principles to aid in the disposal of applications for extension of time as follows:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:



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.”
7. Based on the stated principles, the questions to be answered in this matter are whether the applicant has satisfactorily explained the delay in filing the notice of appeal and whether the respondent will suffer any prejudice in the event leave to appeal out of time is granted.
8. The judgment the applicant intends to appeal against was delivered on 22nd September 2022 while the present application is dated 17th May 2024. Under rule 77(2) of the Court of Appeal, 2022, the applicant was required to file his notice of appeal by 6th October 2022. This application was therefore filed approximately 1 year and 7 months out of time. As a way of explaining the delay, the applicant blames his erstwhile advocates for misadvice and misadventure in pursuing an application for stay as opposed to filing a notice of appeal. The respondent’s take is that this reason cannot hold considering that the applicant retained the services of the same counsel until 9th March 2024 long after his attempt before this Court to stay execution of the impugned judgment had failed.
9. In considering whether the applicant’s former counsel was entirely to blame for the delay in filing the appeal, the holding of the Court in *Itute Ingu & another v. Isumael Mwakavi Mwendwa* [1994] eKLR comes to mind. In the cited case, the Court, while rejecting the applicant’s attempt to blame his former counsel, held that:

“What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court’s rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes. What is the mistake alleged here? It is that the advocate in fact filed no appeal at all and that for some nine years he kept cheating the applicants that he had filed an appeal and the applicants believed him. The advocate obtained the proceedings within a reasonable time. He next obtained a certificate of delay. In all these he made no mistake of a legal nature, as far as I can see. He simply did not file the appeal and the applicants have not told me if they asked him why he had not filed the appeal and the reason he would have given them for his failure to act in the matter. It seems that as soon as the applicants learned that no appeal had been filed, they simply instructed their present advocates, and it is not surprising



that I do not have before me any kind of explanation whatsoever as to why no appeal was in fact filed. True, the previous advocates may have, for some reason of their own, cheated these applicants, but I have to weigh that against the fact that the present respondent waited for the applicants to take action in the matter until on the 6th October, 1992, some 7 years after the original judgment, when he filed his notice of motion to strike out the notice of appeal. That motion was itself unchallenged and the respondent obtained an order upon it on the 10th March 1993. The present application was filed some 16 months thereafter.”

10. The applicant before me has not explained why no appeal was filed in the first place. Whereas the applicant blames the former counsel on record, he has failed to rebut the respondent’s assertion that he retained the same counsel long after the Court had pointed out that it lacked jurisdiction because no notice of appeal had been filed. Further, the applicant has not explained the steps he took upon the delivery of the ruling on 6th October 2023 in Nakuru Civil Application No. E065 of 2022. The applicant’s acquiescence in his previous counsel’s lapses cannot entitle him to the exercise of the discretionary power of this Court to enlarge time. The failure by the applicant to promptly remedy the situation the moment his application to stay the execution of the impugned judgment was dismissed reveals indolence and complicity on his part. As submitted by the counsel for the respondent, he cannot be absolved from the mistakes of his counsel. The remedy of extension of time being an equitable one, it cannot be available to an indolent party. I, therefore, find the explanation tendered by the applicant unsatisfactory.
11. Based on the finding above, the question of prejudice has become moot. Without sufficient explanation for the delay, it is immaterial the possible prejudice that the respondent will face. The delay in itself is prejudicial as it has the possibility of denying the respondent the much-awaited opportunity to enjoy the fruits of a judgment entered in her favour. In legal proceedings, all the parties are entitled to justice which is only attainable through adherence to established rules and principles.
12. I therefore decline the invitation by the applicant to exercise my discretion in his favour. Consequently, the notice of motion dated 17th May 2024 is without merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

