



**Mutinda & 5 others v Nyamasyo & 2 others (Civil Application  
E200 of 2023) [2024] KECA 944 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 944 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E200 OF 2023  
GV ODUNGA, JA  
JULY 26, 2024**

**BETWEEN**

**DISHON ODHIAMBO ..... 1<sup>ST</sup> APPLICANT  
PETER MUTINDA ..... 2<sup>ND</sup> APPLICANT  
JOSEPH MUTISO ..... 3<sup>RD</sup> APPLICANT  
SALIM MRUCHE ..... 4<sup>TH</sup> APPLICANT  
SAID MBUJA ..... 5<sup>TH</sup> APPLICANT  
MUDZO MBUDZO ..... 6<sup>TH</sup> APPLICANT**

**AND**

**MIRIAM MBEKE NYAMASYO ..... 1<sup>ST</sup> RESPONDENT  
STEPHEN MUINDI MUTISYA ..... 2<sup>ND</sup> RESPONDENT  
DR EDWARD MWARINGA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application seeking to file an appeal out of time against the Judgment of Environment and Land Court (Munyao Sila, J) on 3rd March, 2021 at Mombasa in ELC No. 238 of 2015)*

**RULING**

1. By a Motion on Notice dated 4<sup>th</sup> December 2023, the applicants seek leave to file their appeal out of time against the impugned judgment in Mombasa ELC Case No. 238 of 2015 delivered on 3<sup>rd</sup> March 2021 and that the Record of Appeal dated 30<sup>th</sup> November, 2023 be deemed to have been filed within time.
2. The brief background of the dispute was that by a plaint filed on 28<sup>th</sup> September 2015 by the respondents before the Mombasa Environment and Land Court in ELC No. 238 of 2015 against



the applicants herein, the respondents claimed that the applicants had trespassed onto their plots and built structures thereon thus denying the respondents their rightful use of the property. After hearing the matter, on 3<sup>rd</sup> March 2021, the learned Judge in his impugned judgment found in favour of the respondents who had allotment letters and dismissed the applicants' counterclaim. The learned Judge therefore found the respondents were entitled to the eviction orders against the applicants. This was the decision that the applicants were dissatisfied with and which provoked the instant application.

3. The application was supported by an affidavit sworn by the 2<sup>nd</sup> applicant, Peter Mutinda, on 4<sup>th</sup> December 2023 in which it is averred that upon the delivery of the decision on 3<sup>rd</sup> March, 2021, the applicants applied for typed proceedings but have not been supplied with a complete set of the proceedings which they are in the process of collecting to enable them file a supplementary record of appeal; that due to the need to consult the beneficiaries on the modalities of filing the appeal, they were unable to do so within the prescribed time; that they have strong grounds of appeal shown in the Memorandum of Appeal dated 30<sup>th</sup> November 2023; and that the respondents stand to suffer no prejudice if their application is allowed.
4. The application was opposed by a replying affidavit sworn by Miriam Mbeke Nyamasyo on 27<sup>th</sup> June 2024 in which it was averred that the impugned judgement was delivered more than 3 years ago on 3<sup>rd</sup> March 2021; that the Notice of Appeal was filed against the judgement on 11<sup>th</sup> March 2021; that since then no steps or tangible steps have been taken towards the intended appeal; that the delay is inordinate and unexplained; that the letter allegedly applying for the proceedings is not copied to the then advocates hence no extension of time can be issue; that there is no evidence of vigilance in following up the proceedings; that the applicants were only woken up when the respondents filed the pending Civil Application No E074 of 2023 seeking to strike out the Notice of Appeal; that the hearing of that application was adjourned due to the existence of this application and the applicants were directed to pay costs which has not been done; that none of the applicants are living in the suit parcels of land and have no further interest to pursue in respect thereof; that the application is only aimed at delaying and frustrating the respondents; and that on the basis of the Notice of Appeal, the applicant sought for and obtained stay of execution of the subject judgement, an order which they have been enjoying for the last three years.
5. In the same affidavit, and contrary to the rule that affidavits should only contain facts, the deponent referred to court decisions which according to him, supported the dismissal of the application.
6. When this matter came before me for hearing on the Court's GoTo Meeting virtual platform on 3<sup>rd</sup> July 2024, learned counsel, Mr Martin Tindi appeared for the applicants while Mr Mutisya appeared for the respondents. By that date, the applicants had not filed their submissions and were directed to do so within 7 days. As at the time of preparing this ruling, no submissions had been filed by the applicants. The respondents, on the other hand, filed the submissions dated 27<sup>th</sup> June 2024 through the firm of Mutisya & Associates in which they merely rehashed the contents of the replying affidavit.
7. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon.
8. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the *Court of Appeal Rules* are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is



arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

9. Those principles were restated by Waki, JA in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso v Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

10. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, (*supra*) while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.
11. In *Leo Sila Mutiso v Helen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
12. In this case, the judgement was delivered on 3<sup>rd</sup> March 2021.  
While the Notice of Appeal was filed within time, the Record of Appeal was not filed until, according to the applicants, sometimes in November, 2023. I am saying so because the applicants have not disclosed the number of the appeal and the copy of the memorandum of appeal exhibited neither has the appeal number nor is it lodged with the Deputy Registrar of the Court. Clearly the period of delay is inordinate. It is explained on the basis that the applicants were not supplied with complete proceedings despite applying for them and that due to the need for consultations amongst the beneficiaries, the time prescribed for filing the appeal lapsed.
13. A cursory perusal of the letter purportedly requesting for proceedings dated 3<sup>rd</sup> March 2021 does not indicate that it was copied to the advocates for the respondents. No evidence of subsequent follow up was placed before me. As this Court has consistently held, a party seeking favourable exercise of discretion in terms of extension of time to take a necessary step in the proceedings must satisfactorily



explain the delay and the reasons for it particularly, as in this case, where the delay is clearly inordinate and where the remedial action is sought after the other party has already taken steps to strike out the process. In fact, the need to explain the delay has been dramatically acclaimed by this Court to the effect that even a single day's delay if unexplained, will deny the applicant favourable exercise of discretion. Omolo, JA in *Reliance Bank Limited (In Liquidation) v Grandways Ventures Ltd Others* Civil Application No. Nai. 118 of 2007, while considering a similar application held that:

“It is now settled law that whenever there is a delay, the party guilty of the same should offer some explanation for it before an extension of time in his favour can be considered... Any applicant who treats a delay of sixty-four days as amounting to “all due expedition and alacrity” or as amounting to “without any delay” and, therefore requiring no explanation is really not being fair to the single Judge who is being asked to exercise the discretion conferred by rule 4...Any amount of delay, even if it be for one day, ought to be explained in some way...It may 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.”

14. On his part, Waki, JA in *Motorways Kenya Limited v Kenya Engineering Workers Union* [2018] eKLR held that:

“The period between 1st March when the notice of appeal was due and 6<sup>th</sup> March when one was purportedly filed would ordinarily be viewed as a short one. Any delay, however, even for one day, ought to be explained otherwise it is rendered inordinate. And there lies the 'achilles heel' of this application.”

15. In this case the delay is clearly inordinate and the explanation given that consultations were necessary does not justify a delay of three years in making such a simple application and only after a step is taken to terminate the process.
16. In the premises, I find no merit in this application which I hereby dismiss with costs.
17. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**G. V. ODUNGA**

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

