



**Seme v Birika & 3 others (Civil Appeal (Application)  
E110 of 2023) [2024] KECA 921 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 921 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL (APPLICATION) E110 OF 2023  
WK KORIR, JA  
JULY 26, 2024**

**BETWEEN**

**MICHAEL OLE SEME ..... APPLICANT**

**AND**

**SARUNI MOKITA OLE BIRIKA ..... 1<sup>ST</sup> RESPONDENT**

**SAMSON MORONGO ..... 2<sup>ND</sup> RESPONDENT**

**KATETO KEKO JOHN ..... 3<sup>RD</sup> RESPONDENT**

**MOYOI DEVELOPMENT COMMITTEE ..... 4<sup>TH</sup> RESPONDENT**

*(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 Kilgoris (E.M. Washe, J) issued and dated 3rd October 2023 in EL&C MISC. APP. NO. E008 OF 2022)*

**RULING**

1. The application of Michael Ole Seme dated 28<sup>th</sup> November 2023 is brought under rules 4 and 5(2)(b) of the Court of Appeal Rules, 2022. An application for an order of stay of execution pending appeal brought pursuant to rule 5(2)(b) is a matter reserved for a full bench of the Court and I will therefore limit myself to the single judge application brought under rule 4 for enlargement of the time for filing the notice of appeal as well as the record of appeal against the judgment by E.M. Washe, J. delivered on 3<sup>rd</sup> October 2023 in Kilgoris Environment and Land Court (E&LC) MISC APP. No. E008 of 2022. The application is supported by the grounds on its face and the averments made by the applicant’s counsel Bosibori Oganga in the affidavit sworn in support of the application.
2. It is the applicant’s case that he is the Member of County Assembly (MCA) of the ward where the members of the 4<sup>th</sup> respondent reside. The applicant avers that the delay in filing the notice of appeal within the prescribed time was caused by the fact that he had to consult the residents of his ward



before instructing counsel to appeal against the impugned judgement which had installed the 1<sup>st</sup> to 3<sup>rd</sup> respondents as the officials of the 4<sup>th</sup> respondent. The applicant also deposes that if time is not enlarged, the members of the 4<sup>th</sup> respondent will suffer great financial loss because the 1<sup>st</sup> to 3<sup>rd</sup> respondents are likely to misuse the funds of the 4<sup>th</sup> respondent.

3. The respondents opposed the application through grounds of opposition dated 25<sup>th</sup> April 2024 filed by the firm of Kithinji Marete & Co. Advocates asserting that the applicant has not tendered satisfactory reasons for the delay; that the intended appeal is not only an afterthought but a misuse of the judicial process; that enlarging time will subject the respondents to great prejudice; and that there is no express right of appeal in this matter.
4. The application proceeded by way of written submissions with the firm of Bosibori Oganga & Co. Advocates filing submissions dated 18<sup>th</sup> December 2023 on behalf of the applicant. Even though counsel submitted on the omnibus application, I will confine myself to the arguments in support of the application for enlargement of time. In the submissions, counsel reiterated that the delay was occasioned by the fact that the applicant had to consult the electorate and the delay is excusable as it was not intentional or inordinate. Counsel also submitted that the respondents would suffer no prejudice if time is enlarged.
5. For the respondents, the firm of Kithinji Marete & Co. Advocates filed submissions dated 25<sup>th</sup> April 2024. Counsel submitted that the applicant had failed to file a notice of appeal within the prescribed period and the reasons advanced for the delay are unsatisfactory and only serve to prove that the intended appeal is an afterthought. Counsel also submitted that the intended appeal is not arguable and the respondents will be prejudiced if the application is allowed. Counsel consequently urged for the dismissal of the appeal with costs to the respondents.
6. I have considered the pleadings and the submissions of the parties. The question is whether the applicants have met the conditions for enlargement of time under rule 4 of the Court of Appeal Rules, 2022. The factors to be considered in the determination of applications for enlargement of time were laid down by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR 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.”



7. The question therefore is whether the applicant has satisfactorily explained the delay in filing the notice of appeal. Other issues to be considered are whether the respondents will suffer any prejudice if the application is allowed and whether the delay is inordinate.
8. The applicant intends to appeal against a judgment which was delivered on 3<sup>rd</sup> October 2023. Under rule 77(2) of the *Court of Appeal Rules*, 2022, he ought to have filed a notice of appeal not later than 17<sup>th</sup> October 2023. This application having been filed on 28<sup>th</sup> November 2023, there was a delay of about 39 days. The reason given for the delay is that the applicant, being an MCA had to consult his electors who were members of the 4<sup>th</sup> respondent and in the process, the time allowed for lodging the notice of appeal lapsed.
9. In considering what amounts to inordinate delay, this Court in *Cecilia Wanja Waweru v. Jackson Wainaina Muiruri & another* [2014] eKLR held that:

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed.”
10. On the place of statutory timelines in the dispensation of justice, the Supreme Court in *Hassan Nyanje Charo v. Khatib Mwashetani & 3 others* [2014] eKLR held that:

“[31] In the emerging jurisprudence, the concept of “timelines and timeliness” is generally upheld, as a vital ingredient in the quest for efficient and effective governance under *the Constitution*.

(32) However, even as we take due account of that context, we remain cognizant of the Court’s eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice.”
11. In view of the plausible reason given by the applicant for the delay in filing a notice of appeal, it cannot be said that a delay of 39 days is inordinate. It is appreciated that some electoral wards are vast and it may take time to ensure sufficient and meaningful consultation has taken place. I therefore find the explanation tendered to be satisfactory and hold that the delay is not inordinate.
12. As to whether the respondents are likely to be prejudiced if the application is allowed, I observe that allowing this application will only open the door for the applicant to access this Court. It does not in any way interfere with the judgment of the E&LC. It cannot therefore be said that allowing the applicant to exercise his right of appeal will prejudice the respondents. In an application like the instant one, the Court is called upon to balance between the right to appeal and the right of a successful litigant to enjoy the fruits of judgment. In the circumstances of this case, I find that allowing the applicant to exercise the right of appeal will not be prejudicial to the respondents as any delay in the enjoyment of the fruits of judgment can always be compensated by an award of costs.
13. The respondents also asserted that there is no right of appeal against the judgment the applicant intends to appeal against. This argument was, however, not followed through in the submissions and I will leave the issue at that as the argument has not been fully developed for my consideration.
14. In conclusion, I find that the application dated 28<sup>th</sup> November 2023 has merit. It is therefore allowed in the following terms:



- a. Time for filing the notice of appeal is hereby extended for the applicant to file his notice of appeal within 14 days from the date of this ruling.
- b. The time for all the other activities consequent to the filing of a notice of appeal shall be in accordance with the rules of the Court and time will run from the date of this ruling.

15. The application having succeeded, the costs of the application shall abide by the outcome of the appeal.

**DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> 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**

