



**Mativo & another v Kuria & 20 others; Mativo (Interested Party) (Civil Application E082 of 2023) [2024] KECA 808 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 808 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E082 OF 2023  
WK KORIR, JA  
JULY 12, 2024**

**BETWEEN**

**JAMES MUTUKU MATIVO ..... 1<sup>ST</sup> APPLICANT  
HARRISON MWANGI NYOTA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**EDDY KURIA ..... 1<sup>ST</sup> RESPONDENT  
CHRISTOPHER M. KAMAU ..... 2<sup>ND</sup> RESPONDENT  
MARGARET WANJIRU ..... 3<sup>RD</sup> RESPONDENT  
DAVID ADAMS MBUGUA ..... 4<sup>TH</sup> RESPONDENT  
DAVID MBURU GITHERE ..... 5<sup>TH</sup> RESPONDENT  
W.K. KIBET ..... 6<sup>TH</sup> RESPONDENT  
CATHERINE KOSKEI ..... 7<sup>TH</sup> RESPONDENT  
BEATRICE WANGARI ..... 8<sup>TH</sup> RESPONDENT  
AUGUSTINE LOMONGIN ..... 9<sup>TH</sup> RESPONDENT  
JACQUELIN ADHIAMBO ..... 10<sup>TH</sup> RESPONDENT  
STEPHEN NJOROGE KANYORA ..... 11<sup>TH</sup> RESPONDENT  
MOHAMMED OSMANI HASSAN ..... 12<sup>TH</sup> RESPONDENT  
GLADYS WAIRIMU GICHAGA ..... 13<sup>TH</sup> RESPONDENT  
EMMANUEL J. NJAU ..... 14<sup>TH</sup> RESPONDENT  
JANE CHAKU NDIGA ..... 15<sup>TH</sup> RESPONDENT  
SUSAN K. CHESIALE ..... 16<sup>TH</sup> RESPONDENT**



EVERLYN NYAMBURA ..... 17<sup>TH</sup> RESPONDENT  
S.K. KOSGEY ..... 18<sup>TH</sup> RESPONDENT  
AGNES WANJIKU KARIUNGI ..... 19<sup>TH</sup> RESPONDENT  
LEAH NJERI KARANJA ..... 20<sup>TH</sup> RESPONDENT  
NAIVASHA MUNICIPAL COUNCIL ..... 21<sup>ST</sup> RESPONDENT

AND

JAMES MUTUKU MATIVO ..... INTERESTED PARTY

*(Being an application for extension of time to file a notice and record of appeal out of time to the decision of High Court at Nakuru (R.P.V. Wendoh, J.) dated 20th December, 2018 in HCC No. 110 of 1998)*

### RULING

1. The notice of motion dated 18<sup>th</sup> July 2023 is brought by the proposed interested party, James Mutuku Mativo, pursuant to Articles 159 and 259(2) of the Constitution, sections 3A and 3B of the Appellate Jurisdiction Act and rules 1(2), 4, 43, and 77 of the Court of Appeal Rules. Through the motion, the applicant seeks leave to file and serve a notice of appeal out of time against the judgment delivered by R.P.V. Wendoh J. on 20<sup>th</sup> December 2018 in Nakuru HCC No. 110 of 1998. The applicant also seeks leave to file the record of appeal out of time and that the costs of the application be provided for. The application is premised on the grounds contained on its face and the affidavit sworn by the applicant in support of the application.
2. The applicant's case is that although the judgment he intends to appeal was delivered on 20<sup>th</sup> December 2018, he only learnt of its existence in 2023 after he came across the matter in the cause list. By then, the time for filing an appeal had lapsed. He avers that despite holding a legitimate title to part of the suit property, he was not made a party to the proceedings before the trial court. It is the applicant's case that he is dissatisfied with the said judgment and is interested in pursuing an appeal and he has already secured a certified copy of the proceedings. The applicant deposes that the intended appeal is arguable and the delay was occasioned by the lack of knowledge of the existence of the impugned judgment.
3. The firm of Kiarie, Kabita, Kihunyu & Associates filed submissions dated 22<sup>nd</sup> September 2023 in support of the application. Counsel submitted that the applicant only became aware of the pending appeal when he sought to be enjoined as an interested party but unfortunately, the said appeal was thrown out. Counsel referred to the case of Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR to urge that there was no intentional default on the part of the applicant and that any inconvenience suffered by the respondents can be compensated by an award of costs. Counsel reiterated that the intended appeal is arguable and urged the Court to allow the application and offer the applicant an opportunity to be heard. Counsel additionally submitted that the delay occasioned is not inordinate and that the applicant has tendered plausible reason for the delay. Counsel consequently prayed that the application be allowed.
4. The firm of Mirugi Kariuki & Company Advocates filed submissions dated 14<sup>th</sup> December 2023 in opposition to the application. Counsel pointed out that this application was filed approximately 6 years after the judgment the applicant intends to appeal against was delivered. Counsel submitted that



a delay of 6 years was inordinate. Counsel argued that the applicant is guilty of flagrant disregard of rules 77(1) (2) and 84(1) of the *Court of Appeal Rules* and that the reason tendered for the delay is inexcusable. Counsel referred to *Cosmos Ltd & Another v. Kenya Revenue Authority* [2019] eKLR to reiterate the relevance of the rules of procedure and the need to abide by the stipulated timelines. Additionally, counsel referred to the decision of this Court in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR to submit that Article 159 of the *Constitution* cannot be used to overthrow the rules of procedure. In the end, counsel urged that the application be dismissed with costs.

5. This is an application brought under rule 4 of the *Court of Appeal Rules*. The said rule provides as follows:

“The Court may, on such terms as may be 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.”

6. In determining an application brought under the stated rule, I am required to exercise my discretion judiciously and upon reason. The discretion should not be exercised capriciously or whimsically. The principles governing the exercise of discretion in an application for extension of time were highlighted 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 stated principles are neither exhaustive nor should all of them be considered in every application. A court seized of an application is therefore at liberty to determine which principles or factors will determine the application before it-see *Margaret Muthoni Muchiga v. Esther Kamori Gichobi* [2010] eKLR.

Having considered the pleadings and submissions on record, the question for determination is whether the applicant has satisfactorily explained the delay in filing the notice of appeal.



8. The judgment the applicant desires to appeal against was delivered on 20<sup>th</sup> December 2018 while the present application is dated 18<sup>th</sup> July 2023. The applicant avers that he only became aware of the existence of the impugned judgment in 2023 when he saw the matter on the cause list. He also avers that the said appeal lodged in 2019 has since been dispensed with. The applicant is indeed correct as the notice of appeal he is referring to was struck out through in ruling delivered on 30<sup>th</sup> June 2023 in [Kuria & 19 others v. Nyota](#) [2023] KECA 797 (KLR).
9. The delay in bringing the instant application is about five years.  
  
The applicant having not been a party to the judgment he intends to appeal against, there should be an existing appeal to which he will be enjoined as an interested party. Even so, the explanation tendered is that he only became aware of the existence of the judgment in 2023. In my view, the period of delay is inordinate and the reason tendered for the delay is unsatisfactory. Furthermore, the appeal which the applicant seeks to participate in has already been struck out.
10. For the reasons stated, I find the application before me bereft of merit and fit for dismissal. As the respondents only filed submissions in opposition to the application with no clarity as to which parties counsel represented, I find that the appropriate order on costs is to direct each party to bear own costs of the application. Consequently, the notice of motion dated 18<sup>th</sup> July 2023 is hereby dismissed. The parties shall bear their own costs.

**DATED AND DELIVERED AT NAKURU THIS 12<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**

