



**Mwangi v Muruaki Farmers Cooperative Society (Civil Appeal (Application)  
E032 of 2024) [2024] KECA 822 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 822 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL (APPLICATION) E032 OF 2024  
WK KORIR, JA  
JULY 12, 2024**

**BETWEEN**

**MWANGI NJOROGE MWANGI ..... APPLICANT**

**AND**

**MURUAKI FARMERS COOPERATIVE SOCIETY ..... 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 Nyabururu  
(Y.M. Angima, J) dated 8th December 2022 in EL&C NO. 316 OF 2017)*

**RULING**

1. Before me is a notice motion dated 8<sup>th</sup> March 2024 lodged pursuant to sections 1A, 1B and 3B of the *Appellate Jurisdiction Act*, rule 4 of the *Court of Appeal Rules* and Article 159(2) of the *Constitution*. Through the application, Mwangi Njoroge Mwangi seeks enlargement of time for filing a notice of appeal and prays that the notice dated 16<sup>th</sup> November 2023 be deemed as duly filed. The application is based on the grounds on its face as well as the averments in the applicant's supporting affidavit.
2. The applicant states that the impugned judgment was delivered on 8<sup>th</sup> December 2022 in favour of the respondent and being dissatisfied with the decision he filed a notice of appeal dated 10<sup>th</sup> January 2023. Immediately thereafter he fell into financial distress and could not pay his advocates who ceased acting for him. The applicant avers that at around the same time he discovered new evidence and acting in person, he withdrew the notice of appeal dated 10<sup>th</sup> January 2023 and applied for a review of the impugned judgment before the trial court. When the ruling on revision was delivered, it was not in his favour and this has informed his decision to challenge the judgment on appeal. It is the applicant's case that by the time the ruling on revision was delivered, time for lodging the notice of appeal had lapsed. According to him, he has been actively pursuing his case and the delay in filing the notice of appeal is honest and thus excusable.



3. The respondent opposed the application through an affidavit sworn on 25<sup>th</sup> March 2024 by its chairman, John Kuria Mathenge. The respondent agrees with the history of the matter as stated by the applicant and avers that upon dismissal of the application for review on 5<sup>th</sup> October 2023, the applicant filed a notice of appeal dated 16<sup>th</sup> November 2023 against the impugned judgment and not the ruling on the application for review. It is the respondent's case that the applicant was represented by counsel throughout the review proceedings and is not deserving of an order for enlargement of time.
4. The application proceeded by way of written submissions. On behalf of the applicant, the firm of Njoki Wanjira & Co. Advocates filed submissions dated 4<sup>th</sup> April 2024 in which the grounds in support of the application are reiterated. It is submitted that the right of appeal is a fundamental right. Conceding that there is a delay of about 13 months, counsel submitted that the applicant has given plausible reasons for the delay. Counsel relied on *Kamlesh Mansukhalal Damki Patni v. Director of Public Prosecution & 3 others* [2015] eKLR to urge that the discretion of the Court to enlarge time should be exercised in the interests of justice and to give litigants access to justice. Counsel also referred to the case of *Belinda Mural & 9 others v. Amos Wainaina* [1978] eKLR to argue that the mistakes of counsel should not be visited upon a litigant. He therefore urged that the application be allowed so that the applicant can ventilate his grievances before the Court.
5. For the respondent, the firm of Mboga G.G. filed submissions dated 19<sup>th</sup> April 2024 in opposition to the application. Counsel termed the present application as incompetent and an affront to the court process. As for the factors to be considered in the determination of an application for enlargement of time, counsel relied on *James Lenges v. Attorney General & 11 others* [2021] eKLR. According to counsel, the applicant has not tendered sufficient reasons for enlargement of time. Counsel also pointed out that of Rule 1 of Order 45 of the *Civil Procedure Rules* does not envision an appeal being filed after an application for review has been declined hence the present application, if allowed, would be offending the said provision. Counsel consequently urged that the application be dismissed with costs.
6. I have considered the pleadings and the submissions of the parties. The issue for determination in this application is whether the applicant has satisfied the conditions for the exercise of the discretionary jurisdiction under rule 4 of the *Court of Appeal Rules, 2022* to extend time. The manner of exercising that jurisdiction was expressed in *Paul Wanjohi Mathenge v. Duncan Gichane Mathenge* [2013] eKLR thus:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”
7. Flowing from the above dictum, it follows that 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 the applicant is allowed to appeal out of time.
8. The impugned judgment was delivered on 8<sup>th</sup> December 2022 hence the period for filing the notice of appeal lapsed on or about 22<sup>nd</sup> December 2022. There is therefore a delay of about 15 months. The explanation put forth by the applicant is that he faced financial difficulties in instructing counsel hence he opted to act in person. While so acting, he pursued a revision of the impugned judgment and when his application for review was dismissed, he opted to pursue an appeal hence this application. This



Court has continuously held that financial distress is not a good ground for extension of time if not supported by evidence. In that regard, the Court in *Fursys (K) Limited v. Systems Intergrated Limited t/a Symphony Limited* [2015] eKLR held that:

“The explanation of cash crush, unsupported by the amounts required to be paid to the former advocates or the deposit to the current advocates, and partly destroyed by the tender involving millions of Kenya shillings by the applicant, and not supported by any financial statements cannot be taken seriously in the circumstances of this case, and it definitely does not call for the favourable exercise of my discretion.”

9. Similarly, in *Kinyua Ng'ang'a & 2 others v. Nahashon Njenga Ng'ang'a & 2 others* [2012] eKLR, the Court held that:

“The applicants have also talked of ill health and lack of the necessary finances to pay the required court fees. However, the court fees in this case, were only Kshs. 1,340/- and if the applicants truly could not afford to pay that amount, they could have applied to be allowed to bring the application as paupers so that the fee is waived. But again the applicants have neither exhibited any documents as evidence of the alleged illness nor have they offered anything in support of the alleged impecuniosity.”

10. Additionally, in an application for extension of time, the whole period of the delay must be disclosed and explained. That was the holding of the Supreme Court in *County Executive of Kisumu v. County Government of Kisumu & 8 others* [2017] eKLR. It is not clear when the applicant's present advocates came on record although the respondent asserts that the same firm of advocates represented the applicant in the review proceedings. Of relevance to the determination of this application is the notice of appeal filed by the applicant's current advocates on 16<sup>th</sup> November 2023. In view of the existence of that notice, even if I were to accept, which I don't, that the applicant was impecunious, the inertia between 16<sup>th</sup> November 2023 and 8<sup>th</sup> March 2024 remains unexplained.

11. Although the fact of the arguability of an intended appeal should not play a major role in the determination of an application for enlargement of time, I find that in this application it is necessary to observe that the applicant does not have an arguable appeal. This is because once the applicant pursued the review option, he forfeited his right to appeal. My position finds support in the decisions of the Court in *Multichoice (Kenya) Ltd v. Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR and *Gerald Kitbu Muchanje v. Catherine Muthoni Ngare & another* [2020] eKLR. For instance, in respect to the provisions of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, the Court in *Multichoice (Kenya) Ltd (supra)* concluded that:

“Both provisions require no further elucidation as they are as clear as they can be; that a party will

The applicant was entitled to appeal against the ruling dated 5<sup>th</sup> October 2023 rejecting his application for a review of the judgment delivered on 8<sup>th</sup> December 2022. However, a glance at the annexed memorandum of appeal shows that the applicant intends to appeal against the judgment and not the ruling. He therefore does not have an arguable appeal.

12. For all the stated reasons, I find no merit in the application dated 8<sup>th</sup> March 2024, and it is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> DAY OF JULY, 2024**

**W. KORIR**



**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

