



REPUBLIC OF KENYA



KENYA LAW
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**Samuel Onango Ogolla t/a Zamken Building Construction & General
Supplies v BOG St. Francis of Assis Myanga Secondary School (Civil
Application E025 of 2024) [2024] KECA 817 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 817 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E025 OF 2024**

HA OMONDI, J

JULY 5, 2024

BETWEEN

**SAMUEL ONANGO OGOLLA T/A ZAMKEN BUILDING CONSTRUCTION &
GENERAL SUPPLIES APPLICANT**

AND

**BOG ST. FRANCIS OF ASSIS MYANGA SECONDARY
SCHOOL RESPONDENT**

*(An application for enlargement of time to file Notice of Appeal out of
time from the judgment and decree of the High Court of Bungoma (JRA
Wananda, J.) dated on 28th April 2023 in HCCA No. E017 of 2022)*

RULING

1. The application dated 26th February 2024 seeks that: the proposed appellant be granted leave to appeal out of time; pending hearing and determination of this application, temporary stay of execution of the judgment in Bungoma HCCC No. E017 of 2022 delivered on 28th April 2023 (Wananda, J) be granted; and costs be in the cause. The application is supported by an affidavit of even date sworn by Samwel Onango Ogolla.
2. The applicant had filed an appeal Bungoma HCCC No. E017 of 2022 against the decision in Bungoma CMCC No. 049 of 2020, against the respondent.; the court heard the appeal and dismissed it. The applicant's counsel then on record was unaware that judgment was delivered on 28th April 2023 as the High Court was not sitting on that date; no subsequent dates were given for the judgment; no notice was issued to advice on the status of the file; and the file was out of the applicant's reach as the Judge had been transferred to Eldoret from Bungoma. It was not until a proclamation was issued on 14th February 2024 that the present advocate realized that judgment had been delivered. The advocate on



record immediately filed for stay of execution in the High Court on 29th February 2024, which is yet to be determined. That by the time the advocate obtained sufficient instructions time to file appeal had already run out, yet the appeal has high chances of success. This Court is urged to find that the mistake of counsel ought not be visited on the client.

3. The respondent did not file any reply nor submissions.
4. Drawing from the principles set out in *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others* [2014] eKLR on what ought to be taken into consideration in an application for extension of time, the applicant argues that the delay in obtaining certified copies of proceedings, was occasioned by the unavailability of the case file, which had been carried away by the trial judge who was on transfer to Eldoret from Bungoma; that the delay was unforeseeable, beyond his control and therefore excusable.
5. The applicant further submits, that in deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation, and the prospects of success as was stated in the case of *National Union of Mineworkers v Council for Mineral Technology* ZLAC [1998] 22 at para 10:

“The approach is that the court has a discretion to be exercised judicially (sic) upon a consideration of all facts, and in essence it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, and the prospects of success, and the importance of the case.

These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong....”

6. Has the applicant met the prerequisites for granting relief under rule 4 of the Court of Appeal Rules? Rule 4 of the Court of Appeal Rules gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka v Waruguru Kithaki & 2 Others* (2013) eKLR.
7. M’Inoti, J, had this to say concerning Rule 4 in *Imperial Bank (IR) & Anor v Alnashir Popat and others* [2018] eKLR:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”

8. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR sets down these principles as follows: -
 - i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.



- iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
- v. Whether there will be any prejudice suffered by the respondent if extension is granted.
- vi. Whether the application has been brought without undue delay.

One other consideration included by the learned Judge in the case of Julius Kamau Kitheka (*supra*) is whether *prima facie* the intended Appeal/Appeal has chances of success or is a mere frivolity.

- 9. I need not belabor the point, the applicant in my view has explained the delay in filing the appeal. Judgement was delivered without notice, and the trial Judge had been transferred to Eldoret – factors beyond the applicant’s control and which led to the delay. The application is merited, and is allowed. Costs shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

