



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwakio v Buluma (Civil Appeal (Application) E148 of 2023)  
[2024] KECA 1283 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1283 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E148 OF 2023  
JW LESSIT, JA  
SEPTEMBER 27, 2024**

**BETWEEN**

**PRESTON MWAKIO ..... APPLICANT**

**AND**

**MERCELINE KISHAGHA BULUMA ..... RESPONDENT**

*(Being an application for enlargement of time to file and serve an appeal out of time from the Judgment and Decree of the Environment and Land Court at Mombasa (Matheka, J.) delivered on 27th July 2023 in ELC Case No. 306 of 2015)*

**RULING**

1. Preston Mwakio, the applicant has brought an application dated June 12, 2024 pursuant to rule 4 of the [Court of Appeal Rules 2024](#) seeking, inter alia, orders:
  - i. The time for Filing and Serving the Appeal herein be extended;
  - ii. The Notice of Appeal dated and filed on 16<sup>th</sup> August 2023 be deemed as being properly filed within time, properly on record and served on the respondent;
  - iii. The Record of Appeal dated 11<sup>th</sup> September, 2023 and filed on 14<sup>th</sup> September 2023 be deemed as being properly on record and properly served upon the respondent; and,
  - iv. The costs of this application be provided for.
2. In both the application and his supporting affidavit sworn on even date the applicant attributes the delay in filing of his appeal on the part of his advocate then on record. He contends that at the time of delivery of the impugned judgment on 27<sup>th</sup> July 2023, M/s Shariff & Company Advocates which firm was then handling the matter on his behalf, had ceased to operate by dint of the fact that the sole proprietor had joined the bench from the bar and could therefore not continue with operation as an



- advocate and for reason thereof, he had to wait for the firm to be regularized to be able to file the Notice of Appeal.
3. The applicant avers that despite having lodged the application to change the particulars of the advocates firm with the business registration service in January 2023, it was only in the evening of 15<sup>th</sup> August 2023, 5 days after the 14 days prescribed for filing of the Notice of Appeal, that the firm received the certificate of practice (Shariff Ramadhan & Company Advocates) and proceeded on the next day, 16<sup>th</sup> August 2023, to lodge the applicant's Notice of Appeal. The applicant adds that he even went ahead to have his Record of Appeal prepared and filed on time, on 14<sup>th</sup> September 2023, in demonstration of his interest to pursue his appeal.
  4. The applicant avers that the delay was not inordinate, was unintended and beyond his control and that he acted with speed immediately the law firm was regularized. He states that he has explained the reason for the delay as required in law. He further, avers that from his memorandum of appeal he has an arguable appeal with high chances of success. He argues that many provisions of law have been infringed and that he has been denied his only home and that it is only through his appeal that his hope of regaining his home suffices (sic). In addition, the applicant claims that the respondent will not be prejudiced in anyways if the prayers are granted. Lastly, the applicant states that in the interest of justice and equity, it is only just and fair that the orders sought are granted.
  5. In opposing the application the respondent filed her replying affidavit sworn on 20<sup>th</sup> June 2024. The respondent avers that the applicant vide a Notice of Motion dated 23<sup>rd</sup> August 2023 filed at the Environment and Land Court sought for similar orders as in this case and by the ruling of the trial judge dated 26<sup>th</sup> October 2023, the same was dismissed on grounds that sufficient reason for the delay in filing the Notice of Appeal had not been given. The respondent contends that the firm of M/s Shariff & Company Advocates continued representing the applicant long after Lady Justice Shariff had joined the bench on 7<sup>th</sup> December 2022 and until the impugned judgment was delivered on 27<sup>th</sup> July 2023 and therefore there was sufficient time to effect the change of proprietorship and business name and the same should not have been an excuse for the delay in lodging the Notice of Appeal.
  6. In conclusion, the respondent contends that the delay in lodging the Notice of Appeal is not plausible. Further, that there has been undue delay in filing the instant application which has not been explained. Although the respondent agrees that the applicant filed his Record of Appeal and served upon her, she however avers that there is no proper appeal before this Court and as such, the applicant does not have an arguable appeal. The respondent thus urges this Court to exercise its discretionary remedy judiciously by balancing the interest of both parties to the suit and by looking at the conduct of both parties.
  7. When the matter came up for hearing virtually on 4<sup>th</sup> July 2024 learned counsel Ms. Mbaka appeared for the applicant whereas learned counsel Mrs. Kabole appeared for the respondent. The arguments advanced thereon by the advocates were reiteration of their respective cases as set herein above.
  8. Ms. Mbaka submitted and emphasized that the applicant has established the requirements to warrant the grant the orders of extension of time under rule 4 of this Court's Rules. Mrs. Kabole on the other hand conceded that the five (5) days delay was not inordinate however, she argued that the reason advanced for the delay was not plausible further, that no reason has been advanced before this Court as for the delay between 26<sup>th</sup> October 2023 when the superior court delivered its ruling on the applicant's application for extension of time to 12<sup>th</sup> June 2024 when the instant application was filed thus the application was for dismissal.



9. I have carefully considered the pleadings and written submissions filed in the application, the oral submissions by counsel, the authorities and the law relied on. The issue for determination is whether the applicant's prayer for extension of time should be granted. Although this is a discretionary power the same being envisaged under rule 4 of this Court's Rules, it is a discretion that should be exercised judicially and not whimsically.
10. The factors to be considered when determining such an application are found in various judicial pronouncements of the court. See. *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231; and *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR.
11. Further, in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR the Supreme Court laid down the principles that govern the exercise of discretion for extension of time as follows:
  - i. "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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a 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 the extension is granted;
  - vi. Whether the applicant has been brought without undue delay; and
  - vii. Whether in certain cases, like elections, public interest should be a consideration for extending time."
12. The main reason advanced by the applicant for the delay is that the advocate in conduct of his matter, Ms. Shariff (as she was then) joined the bench and could therefore not represent him; and further, that the said advocate's law firm; M/s Shariff & Company Advocates, needed to be regularized in terms of changing its particulars before it could file his Notice of Appeal and that it was only on the evening of 15<sup>th</sup> August 2023, five (5) days after the lapse of the fourteen (14) days prescribed by the law for filing the Notice of Appeal that the firm received its certificate of practice; [Shariff Ramadhan & Company Advocates], and proceeded to file the Notice of Appeal on 16<sup>th</sup> August 2023.
13. The respondent has opposed the application on the main for the reason the advocates for the applicant had sufficient time to regularize and put their house in order. That although the applicant attached the certificate of registration of change of particulars issued on 15<sup>th</sup> August 2023, there is no evidence on record to ascertain that the application of the same was lodged in January 2023 as alleged by the applicant. Further, the applicant made a similar application before the superior court and the same was dismissed.
14. On the issue on whether the reason for the delay is plausible, I take judicial notice that Ms. Shariff (as she was then) was appointed among others, as a Judge of the High Court on 5<sup>th</sup> December 2022. The delay to obtain the change of name after the Ms. Shariff's appointment to the bench was a matter beyond the control of the applicant. The delay in question is of 5 days, this is neither inordinate nor



unreasonable. Besides the respondent has not shown what prejudice he stands to suffer if the applicant is allowed the prayers he has sought. The applicant has a constitutionally underpinned right of appeal.

15. For the foregoing reasons, I find merit in this application and make the following orders:
- i. The application dated June 12, 2024 be and is hereby allowed;
  - ii. The time for the filing of the notice of appeal be and is hereby extended;
  - iii. The notice of appeal dated 16<sup>th</sup> August 2023 and filed on the even date be deemed to be properly filed and properly on record;
  - iv. The record of appeal dated 11<sup>th</sup> September, 2023 and filed on 14<sup>th</sup> September 2023 be deemed to be properly on record;
  - v. The applicant to serve the record of appeal upon the respondent within 21 days of the date hereof; and,
  - vi. The costs of the application be costs in the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

