



**Maalim v Alio & another (Civil Application E053 of 2024)
[2024] KECA 1238 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1238 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E053 OF 2024
J MOHAMMED, JA
SEPTEMBER 20, 2024**

BETWEEN

NURDIN ABASS MAALIM APPLICANT

AND

MOHAMUD IBRAHIM ALIO 1ST RESPONDENT

COUNTY GOVERNMENT OF MANDERA 2ND RESPONDENT

(An application for extension of time to file the Notice of Appeal out of time in the intended appeal against the decision of the Environment and Land Court at Garissa (J. M. Mutungi, J.) dated 25th April 2024 in ELC Appeal No. E003 OF 2022)

RULING

Background

1. Before me is an application dated 7th June, 2024 by Nurdin Abass Maalim (the applicant) expressed to be brought under Article 20(3)(a)(b), 48 50,159(2)(d) and 259(1) of *the Constitution* of Kenya, Section 3A and 3B of the *Appellate Jurisdiction Act* and Rules 4 and 77 of the Court of Appeal Rules (this Court's Rules) 2022. The applicant seeks for orders:

1. Spent
2. That this Court be pleased to grant the applicant leave to file the notice of appeal out of time; and
3. That costs of this application be in cause.

Mohamud Ibrahim Alio and County Government of Mandera are the 1st and 2nd respondents respectively.



2. The application is premised on the grounds on the face thereof to wit: that the Environment and Land Court (ELC) at Garissa (J.M Mutungi, J.) delivered its judgment on 25th April, 2024 dismissing the applicant's appeal despite there being no cross appeal seeking the same; that the applicant received a copy of the judgment from his counsel on 24th May, 2024 and was dissatisfied with the whole judgment; that the applicant was not made aware of the delivery of the impugned judgment in good time; that the delay in filing the notice of appeal and the record was inadvertent due to a breakdown of communication with his counsel; and that the respondents will not be prejudiced in any way if the orders sought are granted.
3. The application was supported by an affidavit sworn by the applicant giving a background of the matter to wit; that the 1st respondent sued the applicant before the Principal Magistrate's Court at Mandera ELC case No. 13 of 2019 where the 1st respondent sought for an injunction against the applicant over parcels of land No 1182 Bulla Mpya III, MCG/MISC plot No. 41B/Kamor and Plot S/No 190 (MCG); a declaration that the 1st respondent was the legal owner of Plot No.1182 Bulla Mpya III; an order compelling the 2nd respondent to issue the 1st respondent with ownership documents and general damages for trespass.
4. The applicant further averred that he filed a defence and counterclaim against the 1st respondent and an order for dismissal of the 1st respondent's suit. The applicant further averred that the trial court delivered its judgment on 1st July, 2022 dismissing both the applicant's and the 1st respondent's suit. That the applicant filed an appeal against the trial court's judgment being ELC Appeal No. E003 of 2022. That no cross appeal was filed by the 1st respondent but the ELC delivered its judgment on 25th April, 2024 dismissing the applicant's appeal.
5. The 1st respondent did not file a replying affidavit or written submissions.

The 2nd respondent opposed the application through a replying affidavit sworn on 21st June, 2024 by Heyi Bruno, advocate on behalf of the 2nd respondent who deponed inter alia: that there was inordinate delay which had not been explained by the applicant in filing the instant application; that the application was devoid of merit warranting dismissal; that the applicant was indolent in filing the notice of appeal; that the applicant had not met the threshold for grant of the orders sought; that the applicant had not requested for proceedings; and that the appeal is hopeless and frivolous. Counsel urged this Court to dismiss the instant application with costs.

Submissions by Counsel

6. During the hearing of the application, the applicant was represented by Messrs. Wanjohi & Wawuda Advocates while the firm of Yusuf Ali & Company Advocates represented the 2nd respondent. Both counsel had filed written submissions. Counsel for the applicant submitted that the applicant was not aware of the delivery of the impugned judgment from the ELC in good time due to a communication breakdown with his erstwhile advocate; and that it was a mistake of his erstwhile advocates which should not be visited on him. Citing the Supreme Court case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others (2014) eKLR highlighting the principles for consideration in an application for extension of time, counsel submitted that the applicant had met the threshold for grant of the orders sought.

Counsel submitted further that the applicant has an arguable appeal as set out in the memorandum of appeal annexed to the application hence the application should be allowed to enable the appeal be heard on merit.



7. The 2nd respondent, opposed the application and vide its written submissions submitted that the instant application is defective for failure to seek extension of time to file notice of appeal which is a requirement under Rule 4 of this Courts rules citing the case of Bookpoint Limited vs Guardian Bank Limited & another (2021) eKLR. Counsel relied on the decision of Mohamed Shally Sese (Sha Sese) vs Fulson Company Ltd & another (2006) eKLR in support of the proposition that the application failed to meet the conditions for extension of time. Counsel asserted that the reasons advanced for failure to file the notice of appeal on time are not satisfactory. That the impugned judgment was delivered on 25th April, 2024 and the last day for filing the notice of appeal was 9th May, 2024. Counsel asserted that the applicant filed the instant application on 7th June, 2024 which is 42 days after delivery of the impugned judgment.

Determination

8. I have carefully considered the application, the grounds and affidavit in support thereof, the replying affidavit and written submissions, authorities cited and the law. The discretion that I am being called upon to exercise in this application is provided under Rule 4 of this Court's Rules which states that:

“The court may, on such terms as it thinks 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.”

9. The principles governing the exercise of the discretion to extend time under Rule 4 of the Court of Appeal Rules were well stated in the case of Leo Sila Mutiso vs Rose Hellen Wangare Mwangi, [1999] 2 EA 231 as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: First, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

10. Rule 4 of this Court's Rules requires me to exercise my discretion judiciously. There has to be valid and clear reasons upon which discretion can be favourably exercised.

11. Rule 84 of the Court of Appeal Rules, 2022 provides for institution of appeals as follows:

1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule



2. within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
12. The Supreme Court decision in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR laid down guidelines for exercise of discretion in extending time:
- “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 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. Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if 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.” (Emphasis supplied.)
13. The applicant’s reason for the delay that it was a mistake by his erstwhile advocates has been the subject of a number of judicial pronouncements before this Court. As was stated by this Court (Waki, JA) in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR, that:
- “In this case, however, the erstwhile advocates are simply accused of inaction. In the case of *Rajesh Rughani – Vs- Fifty Investment Ltd. & Another* [2005] eKLR the Court of Appeal held,
- “It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.
14. The applicant failed to follow up his case with his counsel or the court to be up to date of its status. He left the matter entirely in the hands of the advocate. As stated by this Court (Odek, JA.) in *Church of God East Africa & Another vs. Dinah Buluma* [2019] eKLR.
- “It behooves a client/litigant to exercise diligence and follow up the progress and outcome of his/her case.”
15. In *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR the Court held inter alia that:
- “The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of



inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.” [Emphasis supplied.]

16. Further, this Court in *Bi-Mach Engineers Limited v James Kahoro Mwangi* (supra) stated as follows regarding the filing of a notice of appeal:

“The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. I find that in the circumstances of this case, the reasons advanced by the applicant for the delay in filing the notice of appeal are not plausible and satisfactory.”

17. As regards the success of the intended appeal, the applicant contends that the appeal has overwhelming chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

18. In the circumstances, I find that the applicant has failed to meet the threshold for extension of time. The application lacks merit and I order that it be and is hereby dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

