



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu v Ndege (Civil Application E063 of 2024)
[2024] KECA 1719 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1719 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E063 OF 2024
JW LESSIT, JA
NOVEMBER 28, 2024**

BETWEEN

DOMINIC WAMWEA NDUNGU APPLICANT

AND

JOSPHAT NGARE NDEGE RESPONDENT

(Being an application for leave to lodge a notice of appeal out of time against the Judgment of the Environment and Land Court of Kenya at Kerugoya (Mutungi, J.) dated and delivered on 12th April 2024 in E.L.C. Appeal No. E013 of 2023)

RULING

1. The applicant, Dominic Wamwea Ngungu, by a notice of motion dated 16th July 2024, brought under rule 4 of the Court of Appeal Rules and all other enabling provisions of the law sought orders;
 - i. That the applicant be granted leave to lodge and file a notice of appeal out of time against the judgment in Kerugoya Environment and Land Court Appeal No. E013 of 2023, delivered on 12th April, 2024 and/or,
 - ii. That the notice of appeal dated 26th April, 2024, lodged and filed on the 29th April, 2024, be deemed as duly filed and served within time and;
 - iii. That this Honourable Court be pleased to make any other order it deems fit in the circumstances.
2. The grounds in support of this motion are on the face thereof and in the affidavit sworn by the applicant, of even date. The gist of the application is that the applicant, then acting in person, successfully lodged his notice of appeal on 26th April 2024, which was within the time prescribed by rule 77 of the Court of Appeal Rules (the Rules), the judgment having been entered on 12th April



2024. That due to downtime in the e- filing system, and 26th being a Friday, it was not until Monday 29th April that the invoice was generated and the applicant was able to file the notice of appeal.

3. The application is not opposed, as no response has been filed, neither are there any submissions by the respondent.

4. I have considered the application, the supporting affidavit sworn by the applicant and the submissions filed by him. The application is brought under rule 4 of the Court of Appeal Rules, which provides:

“ 4. Extension of time

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.”

5. In an application for extension of time to, among others, file notice of appeal or in the alternative to deem the notice as duly filed, the principles applicable have been well settled. The Supreme Court in *Nicholas Kiptoo Arao Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications of extension of time 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 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 consideration for extending time.”

6. The record is clear that the delay involved in the application is 3 days. The applicant has demonstrated in his supporting affidavit the efforts he made to file the notice on time. Indeed he lodged the notice on time but could not pay for the filing due to technical challenges. Further, there was a weekend involved stretching the delay by three days.

7. I am satisfied that the explanation given for the delay in filing the notice was reasonable. I am satisfied that the applicant was diligent and that the delay was not inordinate. In the circumstances, I make the following order:

a. The notice of motion dated 16th July 2024 be and is hereby allowed;



- b. That the notice of appeal dated 26th April, 2024, lodged and filed on the 29th April, 2024, be deemed as duly filed and served within time;
- c. here will be no order as to costs.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF NOVEMBER, 2024.

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

