



**Kaikai v Kalasinga (Civil Application E104 of 2024)
[2024] KECA 1651 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1651 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E104 OF 2024
HM OKWENGU, JA
NOVEMBER 15, 2024**

BETWEEN

JAMES KAYIONI KAIKAI APPLICANT

AND

DANIEL LEURU KALASINGA RESPONDENT

(Being an application under Article 159 (2) (D) of the Constitution, Sections 3, 3A and 3B of the Appellate Jurisdiction Act, and rules 4, 5(2)(B), 31, 39(B), 41, 42, 43, 47 and 53 of the Court of Appeal Rules, 2010 ('the rules') for extension of time to file an appeal from the Judgment of (FF Gikonyo, J) delivered on 4th March, 2024 in High Court at Kilgoris Civil Appeal No. 1 of 2021)

RULING

1. James Kayioni Kaikai, the applicant herein, has moved this Court by way of a Notice of Motion dated 5th August, 2024, seeking an order for extension of time to enable him file an appeal from the judgment of the High Court which was delivered on 4th March, 2024.
2. The applicant who was the respondent in an appeal before the High Court is aggrieved by the judgment of the High Court in which the appeal was allowed and the trial court judgment, which had been entered in his favour by the lower court, set aside. The applicant has filed an affidavit in support of the notice of motion, in which he deposes that his advocate filed a notice of appeal on the 8th March, 2024, and on the same date also applied for certified copies of the proceedings. Although the applicant had instructed his advocate to file an appeal, the advocate did not file the appeal.
3. Consequently, the applicant withdrew instructions from that advocate and has filed this notice of motion in person. He blames the advocate for failing to file the appeal in time, and maintains that he has an arguable appeal, which raises substantial triable issues. He pleads with the Court not to condemn him for the mistake of his counsel, but to allow him to file his appeal out of time.



4. He has annexed a draft memorandum of appeal in which he raises four issues. First, he faults the learned Judge for failing to make a finding that he had proved his case beyond reasonable doubt; second, he faults the learned Judge for failing to appreciate the evidence tendered before him; thirdly, he faults the learned Judge for erring in law and fact by allowing the respondent's appeal; and finally, he faults the learned Judge for failing to consider the authorities that he submitted on the matter before the Court.
5. In his submissions, which were also prepared in person, the applicant relies on Sokoro *Savings and Credit Cooperative Society Limited -vs- Mwamburi (Civil Application E032 of 2022)* [2023] KECA 381 (KLR), wherein the Court held that an applicant could not be blamed for a delay that was occasioned by the fault of his advocate. The applicant contends that he is deserving of the equitable remedy of extension of time, so as to obviate prejudice suffering, loss and damage, that he is likely to suffer, as he may be shut out of the corridors of justice if the order sought is not granted.
6. He contends that the delay was unforeseeable and beyond his control, and that he is not responsible for the delay. He urged the Court to find that he has shown sufficient cause to justify the exercise of the Court's discretion in his favour.
7. Daniel Leuru Kalasinga, the respondent herein, has opposed the applicant's motion through written submissions, in which he contends that although the applicant applied for copies of proceedings on 6th March, 2024, he failed to serve the respondent, and therefore he is precluded by the proviso to rule 84(1) of the Court of Appeal Rules, from enjoying the benefit of rule 84 of the Court of Appeal Rules. The respondent contended that the applicant has not met the guiding principles for granting an order for extension of time, as laid out by the Supreme Court in Nick Salat's case, and applied in Fahim Yasin Twaha -vs- Timamy Issa Abdalla & 2 Others [2015] eKLR. This is because the applicant has not explained the reasons for the delay, or demonstrated any extenuating circumstances that can enable the Court to exercise its discretion in his favour.
8. The respondent argues that despite the applicant blaming his erstwhile advocate, on the delay in filing the record of appeal, he has not demonstrated the attempts that he made to follow up the proceedings, nor has he exhibited any documents that he has addressed to the Deputy Registrar or to his lawyers on the fast tracking of typed proceedings.
9. The respondent relied on Bi-Mach Engineers Ltd -vs- James Kahoro Mwangi [2011] eKLR; and Kenya Commercial Bank Ltd - vs- Kenya Planters Cooperative Union [2010] eKLR; for the proposition that it is not enough for the applicant to simply accuse his former advocate, as he had a duty to assist the court in managing his case. The respondent urged the Court to dismiss the applicant's motion as he has not given sufficient reasons to justify the exercise of the Court's discretion in his favour.
10. I have carefully considered the motion before me, the contending submissions and the law. Although the applicant has cited many provisions of the law, the application being one which is basically for extension of time to file a record of appeal, falls squarely within rule 4 of the Court of Appeal Rules. It is that rule read together with rule 55(1) of the Court of Appeal Rules, that gives me power, as a single Judge, to exercise the discretion to extend time, for the doing of any act authorized or required under the rules. For this reason, I will address the application solely as one under rule 4 of the Court of Appeal Rules.
11. In Leo Mutiso -vs- Rose Hellen Wangari Mwangi [1999] 2EA 231, this Court stated as follows:

“It is now well settled 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: Firstly, 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.”

12. In *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court addressing the issue of the exercise of discretion in extension of time stated:

“This discretion was a very powerful tool which ought to be exercised with abundant caution, care and fairness, and it ought to be used judiciously and not whimsically to ensure that the principles enshrined in *the Constitution* were realized.”

13. In the same case the Supreme Court identified the following principles for the exercise of discretion to extend time:

1. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the Court;
 2. A party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
 3. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;
 4. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;
 5. Whether there would be any prejudice suffered by the respondents if the extension was granted;
 6. Whether the application had been brought without undue delay; and;
 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
14. The burden therefore falls on the applicant, to demonstrate that the delay was not inordinate, and also to explain the reason for the delay. In addition, the Court has to consider the prejudice if any that the respondent is likely to suffer, if time is extended for the applicant to file the record of appeal.
15. The judgment subject of the intended appeal was delivered on 4th March, 2024. As per the notice of appeal which was attached to the motion, the applicant through his advocate filed a notice of appeal four days after the judgment that is on 8th March, 2024. This means that the applicant ought to have filed the record of appeal within sixty days from 8th March, 2024. That is, on or around 7th May, 2024.
16. The applicant has exhibited a letter dated 6th March, 2024, received in the High Court on 8th March, 2024, wherein, his advocate sought a certified copy of the judgment and proceedings. Unfortunately, after 8th March, 2024, the advocate does not appear to have taken any further action in pursuing the appeal. The applicant explains that this is what led to his withdrawing instructions from the advocate. This is confirmed by a letter dated 25th July, 2024, by the advocate in which the advocate informed the Chief Executive Officer, Kilgoris High Court that he had ceased acting for the applicant.
17. The applicant has exhibited a draft memorandum of appeal dated 30th July, 2024, which he prepared in person. His notice of motion subject of this ruling which was also prepared in person, was filed six days later on 5th August, 2024. This means, that as at the time of filing the application, the applicant



was late by about three months as the record of appeal ought to have been filed by 7th May, 2024. The delay of three months is in my view not an inordinate delay.

18. The applicant totally blames his advocate for having failed to file the appeal within time. It is evident that the advocate must have had instructions to file the appeal, as he not only filed the notice of appeal, but also applied for certified copies of the proceedings and judgment. It is evident that as at the time when the applicant withdrew instructions from the advocate, no further action had been taken by the advocate, and this confirms the applicant's reason for withdrawal of instructions from the advocate.
19. It is also apparent that the advocate had not copied his letter bespeaking proceedings, to the respondent, thereby making it impossible for the applicant to enjoy the benefit of the proviso to Section 84(1) of the Court of Appeal Rules, that allows the period certified as necessary for the preparation and supply of proceedings to be excluded from computation of time.
20. In regards to mistakes made by counsel, I appreciate what was stated by Madan, JA. (as he then was) in *Murai -vs- Wainaina (4) [1982] KLR 38*, that:

“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
21. The applicant's erstwhile advocate put the applicant in a cumbersome position. Much as the applicant trusted him to comply with his instructions and file the necessary appeal, the advocate let him down by not only failing to file the record of appeal, but also failing to comply with rule 84(2) of the Court of Appeal Rules. While I do not condone the laxity on the part of the advocate, I find that the applicant has explained the reason for the delay, and has shown that he has done what he could possibly do, to protect his interest. Although extension of time is not a right, the Court is obliged to exercise its discretion in a way that will ensure fairness, taking into account the circumstances of each case. The respondent has not demonstrated any prejudice that he is likely to suffer, if time is extended for the applicant to file the record of appeal. On the other hand, the applicant will be completely shut out from the seat of justice, if this Court does not exercise its discretion in his favour.
22. In the circumstances, I allow the applicant's motion dated 5th August, 2024, and extend time for the applicant to file the record of appeal. I direct that the record of appeal be filed within thirty (30) days from the date hereof. The costs of this motion shall be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF NOVEMBER, 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

