



**Migwi v Wangari & another (Civil Application E065 of 2023)
[2024] KECA 1628 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1628 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E065 OF 2023
A ALI-ARONI, JA
NOVEMBER 7, 2024**

BETWEEN

JAMES KINYUA MIGWI APPLICANT

AND

ANTHONY WACHIRA WANGARI 1ST RESPONDENT

TIMOTHY NJIRIANI WARUI 2ND RESPONDENT

*(An application for extension of time to file an appeal from the
Judgment of the Environment and Land Court at Kerugoya (Cherono,
J.) dated 18th February 2022 in ELC Appeal Case No. 55“A” of 2013)*

RULING

1. Before the court is a notice of motion dated 18th July 2023 brought under Rule 4 of the Court of Appeal Rules seeking for an extension of time to file an appeal out of time against the ruling of ELC at Kerogoya (Cherono J.) delivered on 18th February, 2022 in ELC Appeal Case No. 55“A” of 2013.
2. The application is predicated on the grounds on the face of the application stating that; the appeal has a high chance of success; the delay was neither deliberate nor is it inordinate, and that the applicant will otherwise be denied the chance to ventilate his case in this Court if the application is not granted.
3. The application is further supported by the affidavit of the applicant James Kinyua Migwi, sworn on 18th July 2023 in which he deposes that; upon the ruling being made he was dissatisfied with the same and filed a notice of appeal on 25th February 2022; by a letter dated 21st February 2022, the applicant applied for copies of proceedings for purpose of appealing; the applicant and his counsel have been following up with the High Court Kerugoya ELC Registry seeking proceedings and the impugned ruling; the proceedings were ready and certified as a true copy of the original on 25th May 2023; the applicant collected proceedings and ruling on 31st May 2023, and took them to his counsel on the same



- date; the delay in filing the appeal was due to the length of time it took for proceedings and ruling to be ready; the appeal has high chances of success and the applicant prays that he be allowed to file the appeal out of time.
4. The 2nd intended respondent has filed a replying affidavit sworn on 20th November 2023 in which he deposes that; the applicant's appeal was dismissed for want of prosecution on 1st November 2018; the applicant applied for a review of the ruling which was allowed on 13th March 2020; the applicant did not pursue the appeal and the same was dismissed again for want of prosecution on 18th February 2022; given the fact that the ruling was made on 18th February 2022 against which the appeal is sought, a period of approximately 1 year and 5 months have since lapsed; the applicant has failed to attach a copy of ruling and/or order against which he seeks to appeal; further the draft memorandum of appeal is not annexed to the application; the application is an afterthought and meant to frustrate the respondents; the letter dated 21st February 2022 requesting proceedings and ruling was only lodged in the court registry on 30th March 2022 contrary to Rule 84(1) of the Court of Appeal Rules, 2022; that no follow up was made between 21st February 2022 and 4th July 2022 which is a clear indication that the applicant deliberately slept on his rights; that the follow-up letter dated 4th July 2022 was only taken to court on 30th January 2023 after the lapse of a period of over 6 months which remains unexplained; that the notice of appeal was never served upon the 2nd intended respondent's advocate contrary to Rule 79(2) of the Court of Appeal Rules, 2022 and that the letter dated 21st February 2022 and 4th July 2022 was not served upon the 2nd intended respondent's advocate contrary to Rule 84(2) of the Court of Appeal Rules, 2022.
 5. Further, according to the 2nd respondent, the delay between 30th January 2023 when the last follow-up letter was lodged before the Environment and Land Court in Kerugoya, and 25th May 2023 when this application was made is approximately 3 months and 24 days, which remains unexplained; that the Environment and Land Court in Kerugoya should not be condemned for the applicant's indolence; that the applicant has not presented before this Court, any certificate of a delay from the Environment and Land Court at Kerugoya; that even when the proceedings were certified on 25th May 2023 as averred by the applicant, this application was only drafted on or before 18th July, 2023 there being an unexplained delay of a period of 1 month and 24 days and that the proceedings certified on 25th May 2023 are not attached to the instant application to enable the court to grant the applicant, the benefit of the doubt.
 6. The 2nd respondent further states that whereas this Court served the 2nd intended respondent's advocate with the court's directions vide email dated 13th October 2023, the applicant only served the application for which the directions had been given on 7th November 2023 contrary to Rule 51(1) of the Court of Appeal Rules; that the application as presented is misconceived, mischievous and brought in bad faith to defeat justice; that the 2nd intended respondent is bound to suffer great injustice should this application be allowed and that it is in the interest of justice that the application be dismissed with costs.
 7. The applicant's counsel did not file any submissions.
 8. On the part of the respondents their learned counsel filed undated submissions and a digest of authorities wherein he has rehashed the contents of the 1st respondent's affidavit. In addition learned counsel submits that between 18th February 2022 when the appeal was dismissed and 18th July 2023 when the instant application was made, there was a lapse of about 1 year and 5 months which has not been explained; that the notice of appeal by the applicant was not served upon the 1st respondent or his counsel; from the letters written to court requesting for proceedings and the ruling and the follow-up letters, the applicant is indolent by nature and not even the court of equity would entertain him; that



there is no certificate of delay presented before the court to enable it to exercise its judicial discretion in favour of the applicant; between obtaining the purported proceedings certified on 25th May 2023 and the time of drafting the instant application, there has been an unexplained delay of 1 month and 24 days and that the applicant has failed to present in evidence a draft memorandum of appeal against which the appeal is lodged.

9. I have considered the application, the affidavit in support, the replying affidavit, and the submission placed on record by the respondent's counsel in the absence of the applicant's submission. The issue for determination is whether the applicant is deserving of the orders sought. Rule 4 of the Court of Appeal Rules governs the extension of time. The rule allows this Court to exercise discretion to extend the time limited by the rules for doing any act authorized or required by the rules. In the case of *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA, this Court set out the principles to be applied in the exercise of its discretion in the determination of any application under Rule 4. The court held that; -

“the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”

The case of *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR lends clarity to the issue of the court's jurisdiction in the determination of applications made under Rule 4. The discretion is unfettered. In its decision, the court observed:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

10. The applicant has attempted to explain the delay in filing his appeal as being the delay in receiving the certified proceedings and copy of the impugned ruling. He has not annexed the certificate of delay but states on oath that same were ready on the 25th of May 2023 and he collected the same on the 31st of May 2023. Rule 84 of this Court's Rules state that:

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. (Emphasis added)

11. Notable is that no certificate of delay was annexed neither the draft memorandum of appeal. The court has no way of telling the time that was necessary for the preparation and delivery of the proceedings and ruling, further, the court cannot be able to tell whether the appeal has a high chance of success, without necessarily delving into the grounds of appeal.
12. In the circumstances I decline to allow the application with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF NOVEMBER, 2024.

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

