



REPUBLIC OF KENYA



KENYA LAW
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**Murangi v Mwangi (Civil Application E095 of 2024)
[2024] KECA 1623 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1623 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E095 OF 2024
A ALI-ARONI, JA
NOVEMBER 7, 2024**

BETWEEN

MARY RITA MURANGI APPLICANT

AND

MARGARET MUTHONI MWANGI RESPONDENT

(An application for extension of time to file an appeal out of time in an intended appeal from the Judgment and Decree of the High Court of Kenya at Embu (L.Njuguna J.) dated 23rd May 2024 in HCCA No. E066 of 2022)

RULING

1. Before the court is an application by way of a notice of motion dated 1st October 2024 brought under Sections 3A and 3B of the *Appellate Jurisdiction Act* and Rules 4, 41, and 42 of the Court of Appeal Rules, seeking leave to appeal out of time. The grounds relied on the face of the application are that: the applicant is aggrieved by the decision of the High Court; the learned judge allowed the appeal in favour of the respondent, granting the respondent 50% and 10% penalty for breach of the contracts forming the subject matter of the suit even though the respondent had neither proffered an appeal nor a counter– appeal against the impugned judgment thereby breaching the cardinal principle of law that a court can only grant reliefs sought by a party; and that the learned judge failed to uphold the applicant’s right to a fair hearing by failing to order a retrial of the suit in Embu CMCC No. 94 of 2019 which proceeded in the applicant’s absence.
2. The application is further supported by the affidavit of the applicant sworn on 1st October 2024 in which she deposes that; the appeal is arguable; the applicant was not heard on merit in Embu CMCC No. 94 of 2019; the case proceeded in her absence during the Covid-19 period; time allowed in law for filing a notice of appeal has lapsed; the delay in filing the appeal was occasioned by the fact that the applicant was not supplied with a copy of the judgment in good time; the delay in filing the appeal was inadvertent; this application has not been inordinately late; it is in the interest of justice that the



- orders sought be granted; and that the applicant is willing to abide by any directions that the court may deem fit to issue.
3. The applicant has filed a further affidavit sworn on 16th October 2024, wherein she deposes that; the delay in filing a notice of appeal and lodging the memorandum of appeal was because the judgment was delivered on three different occasions; initially the judgment was delivered in open court on 8th May 2024 thereafter, the applicant came to learn that the judgment was re-delivered afresh on 23rd May 2024 and the same was substantially different from the latter one; despite great efforts to get a copy of the judgment of 23rd May 2024, the registry was adamant on its refusal to issue the applicant with a copy of the judgment and the same was only made available sometime in September.
 4. The respondent has filed a replying affidavit sworn on 14th October 2024. She deposes that the application is unmerited, misconceived, bad in law, an afterthought, an abuse of the court process, devoid of merit and purely meant to engage the respondent in endless litigation; that the applicant has not sought leave to file the notice of appeal out of time, thus the intended appeal (if any) does not have legs to stand on in the eyes of the law for blatant breach of the rules; that the assertion by the applicant that she was not supplied with a copy of the judgment is an attempt to hoodwink the court as she was represented in court by the Firm of Dennis Kariuki and Company Advocates who actively participated in the suit and duly attended court when the judgment was delivered on 23rd May 2024.
 5. According to the respondent, once a matter have been filed, it belongs to the litigant and it behooves the litigant to always follow up on their case and check on its progress to its logical conclusion, thus the reasons advanced by the applicant, that she did not get the copy of the judgment on time is whimsical, and the court ought to frown upon it; that no cogent evidence has been adduced by the applicant that is demonstrable and persuasive to show that she took necessary steps to acquire a copy of the judgment from the court, if at all; that the application is a non-starter and an afterthought having been brought after an unreasonable delay of over 6 months since the judgment was delivered; the inordinate delay has not been explained by the applicant; the application is devoid of merit for the reason that the applicant did not file a notice of appeal as required by the law, within 14 days after judgment was delivered and the court should not turn a blind eye to situations where the rules are flagrantly breached; litigation must come to an end and a successful litigant be allowed to enjoy the fruits of the judgment without hindrance from a party bent on scuttling the process through unscrupulous means; the court's discretion must be exercised judiciously and not capriciously and that the applicant has failed to demonstrate she is deserving of the court's discretion.
 6. The applicant's counsel has filed submissions dated 16th October 2024 where the contents of applicant's affidavit and further affidavit are rehashed. In addition, learned counsel submits that Rule 4 of this Court's Rules vests the court with unfettered discretion to extend the time as espoused in the case of Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR. She also relies on the case of Njoroge vs. Kimani [2022] KECA 1188 [KLR] where this Court outlined factors such as length of the delay, reasons for the delay, and prospects of success as relevant factors in deciding if an applicant had established sufficient cause for the exercise of the discretion to extend time in their favor.
 7. Learned counsel further submits that the applicant has offered sufficient explanation for the delay in filing the notice of appeal and the record thereof; and that the respondent will suffer no undue prejudice should the court grant the application. In support of her proposition, learned relies on the case of Sokoro Savings and Credit Co-operative Society Limited vs. Mwamburi [2023] KECA 381 (KLR) where the court stated that the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system.



8. On the part of the respondent, learned counsel has filed submissions dated 21st October 2024. On whether the applicant deserves the prayer sought, learned counsel relies on the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, where the court laid down the principles applicable in cases where extension of time is sought for. Learned counsel also relies on the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR where this Court in considering an application for extension of time and leave to file the notice of appeal out of time, stated that in deciding whether or not to extend the time the court exercises unfettered discretion and that in the exercise of such discretion, the court must act upon reasons, not based on whim or caprice.
9. The respondent's learned counsel further submits that the delay is not excusable; the applicant has not attached a letter requesting a copy of the judgment as evidence that she took necessary steps to get a copy of the judgment from the court; it is more than 6 months since the judgment was delivered; and the draft memorandum of appeal does not raise any arguable grounds. Reference was made to the case of *Bartilol & 3 Others vs. Bartilol & Another* [2024] eKLR, where the court held that the law does not set out any minimum or maximum period of delay; and that any delay ought to be satisfactorily explained.
10. I have considered the application, the affidavit, the further affidavit in support, the replying affidavit, submissions by the parties, and the case-law cited. The issue for determination is whether the applicant is deserving of the orders sought. Rule 4 of this Court's Rules grants the court the unfettered discretion to extend the time limited by the rules for doing any act authorized or required by the rules. In the case of *Dominic Okodoi vs. Republic* [2021] eKLR, this Court held as follows:

“Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to –

“... 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 ... on such terms as it thinks just.”

11. In the case of *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA, this Court stated:

“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.”

In the case of *Fakir Mohammed vs. Joseph Mugambi and 2 Others* [2005] eKLR 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.”



12. Following the above quoted cases I find that the applicant has sufficiently explained the reason why there was a delay. Firstly, there was a judgment in open court on the 8th of May, 2024 followed by another judgment on the 23rd of May 2024. The applicant further states that her effort to obtain a copy of the judgment was futile until September 2024 when a copy was availed. I am further of the view that it is only by obtaining a copy of the judgment that one would be able to have clarity of mind to decide whether to appeal or not. The respondent has not denied that two judgments were delivered on the same matter. Neither has the respondent controverted the fact that judgment was available in September 2024.
13. I find the explanation made to be satisfactory, the intended grounds of appeal not frivolous on the face of it, and in the circumstances of the case, the delay not inordinate. I allow the application. The notice of appeal be severed within the next 7 days and the record be filed within the next 60 days of the date hereof.

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

