



Atieno & another v Aradi & 2 others; Ndusu (Interested Party) (Civil Application E035 of 2024) [2024] KECA 1535 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KECA 1535 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E035 OF 2024
JM MATIVO, JA
NOVEMBER 4, 2024**

BETWEEN

MARY IRENE ATIENO 1ST APPLICANT

STEVE BIKO ARADI 2ND APPLICANT

AND

BRIAN MUSANGI ARADI 1ST RESPONDENT

HEBISIBAH MORAA ONDIEKI 2ND RESPONDENT

CHARLES CHAHYA ARADI 3RD RESPONDENT

AND

ELPHAS ABASI NDUSU INTERESTED PARTY

(Being an application for enlargement of time to file a notice of appeal out of time in an intended appeal from the Ruling of the High Court of Kenya at Nakuru (S.M Muhochi, J.) dated 30th January, 2024 in Succession Cause No. 422 of 2006)

RULING

1. Vide an application dated 27th March, 2024, brought under Rule 4, of the Court of Appeal Rules 2022, the applicants pray for extension of time within which to file and serve notice of appeal and the record of appeal against the ruling issued 30th January, 2024 in Nakuru High Court Succession Cause No. 422 of 2006.
2. The application is premised on the grounds listed on the face of the application and the applicant’s supporting affidavit sworn on 27th March, 2024 by Conrad A. Maloba the advocate on record for the applicants. The grounds in support of the application are that:- (a) the impugned ruling was to be delivered on 30th January, 2024 in open court however the learned judge did not sit on that day; (b)



- On 26th March, 2024 the applicants discovered that the impugned ruling was availed to the registry on 30th January, 2024 without notice; (c) vide letter to the deputy registrar dated 26th March, 2024 the applicant expressed their dissatisfaction with the manner in which the impugned ruling was delivered because it shut them out from filing the requisite notice of appeal on time.
3. The application is opposed vide replying affidavit sworn on 30th April, 2024 by Richard B. O. Onsongo who is the advocate on record for Brian Musangi Aradi (the 1st respondent). The deponent avers that: (a) indeed the learned trial judge sat on 30th January, 2024 and the matter of the estate of the late Manoah Kisame Aradi was cause listed at No. 25 in the matters that were before Hon. Justice S.M. Muhochi; (b) the impugned ruling was read in open court in the presence of counsel for both parties. Consequently, the applicants are using falsehoods with an intention to mislead the court into granting them orders sought in their application dated 27th March, 2024; and (c) the conduct of the applicants and the falsehoods disentitles them of the discretion of the court.
 4. The 2nd, 3rd respondents and the interested party despite being served with the application dated 27th March, 2024 did not participate in these proceedings.
 5. Vide submissions filed in court on 17th May, 2024, Mr. Onsongo learned counsel for the 1st respondent contended that favourable orders cannot be sought and be obtained on the basis of an affidavit that is less candid and is meant to mislead. To buttress his submission learned counsel cited the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 (2009) eKLR 229 where this court held that the employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice.
 6. It is noteworthy that this ruling was delivered without the benefit of the applicants' submissions which were not on record as at the time of writing the ruling.
 7. I have considered the application, the affidavit in support thereto and its annexures – including the ruling of the Court, the replying affidavit, and the written submissions by the 1st respondent. The only question for determination is whether the applicants have met the threshold for the exercise of the Court's discretion to grant leave for them to file a notice and record of appeal out of time.
 8. The application is governed by Rule 4 of the Court of Appeal Rules which provides 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 Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR summed up the applicable considerations as follows: -
 - i. Extension of time is not right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;



- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and,
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
10. Based on the cited decision, it is apparent that this application will be dispensed by determining whether the applicants have tendered sufficient reasons for not filing their notice of appeal within the stipulated time and whether the respondents will suffer any prejudice should the application be allowed.
11. Pursuant to the provisions of rule 77 (2) of the Court of Appeal Rules, 2022, and considering that the ruling was delivered on 30th January, 2024, the notice of appeal ought to have been filed by 13th February, 2024. The present application is however dated 28th March, 2024 and the period of delay is about one month and fourteen days. The applicants contend that, first, they were not aware of the delivery of the impugned ruling as the learned judge did not sit on 30th January, 2024. Therefore, the impugned ruling was delivered without notice and that it is only on 26th March, 2024 that they stumbled upon the impugned ruling at the registry. Secondly, they assert that vide letter dated 26th March, 2024, they requested the deputy registrar to advise on how the ruling was available at the registry since it was highly unprocedural.
12. The Supreme Court of Kenya pronounced itself in the question of extension of time in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR, and stated as follows:
- “the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
13. The explanation proffered by the applicants on the face of appears to be plausible. However, that is how far it goes. Its credibility (if it had any) was extinguished the moment the respondent annexed a cause list which demonstrated that the succession matter was actually listed for ruling on 30th January, 2024 and that all the parties were both present when the ruling was delivered in open court. It is noteworthy that the applicant alleged that they wrote to the Deputy Registrar, High Court asking for advice on how the ruling was availed at the registry which was highly unprocedural. Be that as it may, it is noteworthy that the applicant did not annex any evidence in support of that serious allegation. As a result, the inordinate delay of one month and fourteen days has not been explained.
14. There is simply no good reason to exercise the Court’s discretion for the benefit of the applicants in this case. In conclusion, I dismiss the applicants’ application dated 27th March, 2024 with **no orders** as to costs.

DATED AND DELIVERED AT NAKURU THIS 4TH DAY OF NOVEMBER, 2024.

J. MATIVO

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JUDGE OF APPEAL



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

Signed.

DEPUTY REGISTRAR.

