



Rotich v Rono (Sued as the legal representative of the Estate of Andrew Kipngeno Rono) & another (Civil Application E079 of 2024) [2024] KECA 1552 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KECA 1552 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E079 OF 2024
JM MATIVO, JA
NOVEMBER 4, 2024**

BETWEEN

PHILIP ROTICH APPLICANT

AND

ELIZABETH CHEPTANUI RONO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANDREW KIPNGENO RONO) 1ST RESPONDENT

SAMUEL KIPKEMOI TOO (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF ANDREW KIPNGENO RONO) 2ND RESPONDENT

(An application for extension of time to file a notice of appeal out of time in an intended Appeal from the Judgment and orders of the Environment and Land Court of Kenya at Nakuru (L. A. Omolo, J.) dated 2nd May, 2024 in ELC No. 20 of 2020)

RULING

1. Vide an application dated 31st July, 2024 brought under Rule 4, of the *Court of Appeal Rules* 2010, the applicant prays for extension of time within which to file and serve an Appeal against the Judgment issued 2nd May, 2024 in Nakuru ELC No. 20 of 2020 and to have the notice of appeal dated 31st July, 2024 admitted as duly filed.
2. The application is premised on the grounds listed on the face of the application and the applicant's supporting affidavit sworn on 31st July, 2024 by the applicant. The grounds in support of the application are that:- (a) a notice was issued on 22nd February, 2024 indicating that matter pending for ruling and judgment before the learned Judge would be delivered on notice; (b) no notice of delivery of judgment in ELC 20 of 2020 was subsequently issued; (c) by the time the applicant came to learn about the said delivery of judgment on May, 2024 time to issue a notice of appeal had lapsed; (d) the appeal is arguable with good chances of success (e) the applicant stands to suffer substantial loss if the application is not allowed and risks being evicted from the suit parcel; the applicant is willing to deposit



security for costs as may be set on just terms by this Court; (f) the instant application has been filed promptly without undue delay.

3. The application is opposed vide replying affidavit sworn on 24th September, 2024 by Samuel Kipkemoi Too. He avers that: (a) there was notice for the delivery of the judgment; (b) no notice of appeal or a copy of the memorandum of appeal annexed to the application and there is no way of telling whether the appeal is arguable; (c) the applicant's intention is to deny the respondents the fruits of judgment.

4. The application was dispensed with via written submissions.

The applicant's submissions were filed in court on 15th October, 2024. The respondent did not file any submissions by the time this application came up for hearing on 4th November, 2024 at 9.00 AM. Mr. Ikua learned counsel for the applicant maintained that the delay of two and a half months is not so inordinate and contended that favourable orders cannot be remedied and considering the reason offered for delay.

5. Regarding the allegation that the impugned judgment was delivered without notice, counsel submitted that a cursory look at page 91 of the judgment shows that the impugned judgment was delivered in the absence of the parties. Consequently, the delay having been explained is reasonable and excusable as the same was due to factors beyond the applicant's control.

6. Regarding the arguability of the appeal, Mr. Ikua maintained that the failure to attach a draft memorandum of appeal is not fatal to an application for extension of time. For authority counsel cited the case of *Kiu & Another vs. Khaemba & 3 Others* (Civil Appeal (Application) E270 of 2021 KECA318 (KLR) where this Court stated that arguability of the appeal in the absence of a memorandum of appeal can be discerned from any other supportive facts proffered by the applicant in support of the application.

7. I have considered the application, the affidavit in support thereto and its annexures – including the judgment of the Court, the replying affidavit, and the written submissions by the applicant. The only question for determination is whether the applicant has met the threshold for the exercise of the Court's discretion to grant leave for him to file a notice of appeal out of time.

8. The application is governed by Rule 4 of the *Court of Appeal Rules, 2022* 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 above authority, it is apparent that this application will be dispensed by determining whether the applicant has tendered sufficient reasons for not filing his notice of appeal within the stipulated time, whether the appeal is arguable 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 2nd May, 2024, the notice of appeal ought to have been filed by 16th May, 2024. The present application is however dated 31st July, 2024 and the period of delay is about one (1) month and 15 days. The applicant contended that the judgment was delivered without notice in the absence of all the parties and he only came to learn of the judgment after time had already lapsed. The applicant even went ahead to refer the court to page 91 of the impugned judgment to demonstrate that indeed all the parties were absent.
 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. Having considered the applicant’s explanation, I am of the view that the one month and fifteen days delay it took to file this application is not inordinate in the circumstances. I therefore find the reasons for the delay to be plausible and sufficient and that the delay was in the circumstances excusable.
 14. On the chances of the intended appeal succeeding, all that I need to be persuaded at this stage is that the applicant has demonstrated the existence of plausible grounds of appeal and not their merit. Even though the applicant has not availed a draft memorandum of appeal, in his submissions he stated that the learned judge erred in law and in fact in failing to hold that the plaintiff was the owner of the suit title despite producing the title to that effect and conclusively relying on the evidence of the respondent’s witness DW3 who claimed to have witnessed the sale agreement. It is my considered view that the said ground of appeal is arguable and ought to be heard and determined on merit by this Court. See *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge* [2013] KECA 199 (KLR) where the same reasoning was buttressed.
 15. In the end, I find that the applicant merits the exercise of this Court’s discretion for the above stated reasons. I, accordingly allow the applicant’s notice of motion application dated 31st July, 2024, on the terms that the applicant is granted extension of time to file and serve a notice of appeal against the judgment delivered by L.A. Omolo, J. on 2nd May, 2024 in ELC No. 20 of 2020 within 7 days from the date of this ruling. There shall be no order as to the costs of the application.

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.

