



**Swali v Mandila & 2 others (Civil Application E083 of 2024)  
[2024] KECA 1823 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1823 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E083 OF 2024  
MSA MAKHANDIA, JA  
DECEMBER 20, 2024  
[IN CHAMBERS]**

**BETWEEN**

**MOSES SWALI ..... APPLICANT**

**AND**

**ALFRED MANDILA ..... 1<sup>ST</sup> RESPONDENT**

**DAVID NAMBALE ..... 2<sup>ND</sup> RESPONDENT**

**PHILIP LUCHELI ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time and leave to file record of appeal out of time against the judgment and decree of the High Court of Kenya at Kakamega (Musyoka, J.) dated 21st July 2023 in HCCA No. 20 of 2021)*

**RULING**

1. By a motion on notice dated 12<sup>th</sup> March 2024, Moses Swali (“the applicant”), seeks that the time within which to file the record of appeal be extended and that the costs of the application be provided for.
2. The application has been filed pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, rule 4 of this *Court’s Rules* and Rule 5 of the *Appellate Jurisdiction Act*. From the grounds in support of the application as well as the supporting affidavit to the application, the following emerges: that the respondents filed suit against the applicant being Butali PMCC No. 276 of 2018 which suit was heard and determined in the applicant’s favour. The respondents being dissatisfied, filed an appeal being Kakamega HCCA no. 20 of 2021. The High Court allowed the appeal and set aside the judgment of the trial court in a judgment delivered on 21<sup>st</sup> July 2023.
3. Dissatisfied with the judgment and decree, the applicant filed a Notice of Appeal and wrote a letter bespeaking proceedings on the even date. However, the applicant was unable to obtain the proceedings



in good time to enable him file the appeal within the statutory period despite the applicant's counsel's constant pursuit of the same with the Court's registry.

4. That the proceedings had since been availed but the statutory period within which the applicant had to file the appeal had long lapsed, hence this application. The applicant contends that the delay was not deliberate; the intended appeal has high chances of success which should be heard on merit. The applicant also takes the view that it will be in the interest of justice that the application be allowed.
5. The application was opposed by way of a replying affidavit sworn by the respondents dated 5<sup>th</sup> August 2024. They depose that the intended appeal has weak prospects of success, that the respondents will suffer prejudice if the application is allowed; no plausible reason has been given for the delay, that the letter bespeaking proceedings was written one year after the filing of the Notice of Appeal; that the application was *sub judice* as similar active applications were pending in Kakamega High Court dated 17<sup>th</sup> November 2023 and 2<sup>nd</sup> July 2024 respectively. In the premises, the instant application was incompetent and ought to be struck out.
6. It is now settled that extension of time is not an automatic right. It is an equitable remedy that is only available to a deserving party at the discretion of the court. The unfettered discretion to extend the time limited by the Rules or by the decision of the Court is conferred by Rule 4 which provides:

“...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 superior court, for the doing of any act authorized or required by these Rules whether before or after the doing of that act, and a reference in these Rules to any such time shall be construed as a reference to the time as extended...”

7. In the exercise of the discretion under rule 4, the Court takes into account various considerations as demarcated in the case of *Paul Wanjohi Methane v. Duncan Gichane Mathenge* [2013] eKLR where the Court stated that:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion, I ought to be guided by consideration of factors stated in previous decisions of this Court including but not limited to, the period of delay, the reasons for delay, the degree of prejudice to the respondents and Interested Parties if the application is granted, and whether the matter raises issues of public importance...”

See also the decision by the Supreme Court of Kenya in *Nicholas Kiptoo Korir arap Salat v. IEBC* [2014] eKLR.

8. As regards the delay, I note that the judgment sought to be appealed was delivered on 21<sup>st</sup> July 2023. The instant application was lodged on 12<sup>th</sup> March 2024, a delay of about eight (8) months. Given the circumstances of this case, I would not consider such delay as inordinate. I say so because the certificate of delay indicates that the proceedings were ready for collection and indeed were collected on 26<sup>th</sup> February 2024. I do not think that it would have been wise on the part of the applicant to file the instant application without having in possession the certified copy of the proceedings.
9. As for the reasons for the delay, it is quite apparent that it was not the applicant's fault for the delay in obtaining the proceedings. There are several letters from the applicant's counsel to court repeatedly asking for the proceedings to be availed to them without tangible results. Indeed, the certificate of delay indicates that an application for certified copies of the proceedings was made on 26<sup>th</sup> July 2023 contrary to the claim by the respondent that it was made a year later after the filing of the Notice of Appeal.



That the time taken to type and supply the proceedings was from 26<sup>th</sup> July 2023 to 21<sup>st</sup> February 2024, a total of 211 days. Clearly, therefore, the reasons given by the applicant for the delay are plausible.

10. Though the respondents claim that they will be prejudiced if the application is allowed, they have not demonstrated to my satisfaction in which way they will be so prejudiced. On the other hand, I am satisfied that the applicant will be prejudiced if the application is denied since he will have been blocked from exercising his constitutional and undoubted right to exhaust the appellate process.
11. I note that the respondents have pointed out that this application is *sub judice*. However, they have not demonstrated in what manner the application is *sub judice*. Although the respondents provided the numbers of similar applications pending in the High Court at Kakamega, they did not however annex copies of those applications and their determination if at all. In the absence of such details, I am unable to hold that this application is *sub judice*. It is not enough to merely allege. A party must go further and prove the allegation. In this regard, the respondents have miserably failed to do so. It is not for the court to go fishing for the evidence.
12. In the result, I allow the application. The time within which the applicant should lodge and serve the record of appeal is extended by thirty (30) days from the date hereof, failing which, the extension of time hereby granted shall automatically lapse. Costs shall be in the appeal.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF DECEMBER 2024.**

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

signed

**DEPUTY REGISTRAR**

