



**Njuki v Wandira (Civil Application E022 of 2024)  
[2024] KECA 1891 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1891 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E022 OF 2024  
A ALI-ARONI, JA  
DECEMBER 19, 2024**

**BETWEEN**

**EMILIO NYAGA NJUKI ..... APPELLANT**

**AND**

**PHILIP WAMWEA WANDIRA ..... RESPONDENT**

*(Being an application for an extension of time to appeal out of time from the Judgment of the High Court at Embu (Kaniaru, J.) delivered on 9th May 2022 in ELC Appeal No. 16 of 2019)*

**RULING**

1. Before the court is a notice of motion dated 8<sup>th</sup> January 2024 brought under section 3A and 3B of the Appellate Jurisdiction Act, section 1A and 1B of the Civil Procedure Act, Article 159(2)(d) of the Constitution seeking leave to file an appeal out of time.
2. The application is predicated on the grounds on the face of the application stating that; the applicant and the respondent herein were parties at the High Court Embu, where the case was decided in favour of the respondent; the judgment was read in the absence of the learned counsel for the respondent and in the presence of counsel holding brief for the applicant’s counsel; the appellant was not in court the day judgment was delivered; and learnt of the same months later; on receiving this information he got in touch with his counsel then on record but learned counsel had not yet obtained a copy of the judgment from the court’s registry and seemed disinterested in the appeal; on 25<sup>th</sup> September 2023 the applicant applied for a copy of the judgment and at the time of receipt he noticed that the period within to file an appeal had lapsed; the appellant sought legal advice, and was informed that he had a chance to seek to appeal out of time considering that chances of success are high; and further it is only fair and just that this application be granted.
3. The application is further supported by the affidavit of the applicant sworn on 8<sup>th</sup> January 2024, where he has extensively rehashed the grounds of appeal and in addition deposed that; he noticed that his



counsel was not interested in pursuing the appeal to this Court; he proceeded to the High Court at Embu and requested for the certified copy of the judgement in writing on 26<sup>th</sup> September, 2023; he has already applied for proceedings and he has been assured the same shall be furnished to him when typed, stamped and signed; the judgment was not only bad in law, but the judge erred by failing to observe and read the grounds of appeal which were before him; that courts today strive to sustain rather than strike out matters on purely technical grounds, where a procedural infraction causes no injustice by way of injurious prejudice to a person; justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness and therefore this application has overwhelming chances of success warranting leave to appeal out of time as sought in this application; he has attached a draft memorandum of appeal; the balance of convenience tilts in favour of granting leave to appeal out of time; the delay is not inordinate and the respondent shall not be prejudiced in any way if the orders sought are granted; that unless the orders sought are granted, immeasurable loss and damage will result.

4. The application is opposed through a replying affidavit of the respondent sworn on 31<sup>st</sup> October 2024, where he deposes that the grounds presented by the applicant for the delay in filing the appeal are unsubstantiated and do not justify the grant of orders to appeal out of time; the application was filed in March 2024, nearly two years after the judgment was delivered and some 6 months after receiving the judgment; the respondent was only served with the application in April 2024, a month later; it is evident from the above timeline that the applicant has unreasonably slept on his right to appeal; he took an inordinate amount of time to file his application and delayed serving it on the respondent which demonstrates a lack of urgency and diligence on his part; the applicant has not demonstrated sufficient reason to warrant the granting of leave to appeal out of time and has not shown how such a grant would serve the interests of justice; the appellant has not provided any justifiable reason for the delay in filing the appeal within the prescribed time limit as per the rules of this Honorable Court; the applicant's claim of having an arguable appeal with chances of success is speculative and lacks merit. The High Court's decision was based on sound legal principles and should be upheld; granting leave to appeal out of time in this instance would be prejudicial to the interests of justice and would unduly delay the finality of the judgment.
5. In his written submissions dated 8<sup>th</sup> April 2023, the applicant urges the court to allow him to file his appeal out of time in the interest of justice. He draws the court to the overriding principles provided in the *Appellant Jurisdiction Act* to be fair and just.
6. The respondent filed written submissions dated 9<sup>th</sup> November 2024 opposing the application. Learned counsel rehashed the contents of the replying affidavit in opposition. He also relied on the *Civil Procedure Rules* instead of the *Court of Appeal Rules* and relied on the principles set out in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where the Supreme Court set principles that a court should consider when exercising its discretion to an extent time.
7. I have considered the application, the affidavit in support, the replying affidavit, submissions by parties, case law cited, and the law. The singular issue for determination is whether the court should extend the time within which the appeal should be filed.
8. Rule 4 of the *Court of Appeal Rules* provides as follows:

“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.”

In the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No 190 of 2019 this Court stated:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.” (emphasis added)

9. Further, in the case of *Imperial Bank Ltd (under receivership) v Alnashir Poppat & 18 others* [2018] eKLR, this Court had this to say on an extension of time; -

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

(emphasize added.)

10. As I exercise discretion donated by rule 4 of this Court’s Rules, I am minded that I should not do so whimsically or capriciously but do so based on the peculiar circumstances of the case, considering the cause of the delay, the period involved, the possible prejudice if any likely to be suffered by the other side and balancing the interest of both sides; where one party has a judgment that favors them and the other has a constitutional right to pursue an appeal, including the need to conclude cases timeously.
11. The applicant herein relied on his counsel to advise of the outcome of his case, as he ought to; although a litigant should be interested in following up on his matter, I do not think he can be faulted for having waited on his counsel to act. He deposes that he learned of the judgment as he went along his daily business, and armed with the information, he approached his counsel, who appeared disinterested; he then proceeded to get a copy of the judgment and to consult. He has since applied for proceedings. The applicant, absent a less caring counsel, took some steps. Indeed, he states that he heard of the judgment several months after delivery.
12. The applicant should not be kept away from the seat of justice; he has explained the delay satisfactorily, and in the circumstances, the delay herein is not inordinate. I am therefore inclined to grant leave for



the appeal to be filed out of time. The notice of appeal be lodged within the next 14 days and served 7 days thereof.

**DATED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER, 2024.**

**ALI-ARONI**

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

**Signed**

**DEPUTY REGISTRAR**

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**JUDGE OF APPEAL**

