



**Kibiti v Kithira (Civil Application E084 of 2024)
[2024] KECA 1871 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1871 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E084 OF 2024
JW LESSIT, JA
DECEMBER 5, 2024**

BETWEEN

SILAS KIBITI APPLICANT

AND

SARAH KITHIRA RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Meru (Nzili, J.) dated and delivered on 15th May, 2024 in E.L.C. (O.S.) E003 of 2023)

RULING

1. The applicant, Silas Kibiti, has brought this notice of motion filed under rule 4 of the Court of Appeal Rules, 2022, dated 27th August, 2024 seeking:
 - “2. That this Honorable Court be pleased to grant the applicant extension of time to lodge the notice of appeal and memorandum of appeal out of time in the Nyeri Court of Appeal, Civil Registry.
 3. That the notice of appeal and memorandum of appeal annexed hereto be deemed as duly filed and served.
 4. That the costs of this application be provided for.
2. The Supreme Court in Nicholas Kiptoo Arao Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR laid down the principal that govern the exercise of discretion in applications of extension of time as follows:
 - “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted.
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.
3. The judgment in this case was delivered on the 15th May, 2024. The application seeking extension of time to file the notice of appeal and the appeal is dated 27th August 2024. The applicant should have filed his notice of appeal by 28th May, 2024. That means by the time the instant application was filed, the delay involved was just over 60 days. The applicant needs to lay a basis to the satisfaction of the Court why the order sought should be granted by giving a reasonable explanation for the delay.
4. By way of explanation, the applicant deposed that he instructed his advocate on record in the superior court to file an appeal. He stated that due to financial constraints he was only able to do part payment to counsel on the 22nd of May, 2024. He deposed that his advocate assured him that he would pursue the appeal however over time efforts to reach him to find out how the appeal was proceeding became futile. He deposed that immediately after realizing that the appeal had not been filed he instructed another counsel to handle the appeal as such there has been no inordinate delay. He also stated that no prejudice will be occasioned on the respondent. That the chances of the appeal succeeding are high.
5. The respondent has opposed the application, through her replying affidavit dated 9th September, 2024. She raised a technical point that the applicant filed his application during the Court vacation without seeking leave to do so. That issue is misplaced. The only time a party that files an application during court vacation will need court's leave is not for purposes of filing the application but for purposes of having the application certified urgent for hearing during vacation. There is nothing to show that the applicant sought to be heard during the court's vacation.
6. The respondent also contended that the only reason given for the delay as alleged by the applicant is that he paid partial fees to his then advocates on 22nd May, 2024 to process an appeal to this Court, that however, there is no evidence that the applicant followed up with his then advocates on the status of his appeal after 22nd May, 2024 until 27th August, 2024 when the present application was made.
7. The delay involved in this application, as I stated earlier is about 60 days. The applicant has explained the reason for the delay. Even though he paid his previous counsel in part on 22nd May, 2024 which was before the time to file the notice of appeal and the record of appeal had lapsed, the counsel seems to have prepared the notice of appeal dated 27th May, 2024, which is marked "SK1" in the replying affidavit. The applicant has demonstrated the efforts and the follow-up that he made to ensure the appeal was filed in time. He annexed the document for the part payment he made to his previous advocate to enable him start the process, which I find sufficient proof to show he had followed up on his appeal with diligence. I am satisfied that the explanation given by the applicant is reasonable explanation.



8. In addition, the applicant has demonstrated that the moment he discovered that his previous advocate was not taking steps to file his appeal, he instructed another counsel who filed the instant application.
9. As to the prejudice either party stands to lose; the applicant stands to lose his undisputable right of appeal. As for the respondent, all she stands to lose is delay in having to wait for the appeal to be determined. Having balanced the two interests, I find that the applicant will stand to lose more if the application is denied.
10. The result of this application is that the application is merited and is thus allowed in the following terms:
 1. The application dated 27th August, 2024 be and is hereby allowed;
 2. the applicant should file its notice of appeal within 21 days from the date hereof and be served within 14 days from the date of filing;
 3. the applicant is granted leave to file the record of appeal within 14 days of the date of filing the notice of appeal and to serve the same within 7 days from the date of filing of the record of appeal; and
 4. the costs of the application be met by the applicant.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF DECEMBER, 2024.

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

