



**Chirchir v Kuria & another (Civil Application E084 of 2021)  
[2023] KECA 21 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KECA 21 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E084 OF 2021  
FA OCHIENG, JA  
JANUARY 26, 2023**

**BETWEEN**

**JOEL KIPKOSGEI CHIRCHIR ..... APPLICANT**

**AND**

**FLORENCE W KURIA ..... 1<sup>ST</sup> RESPONDENT**

**JOB ELIJAH KURIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file an appeal out of time to the decision of Environment and Land Court at Narok (M. Kullow, J) dated 27th October, 2021 in ELC Cause No 165 of 2017)*

**RULING**

1. Before me is a notice of motion dated December 20, 2021 brought under rule 4 and 41 of the [Court of Appeal Rules](#). Substantively, the applicant seeks an order for leave to lodge an appeal out of time against the ruling and order of Hon Mr Justice Mohamed N Kullow of October 27, 2021 in ELC Case No 165 of 2017. The applicant also seeks an order for the notice of appeal filed by the appellant to be deemed as duly filed together with an order that costs of the application do abide in the appeal.
2. The application is premised on the grounds on its face and as contained in the supporting affidavit sworn by the applicant on even dates. The applicant says that his application dated July 8, 2020 was dismissed *vide* a ruling dated October 27, 2021 *ex parte*. He said that he was not aware of the judgment date and only became aware of the fact that the ruling had been delivered when he received a call from the respondent's advocate. He pointed out that the judgment was to be delivered on notice after two successive ruling dates had passed. And that upon learning that the ruling had been delivered, he moved to lodge this application. The appellant said that if the application is granted, he is willing to comply with the rules of this court.



3. This application was opposed through the replying affidavit sworn by the 1<sup>st</sup> respondent on September 26, 2022. The respondent's case is that this application amounts to an abuse of the court process, a waste of judicial time and a delaying tactic meant to defeat the judgment and subsequent ruling of the ELC. The respondent said that the court had in Narok ELC Case No 165 of 2017, ordered that the title of the suit property, being Narok/CIS Mara/Nkobon/77, should revert to the respondents. The order was in the judgment delivered on September 26, 2019. She told this court that the appellant filed an application dated July 8, 2020 in the same court seeking stay and setting aside of the said judgment. And that upon hearing both parties, the court *vide* the ruling dated October 27, 2021 dismissed the said application which is the subject of the intended appeal.
4. The respondent further pointed out that on December 17, 2021 filed an application in the lower court seeking stay of execution pending the intended appeal herein. And that at the same time, counsel for the applicant filed this application and declined to serve the respondent or their advocate with this application despite the court issuing an order that they be served. It is also the respondent's case that the decree emanating from the judgment Narok ELC Case No 165 of 2017 has been acted upon and had been overtaken by events as the title to the suit property had already been registered in the respondents' names. The respondents therefore pray that this application be dismissed with costs since the applicant has failed to demonstrate any plausible reasons for extension of time.
5. The firm of Metty & Associates Advocates filed submissions dated February 28, 2022 in support of this application. Counsel submitted that the applicant's failure to file the memorandum of appeal and the record of appeal was occasioned by the fact that the ruling was delivered *ex parte* on October 27, 2021. It is also their submission that the applicant was not issued with any notice of the ruling date and he only got to know of the existence of the ruling two months after it had been delivered. Counsel placed reliance on the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* as cited in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR. He appreciates that extension of time is an equitable remedy available to a deserving party at the discretion of the court; and that any party seeking it has the burden of laying a basis to the satisfaction of the court on why it should be granted.
6. Additionally, counsel submits that the application at hand meets the threshold for grant of the prayers sought. It is the applicant's submission that the application contains a reasonable reason for the delay and further offers a satisfactory explanation in light of the ruling which was read without the knowledge of the applicant hence rendering him incapable of acting timeously to institute the intended appeal. It is further submitted that there will be no prejudice visited on the respondent should the prayers sought be granted. Further, counsel submits that this application has been brought without undue delay. Counsel urged this court to find the applicant's explanation satisfactory and proceed to allow the application. While relying on the case of *Moroo Polymers Limited v Wilfred Kasvoki Willis* [2019] eKLR, counsel argues that the right of appeal is a constitutionally entrenched right and can only be withheld in exceptional circumstances. And based on this, counsel urged this court to give the applicant an opportunity file and prosecute his appeal.
7. The firm of Waithaka & Partners filed submissions dated October 15, 2022 for the respondents. They expressed the view that the present application is frivolous and a waste of judicial time which amounts to gross abuse of the court process; The respondents believe that the application is geared towards giving unlawful occupancy of the suit land to the applicant. It is also counsel's submission that this application has been overtaken by events because the decree emanating from the judgment in Narok ELC Case No 165 of 2017 has been acted upon by the Land Registrar at Narok and the applicant's title cancelled.



8. Further, counsel said that the applicant's advocate has continued to defy this court's order which directed that the respondents be served with the application. It is their contention that the intended appeal is frivolous and not arguable and therefore the application should not be allowed. To buttress this point, counsel cited the decision of Sichale, JA in County Government of *Mombasa vs Kooba Kenya Ltd* [2019] eKLR. Lastly, counsel submits that the applicant has not demonstrated any prejudice that will be visited upon him if the application is not granted. They also contend that no plausible reason has been tendered to explain the inordinate delay in filing the appeal. In conclusion, counsel submits that this application is with no merit and should be dismissed with costs to the respondents.
9. This is an application under Rule 4 of the former *Court of Appeal Rules*, 2010. There is judicial consensus emanating from the decisions of this court that such an application is one that falls within the discretion of the court. That being the case, the court is obligated to exercise such a discretion judiciously and not upon whim. The Supreme Court, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, laid down the principles that govern the exercise of discretion in applications for extension of time as follows:
- “This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:
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 a 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 a consideration for extending time.”
10. I have given due consideration to the application, the replying affidavit as well as the submissions by both parties. In my view, the only issue for determination herein is whether the application satisfies the grounds for extension of time. To achieve this task, I will employ the following three sub-questions, namely, whether there was undue delay, whether there is reasonable explanation for the delay, and whether there will be any prejudice if the prayers sought are not granted.
11. On whether there has been undue delay, the ruling subject of the intended appeal was delivered on October 27, 2021. The period for lodging the notice of appeal was therefore due to lapse on November 11, 2021. The applicant filed this application on December 20, 2021 or thereabout. The application is therefore brought 54 days after the ruling was delivered or 40 days after the lapse of the 14 days period open for the filing of a notice of appeal.



12. The reasons offered for the delay in bringing the present application as per the application is that the ruling was delivered *ex parte* and that the neither the applicant nor his advocates were served with the notice for delivery of judgment. The applicant also argue that the ruling had been scheduled for delivery on two previous occasions and was never delivered and that his advocates only learnt of the delivery of the said ruling when the advocates were informed of the same by the respondents' advocates. The applicant does not however disclose the exact date when this phone call was made. In my view, and in the absence of contradictory evidence as to the fact, I find that the applicant was not aware of the judgment date. Therefore, the reasons advanced by the applicant herein are sufficient and were beyond his control. The explanation therefore constitutes a plausible reason for the delay of 40 days.
13. The next issue is whether prejudice will be visited on either parties if the prayer for extension of time is granted. I take cognizance of the fact that the ruling which is the subject of the intended appeal is one concerning an application seeking to set aside the main judgment in the suit. Without delving into the merits of the main cause or of the ruling which is the subject of the intended appeal, I do not see any prejudice that may be visited upon the respondents herein. I am alive to the fact that there is no stay of the main judgment in the cause and thereby the respondents are still at liberty to enjoy their win even as the applicant pursues his right of appeal before this court. Further, the argument fronted by the respondents that the orders of the ELC have been acted upon by the Narok Land Registrar does not bar the appellant from pursuing his appeal against the ruling of October 27, 2021.
14. The upshot is that the notice of motion dated December 20, 2021 has merit and is hereby allowed. Accordingly, I now make the following orders;
  - a. The notice of appeal be and is hereby deemed to have been filed within time, as extended herein.
  - b. The appellant has 14 days to file and serve the record of appeal.
  - c. The costs of the application dated December 20, 2021, shall be in the cause, in the substantive appeal.
15. Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

