



**Leo Investment Limited t/a Mara Concord Game Lodge v Ololmaitai & 3 others
(Civil Application E035 of 2021) [2023] KECA 20 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KECA 20 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E035 OF 2021
FA OCHIENG, JA
JANUARY 26, 2023**

BETWEEN

**LEO INVESTMENT LIMITED T/A MARA CONCORD GAME
LODGE APPLICANT**

AND

**SAMSON OLOLMAITAI 1ST RESPONDENT
NTOORIAN KORIATA 2ND RESPONDENT
STANLEY KOINET KORIATA 3RD RESPONDENT
SERA NJOKI MUNGE T/A SANJOMU AUCTIONEERS 4TH RESPONDENT**

*(Being an application for extension of time to file an appeal out of time
from the decision of Environment and Land Court at Narok (Mbogo
C.G., J.) dated 31st January, 2022 in ELC Misc Case No. 2 of 2020)*

RULING

1. Before me is a notice of motion application dated June 23, 2022 where the substantive relief sought is an order granting the applicant leave to file an appeal out of time. The application is brought under section 3A and 3B of the *Appellate Jurisdictions Act* and rule 4 of the *Court of Appeal Rules*, 2010. The application is premised on the grounds contained on the face of it as well as in the affidavit of one Rahim Chatur, a director of the applicant.
2. The applicant's case is that the ruling that is the subject of the intended appeal was delivered to the advocates via email on January 31, 2022. However, the appellant was out of the country and was not able to discuss the outcome with their counsel until February 14, 2022 when they met in the advocate's offices. Subsequently, the advocate on record lodged a similar application at the registry of this Court on March 31, 2022. It is his averment that the email was not acted upon and upon inquiring at the



registry, the advocates were informed that the said email address was no longer in use. It is this discovery that prompted the applicants to lodge the present application in a quest to have the Court allow them to file an appeal out of time.

3. The application is opposed by all the respondents through the affidavit of the 3rd respondent sworn on October 13, 2022. The respondents' case is that the application has no merit. In support of this view, the respondents aver that the applicant stands to suffer no prejudice as the issues which are the subject of the intended appeal arise out of an interlocutory ruling; and which issues can be canvassed in the pending proceedings before the Business Premises Tribunal. Further, the respondents contend that the applicant has not offered a satisfactory explanation for the delay in filing the notice of appeal hence disentitling them from the equitable relief sought herein. The respondents have taken issue with the applicant's averment that the delay was occasioned by the fact that the applicant was out of the country hence the advocates did not have sufficient instructions. They argue that the applicant is a statutory person and its directors were capable of accessing their emails wherever they were. And that in any event, they discussed the impugned ruling on February 14, 2022 and no explanation has been offered for the delay in the period running from February 14, 2022 to June 23, 2022. The respondents further assert that the intended appeal is frivolous and not arguable. The respondents therefore urge this court to dismiss the application.
4. Both parties filed submissions. M/S Nyongesa Wafula & Co. Advocates filed submissions on behalf of the applicant. Through the submissions dated July 12, 2022, counsel submits that the applicant has made out a case to warrant the exercise of this Court's discretion to extend time for filing the notice of appeal. Counsel referred the Court to rule 4 of the *Court of Appeal Rules, 2010* and the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] to support the application. Counsel submitted that their client has offered a satisfactory explanation on the cause of delay in lodging the appeal, namely, that their client fell sick and travelled out of the country, and that their initial application was not acted upon by the registry. It is counsel's assertion that the delay as explained was therefore not within their control and was reasonable in the circumstances. Counsel further submitted that there will be no prejudice visited upon the respondent if the application were to be allowed. In summary, counsel urged the Court to allow his client's application.
5. M/S J. Harrison Kinyanjui & Co. Advocates filed submissions dated October 13, 2022 on behalf of the respondent. Counsel submits that the present application has no merit, is frivolous and fails to offer a satisfactory explanation of the indolence on the part of the applicant. Counsel also submits that the applicant is bound to suffer no prejudice if the application sought is declined and that the present application has been brought with unclean hands and is therefore an abuse of the court process.
6. Counsel also urged that the Court should take judicial notice of the fact the applicant has confirmed that it was in receipt of the ruling on January 31, 2022 which is the same date the ruling was delivered. According to counsel, this portrays the applicant as a user of email communication on a daily basis and he was therefore in a position to communicate with his advocates as soon as he read the email in order to instruct them to lodge the notice of appeal. Counsel submits that the alleged travel out of the country has not been proved. His view was that, in today's world where there exist modern modes of communication, the travel out of the country would not bar the applicant from accessing its advocates with instructions to lodge an appeal.

He submitted that the application herein is without merit and should be dismissed with costs to the respondents.



7. Even though the *Court of Appeal Rules* do not explicitly provide for the factors to be considered in applications under rule 4, this Court and the Supreme Court have, over the years, devised appropriate principles applicable. I will therefore be guided by the pronouncements of this Court in discharging my unfettered discretionary mandate herein. 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.”

8. This court, on its part, pronounced itself on rule 4 applications in *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR at paragraph 12, as follows:

“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 the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”

9. I have considered the application, the replying affidavit, and the submissions by both parties. I have also reviewed and considered the whole record in light of the principles that guide the court in the exercise of jurisdiction under rule 4 of the Court of Appeal, Rules 2010 which principles are contained in the authorities reproduced above. This application raises one issue for determination, namely, whether the applicant has satisfied the prerequisites for granting relief under rule 4 of the *Court of Appeal Rules*, 2010.

10. The first element is whether the applicant has tendered a satisfactory explanation for the delay in filing the notice of appeal. The ruling subject of the intended appeal was delivered on January 31, 2022 hence the final day of filing the notice of appeal was to be February 14, 2022. This therefore means that there has been a delay of 143 days. The appellant attributes the delay on his part to two issues, namely, that



the applicant was out of the country and returned on February 14, 2022, and that he initially filed an application via an email address that is no longer in service. The said initial application was apparently filed on March 1, 2022 which would be about 14 days after the prescribed time had lapsed.

11. In my view, the appellant has not tendered a satisfactory explanation for the whole period of delay. The appellant and his advocates confirmed that they were in receipt of the ruling on the same day it was delivered. Instructions were then not issued by the applicant to his advocates until February 14, 2022, the day when the 14 day period open for lodging a notice of appeal was due to lapse. After the meeting on February 14, 2022, it took another 14 days to file the alleged March 1, 2022 application. This explanation is not satisfactory.
12. No evidence in the form of travel documents has been tendered by the applicant to support his averment that he was outside of the country. Without delving into the intricacies of digital communication, I am convinced that the appellant was capable of giving instructions to his advocate even if out of the country. Failure to do so only amounted to indolence on the applicant's part.
13. Further, even if I were to give the appellant the benefit of doubt and entirely blame our registry for the delay between March 1, 2022 and June 23, 2022, the initial 14 days delay has not been sufficiently explained by the appellant. Additionally, counsel has not tendered any further evidence to persuade this court that indeed they have taken other steps to enable the immediate dispensation of this appeal; for example, that they have applied for typed proceedings. The application therefore falls short.
14. The next matter I have considered is whether the applicant is at a risk of suffering any prejudice if the application is declined. Upon reviewing the ruling which is the subject of the intended appeal, I note that the same concerns contempt proceedings. There is still pending, a substantive hearing before the Business Premises Tribunal where the substantive cause is being heard. All is not lost for the applicant. Contempt proceedings are quasi-criminal in nature and are aimed at securing judicial discipline amongst litigants. The applicant will have an opportunity to bring out all his evidence and will be heard on the same and if still aggrieved by the outcome of the Tribunal, it could lodge an appeal to the relevant Superior Court. I therefore find that the applicant is not bound to suffer any prejudice if this application is denied.
15. The upshot of the above finding is that I am inclined to disallow the application for extension of time with costs to the respondents. consequently, i make the following orders:
 - i. The notice of motion dated June 23, 2022 is dismissed.
 - ii. The applicant shall bear the costs of the respondents.
16. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

