



REPUBLIC OF KENYA



**Watheru v Muhoro (Suing as the Administrator of the Estate of John Ndungu Wanjohi)
(Civil Application E200 of 2022) [2023] KECA 58 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 58 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E200 OF 2022
HM OKWENGU, JA
FEBRUARY 3, 2023**

BETWEEN

DAVID KIHORO WATHERU APPLICANT

AND

**CHARLES WANJOHI MUHORO (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF JOHN NDUNGU WANJOHI) RESPONDENT**

*(An application for extension of time to lodge and serve notice of appeal and
record of appeal from the Judgment of the High Court of Kenya at Nyeri
(Mshila, J) delivered on 25th February 2022 in HCCA No. 61 of 2019)*

RULING

1. What is before me is a notice of motion dated June 9, 2022 in which the applicant David Kihoro Watheru, seeks to have time extended to enable him lodge and serve a notice of appeal and a record of appeal from the judgment of the High Court (Mshila, J) delivered on February 25, 2022. The applicant is aggrieved by the Judgment of the High Court (Mshila, J), in which the learned Judge dismissed his appeal against the judgment of the magistrate's court, except for the issue of liability where she reduced the apportionment of liability from 100% as against the applicant, to 90% as against the applicant, the deceased being held 10% liable.
2. The applicant is dissatisfied with the failure of the High Court to reduce the damages awarded to the respondent by the trial court. He applied for a copy of the judgment on March 7, 2022, but was not furnished with a copy of the judgment because the learned Judge, who is now stationed in Nairobi, had not returned the file back to Nyeri. The applicant also pleads that the delay in filing the notice of appeal was occasioned by an oversight on the part of his advocate who failed to communicate the decision of the High Court to him in good time. He urges that he has an appeal that raises serious issues of law, and that no prejudice will be caused to the respondent if time is extended. The applicant has annexed a copy of the memorandum of appeal. The applicant has also filed written submissions in which he



urges that he is keen in exercising his right of appeal. He blames his advocate and urges the court not to penalize him for the mistake of counsel. The applicant relies on *Kirinyaga Construction Limited v Catherine Wairimu Ndungu (suing as administrator of the estate of Francis Ndungu Githinji)* [2019] eKLR; and *Vishpa Stone Suppliers Co Limited v RSR Stone (2006) Limited* [2020] eKLR.

3. The respondent has opposed the applicant's motion through a replying affidavit in which he maintains that the judgment was delivered on February 25, 2022 in the presence of both his counsel and that of the applicant. The respondent urges that the intended appeal is an abuse of the court process, as the applicant has not exhibited any request for proceedings. He explains that the matter has in fact been pending for settlement as the applicant has engaged the respondent's advocate with negotiations; and that there is no intended appeal, but the same is only being used as a ploy to deny or delay the respondent from accessing the fruits of his judgment.
4. The respondent has also filed written submissions in which he refers the court to the Supreme Court's decision in *Nicholas Kiptoo arap Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, urging that it was incumbent in making the application for extension of time in order to enable the court exercise its discretion in his favour. The respondent also relied on *Pothiwala v Kidogo Basi Housing Cooperative Society Limited & 31 others* [2005] eKLR and *Wasike v Swala* [1984] KLR 591, in which the court stated the criteria applied in exercising its discretion under Rule 4 of the *Court of Appeal Rules*. The respondent also referred to several other authorities of this court regarding the exercise of discretion under Rule 4 of the *Court of Appeal Rules*, and urged that the applicant has failed to explain the delay, not only in lodging the notice of appeal, but also in lodging his motion for extension of time. The respondent urged that it will be highly prejudiced if the applicant's motion is granted, as the applicant has not demonstrated to the court why a matter which has been undergoing settlement on a without prejudice basis, is now coming on appeal.
5. I have considered the application, the affidavit in support and in reply, and the contending submissions. The *locus classicus* on the factors to be considered in an application for granting leave for extension of time under Rule 4 of the *Court of Appeal Rules*, is *Mutiso v Mwangi* [1999] 2 EA 231, in which this court emphasized the factors to be considered in exercising its discretion, as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: firstly, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

6. The Supreme Court has also laid down the principles to be considered in the exercise of discretion to extend time for filing an appeal in *Nicholas Kiptoo arap Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:
 - “1. Extension of time was not a right of a party. It was an equitable remedy that was only available to the deserving party at the discretion of the court;
 2. A party who sought for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court ought to exercise the discretion to extend time was a consideration to be made on a case to case basis;



4. Whether there was a reasonable reason for the delay which ought to be explained to the satisfaction of the court;
 5. Whether there would be any prejudice suffered by the respondents if the extension was granted;
 6. Whether the application had been brought without undue delay;
 7. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.”
7. The applicant explains that although the judgment of the High Court was delivered on February 25, 2022, he was only informed of the judgment by his advocate on March 15, 2022 by which time, time for filing the notice of appeal had already expired. It is clear from the affidavit sworn by the applicant’s advocate in support of the motion that the advocate was aware of the delivery of judgment and did in fact apply for a copy of the judgment on March 7, 2022. Moreover, the respondent has maintained that both his advocate and that of the applicant were present in court when the judgment was delivered and this has not been expressly denied.
 8. The applicant’s motion was filed on June 9, 2022. Assuming for the benefit of doubt that the applicant became aware of the judgment on March 15, 2022, no plausible reason has been given for the delay in filing his motion for extension of time until June 9, 2022. I have noted the correspondence between the applicant’s advocate and the High Court, Nyeri registry. Nonetheless, the correspondence does not provide any excuse for the delay in filing the notice of appeal, as it was not necessary for a copy of the judgment to be availed for this purpose. In any case, the applicant’s advocate was in court when the judgment was delivered and therefore had a good idea of its contents. A copy of the judgment was inconsequential in so far as the filing of the notice of appeal was concerned.
 9. The respondent has also demonstrated that the applicant’s advocate had negotiated and given some assurance that they were going to meet the respondent’s advocate’s costs. It is therefore evident that the failure to take action in regard to the appeal was not an inadvertent omission, but a deliberate action as it was initially not the applicant’s intention to file an appeal.
 10. This is a matter which originated in the magistrates’ court where judgment was entered in favour of the respondent about three (3) years ago. The suit concerned damages for personal injuries and it is clear that the respondent will be prejudiced if the applicant’s motion is granted, as he may not be able to reap the fruits of the judgment that was entered in his favour.
 11. I find that the applicant has not laid any proper basis for this court to exercise its discretion in his favour. I, therefore, dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

