



**Ndungu v Ndungu & another (Criminal Appeal E062 of 2021)
[2023] KECA 382 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 382 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL E062 OF 2021
WK KORIR, JA
MARCH 31, 2023**

BETWEEN

PAULINE NJAMBI NDUNGU APPLICANT

AND

AMOS MAINA NDUNGU 1ST RESPONDENT

GRACE WANJIKU NDUNGU 2ND RESPONDENT

(Being an application for extension of time to file an appeal out of time in regard to the decision of the High Court at Nyahururu (R.P.V. Wendoh, J.) dated 30th April 2019) In HC Succession Cause No. 87 of 2017)

RULING

1. Before me is a notice of motion application dated September 27, 2021 brought by Pauline Njambi Ndungu (the applicant) under rules 41 and 43 of the *Court of Appeal Rules* (“the Rules”) seeking leave to appeal out of time against the decision of the High Court at Nyahururu in succession cause No 87 of 2017. The application is premised on the grounds that the applicant was not financially endowed to enable her file an appeal within the requisite time following the delivery of the impugned decision. It is the applicant’s case that she stands to suffer irreparable loss and damages if the intended appeal is not argued. The application is supported by the applicant’s affidavit filed together with the application as well as a further affidavit sworn on March 17, 2022.
2. The application is opposed vide the replying affidavit of Amos Maina Ndungu (the 1st respondent) sworn on November 8, 2021. The 1st respondent opposes the application on the grounds that the delay occasioned is inordinate and the applicant has not tendered any reasonable explanation for the delay to warrant the court to exercise its discretion to extend time. He also states that the applicant failed to request for certified copies of the proceedings within 30 days as required under rule 82 of the Rules hence demonstrating that the applicant was indolent. He further avers that the respondents stand to



suffer great prejudice if the orders sought are granted with the effect of prolonging the litigation of the subject matter. He also deposes that the families involved in the case are living in their respective parcels peacefully and the applicant intends to interfere with that state of affairs. Finally, the 1st respondent avers that the applicant has not attached any draft memorandum of appeal hence the arguability or otherwise of the appeal cannot be gauged. The 1st respondent therefore prays that this application be dismissed with costs.

3. Through submissions dated January 6, 2023, the applicant submits that she was not capable of raising money for filing the appeal hence the delay in filing the notice of appeal. She also argues that the delay is not inordinate and that the intended appeal has high chances of success. She further asserts that the respondents will not be prejudiced if the orders sought are granted. She thus prays that her application be allowed.
4. The respondents filed submissions dated October 2, 2022. Counsel submitted that the under rule 82 of the Rules, the applicant ought to have lodged a written letter requesting for the record within 30 days after filing the notice of appeal. Counsel urged that in the absence of such a letter, the application cannot be allowed. Counsel relied on the case of *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others* [2014] eKLR to submit that extension of time was not a right of a party but is a discretionary power of the court and that the applicant was expected to provide reasonable explanation for the delay to warrant extension of time. Counsel also submitted that the applicant's claim that she lacked money, which is in any case not supported by any evidence, is not a ground for extension of time. Counsel also relied on the High Court case of *Gerald M'limbine v Joseph Kangangi* [2008] eKLR to urge that leave should not be granted where there is no existing notice of appeal. Counsel further submitted that the whole period of delay ought to be explained as per the decision in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR. On costs, counsel urged this court to award the costs of the application to the respondents, not as a punishment to the applicant, but to compensate them for the work done in defending the application.
5. I have given due consideration to the pleadings and submissions filed in this application. The main issue for determination is whether the applicant's prayer for extension of time should be granted. Rule 4 of the Rules allow the court, for sufficient reasons, to extend timelines fixed by the rules or this court or a superior court for the doing of any act authorized or required by the rules.
6. The factors to be considered in exercising the discretionary jurisdiction for extension of time are not found in the rule 4. However, this court has developed criteria through judicial pronouncements that act as a guide when dealing with applications for enlargement of time. Discussing the factors to be considered in the determination of an application for extension of time, this court in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR stated that:

“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.”
7. In *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court laid down the principles to be considered in the exercise of discretion in applications for 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 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. Having cited authorities setting out the factors to be considered when deciding whether to allow or decline an application for extension of time, the first line of inquiry is whether the applicant has tendered a satisfactory explanation for the delay in filing the notice of appeal. The judgment which is the subject of the intended appeal was delivered on April 30, 2019 while this application was filed on October 4, 2021. The delay period is over 29 months. It is the applicant’s explanation that the delay was occasioned by her financial inability as at the time when the judgment of the High Court was rendered. This court has stated before that the impecuniousness of an applicant is generally not a good reason for extension of time. In that regard, this court in *Francis Mwai Karani v Robert Mwai Karani* [2007] eKLR stated as follows:
- “I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well known one that lack of financial resources is generally not a basis for extending time.”
9. In addition to that, it is also a rule of thumb that a party seeking the court to exercise discretion in his or her favour ought to tender evidence in support of their case. In this respect, it was stated in *Fursys (K) Limited v Systems Intergrated Limited t/a Symphony Limited* [2015] eKLR that:
- “The explanation of cash crush, unsupported by the amounts required to be paid to the former advocates or the deposit to the current advocates, and partly destroyed by the tender involving millions of Kenya shillings by the applicant, and not supported by any financial statements cannot be taken seriously in the circumstances of this case, and it definitely does not call for the favourable exercise of my discretion. I am not persuaded that the applicant was impecunious and accordingly I withhold my discretion to extend time on that score alone. I find the delay(s) inordinate and the explanations proffered utterly lame and unacceptable and I reject them as such.”
10. As expounded in the above cited authorities, despite the general rule being that financial inability is not a ground for extension of time, each case must however be considered on its own circumstances. Proceeding along that line, the question I must address is whether the applicant has tendered any



evidence to support her assertion of impecuniousness. The answer to this line of interrogation is negative as no evidence has been tendered to support this averment. She simply deposes, without more, that financial difficulties delayed her filing of an appeal. In my view, such an averment without evidential support is not sufficient to make a believable case for finding that there was indeed financial inability.

11. Having noted that there was a delay of over two years and coupled with the insipid explanation for the delay, the only conclusion is that the application is without merit. Furthermore, the applicant has not shown any effort or intention to file any appeal. No request has been made for the certified copies of the proceedings of the High Court. The applicant has not attempted to disclose her grounds of appeal and even explain why it took her that long to make this application. The delay of over two years is indeed inordinate and without reasonable explanation. It is also noted from the pleadings before this court that the applicant is representing herself and the claim of financial challenges becomes difficult to understand in a situation where the dear services of an advocate does not come into play. In the circumstances, there is nothing on record capable of tilting my discretion in favour of the applicant. The inevitable outcome therefore is that I am not convinced whatsoever to invoke my discretion to extend time. The application is without merit and is therefore dismissed.
12. The remaining issue is with respect as to who should bear the costs of this application. The application having being dismissed; the ordinary order would be that the respondents be awarded the costs unless there are good reasons to warrant departure from this rule. In this case, the applicant has not advanced any reason as to why she should not meet the respondents' costs. In the circumstances, I am inclined to award the costs to the respondents, which I hereby do. In short, the applicant's notice of motion dated September 27, 2021 has no merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023.

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

