



**Kathuri v Muchira (Civil Application 122 of 2020)  
[2023] KECA 677 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KECA 677 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 122 OF 2020  
J MOHAMMED, JA  
MARCH 24, 2023**

**BETWEEN**

**FRANCIS NYAMU KATHURI ..... APPLICANT**

**AND**

**JECINTA WANGECHI MUCHIRA ..... RESPONDENT**

*(An Application for extension of time to file the record of appeal  
against the ruling of the Environment and Land Court at Kerugoya  
(E.C.Cheronu, J.) dated 12th July, 2019 in ELC Case No. 78 of 2015)*

**RULING**

1. Before me is a notice of motion dated December 4, 2020 filed by Francis Nyamu Kathuri, (the applicant) seeking an extension of time within which to file a record of appeal against the ruling of the Environment and Land Court (ELC) (Cheronu, J.) at Kerugoya in ELC No 78 of 2015. The impugned ruling was delivered on July 12, 2019.
2. In support of the application is an affidavit sworn by the applicant on even date.  
His case is that he was aggrieved by the decision of the ELC and instructed his advocate to file an appeal against the decision; that a notice of appeal was filed on July 26, 2019; that the time for filing lapsed while he waited for his counsel on record to file the record of appeal ; that the counsel on record failed to file the record of appeal within the stipulated 60 days period; that the reason for the delay was his reliance on his counsel on record; that he opted to act in person to protect his interests; and that he prays that the time for filing the record of appeal be extended beyond the stipulated sixty days.
3. The respondent has not filed any response to the application, despite service.
4. The applicant filed submissions to the application rehashing the contents of his affidavit.



## Determination

5. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's and respondents' submissions, the authorities cited and the law. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion, the Court should do so judiciously. In *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters to be considered in an application under Rule 4 of the Rules of this Court 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: first 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.” [Emphasis supplied].

6. Rule 84 of the *Court of Appeal Rules*, 2022 provides as follows regarding the institution of appeals: -

“84. Institution of appeals

1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
  - a. a memorandum of appeal, in quadruplicate;
  - b. the record of appeal, in quadruplicate;
  - c. the prescribed fee; and
  - d. security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
3. The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction, outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

1. In the instant application, the notice of motion was filed on July 26, 2019. The applicant blames counsel on record for the delay in filing the record of appeal. The instant application was filed on December 4, 2020.

2. There is no maximum or minimum period of delay set out under the law.  
Further, the reason or reasons for the delay must be reasonable and plausible.



In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR as was cited by the applicant, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

9. In the instant matter, the applicant blames his previous advocates for failing to file the memorandum of appeal and the record of appeal. In *Rajesh Rughani v Fifty Investment Ltd & Another* [2005] eKLR this Court held:

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

10. In *Bains Construction Co Ltd v John Mzare Ogowe* [2011] eKLR the court observed:

“It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences”.

11. Further, in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, it was thus stated:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

12. By parity of reasoning, the applicant had a responsibility to follow up on his case timeously. In the circumstances, the delay in filing the memorandum of appeal and record of appeal is inordinate and the reason advanced by the applicant is not plausible or satisfactory.

13. As regards the success of the intended appeal, the applicant contends that the appeal has overwhelming chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

14. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the ELC and is desirous of appealing against the said judgment out of time. In the case of *Richard Ncharpi Leiyagu*



*v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, this Court expressed itself as follows:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

15. From the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)*. The upshot is that the notice of motion dated December 4, 2020 is dismissed with costs.

**DATED AND DELIVERED AT NYERI THIS 24<sup>TH</sup> DAY OF MARCH, 2023**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

