



**Mwangi v Gikonyo & another (Civil Application E245 of 2022)
[2023] KECA 239 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 239 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E245 OF 2022
HM OKWENGU, JA
MARCH 3, 2023**

BETWEEN

JAMES NJUGUNA MWANGI APPLICANT

AND

ZAKARIA MACHARIA GIKINYO 1ST RESPONDENT

NANCY WANJA MACHARIA 2ND RESPONDENT

(Being an application for extension of time to file and serve the notice of appeal against the Judgment of the Environment & Land Court at Thika (G. Kemei J.) delivered on 9th June 2022 in ELC No. E084 of 2021)

RULING

1. By a notice of motion dated July 7, 2022, James Njuguna Mwangi the applicant herein, seeks leave of this Court to file a notice of appeal out of time, against the judgment of the Environment & Land Court (ELC), delivered on June 9, 2022, and that the notice of appeal dated July 4, 2022 filed on the same date be deemed as properly filed.
2. The applicant explains that the failure to file the notice of appeal in time was inadvertent as he only came to know of the judgment on the June 24, 2022 when he visited his former advocate's offices. The judgment was apparently delivered through Microsoft Teams online platform. It was when he sought advice from another firm of advocates that he learnt that he could file the notice of appeal out of time. The applicant contends that his intended appeal is merited and has good chances of success. He urges that in the event that the orders he seeks are not granted, he will suffer substantial loss as the judgment will be executed against him. He argues that the Court has unfettered discretion to grant the orders sought in exceptional circumstances as outlined in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and boundaries Commission & 7 others* [2014] eKLR (the Nicholas Kiptoo decision).



3. The applicant filed written submissions in which he relied on *Jedidah Alumasa & 3 others v SS Kositany* [1997] eKLR, where the Court recognized that in certain instances, it may not be possible to comply with the requirement to file a notice of appeal within the stipulated period, hence Rule 4 of the *Court of Appeal Rules* that gives the Court unfettered discretion to extend time.
4. The applicant referred to the Nicholas Kiptoo decision on the factors that the Court should take into account in deciding whether to grant an extension of time. He submitted that his failure to file the notice of appeal was inadvertent and blamed his former advocate for failing to inform him of the judgment.
5. The applicant cited decisions in which the Court declined the wrongs committed by the advocates and their staff on innocent clients. The authorities included: *Owino Ger v Marmanet Forest Cooperative Credit Society Limited* [1987] eKLR; *CFC Stanbic Limited v John Maina Gitthaiga & anor* [2013] eKLR; *Lee G Muthoga v Habib Zurich Finance (K) Limited & Anor*, Civil Application No NAI 236 of 2009 and *Catherine Njoguini Kenya & 2 others v Commercial Bank of Africa Limited*, Civil Application No NAI 366 of 2009. He urged the Court to be merciful to him as he stands the risk of being evicted from the suit property, while the respondent will not suffer any prejudice if the orders sought are granted.
6. The applicant submitted that rules of procedure are handmaidens of justice and that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. Finally, the applicant submitted that he has an arguable appeal and his eviction from the suit property would ruin his business.
7. The respondents opposed the applicant's motion through written submissions in which they argued that the applicant's motion was brought in bad faith, is without merit, is an abuse of the Court process, and should be dismissed in limine. They argued that no plausible explanation had been given for the delay. They pointed out that they stand to suffer great prejudice if the orders sought were granted, as the orders would have the effect of prolonging the litigation and denying them the fruits of their judgment.
8. The respondents submitted that the intended appeal has little or no chance of success as the respondents are the registered owners of the suit property and are holding the original title, while the applicant is a mere trespasser in the suit property: that the key that unlocks the Court's flow of discretionary favour is a plausible and satisfactory explanation for the delay in filing the notice of appeal; and that the applicant has given a very lame excuse of not having known of the judgment.
9. The respondents pointed out that even after the discovery of the judgment on June 24, 2022, the applicant took another 10 days to file his notice of appeal. This delay was also not explained. They submitted that the applicant would not be rendered homeless if the decree is executed as he only operates a hotel and a butchery on the premises. They, therefore, prayed that the application be dismissed.
10. Under Rule 4 of the *Court of Appeal Rules, 2022*, this Court has discretion to extend time for the doing of any act authorized or required by the Rules. As was stated by this Court in *Leo Musila Mutiso vs Hellen Wangari Mwangi* [1999] 2 EA 231;

“It is now settled that the decision whether or not to extend the time for appealing is discretionary. It is also well settled that in general, the matters that 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.”

11. The Supreme Court in the *Nicholas Kiptoo* decision has also restated the principles to be applied by the Court in exercising the discretion to extend time as follows:

- “(i) 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- ii. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- ii. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- ii. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- ii. Whether the application has been brought without undue delay; and;
- ii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

12. The issues that I must address in this application are: whether the applicant has given a reasonable explanation for the delay in filing the appeal; whether his application for extension of time was brought without undue delay; and whether the respondents will suffer any prejudice if the extension is granted.

13. It is not disputed that the judgment was delivered on June 9, 2022 through the Microsoft Teams online platform. The applicant does not deny that his advocate was aware of the judgment, but he claims that the advocate did not inform him of the judgment and that he only learnt of the judgment on June 24, 2022, when he visited his advocate’s office. Assuming that to be the position, the applicant learnt of the judgment 13 days after the delivery of the judgment. The applicant has not explained why the notice of appeal was not filed immediately. Although the applicant had only one day, his advocate could easily have filed the notice of appeal, which is a one pager. It would appear that the applicant did not give his advocate the instructions to file the notice of appeal. The idea to file the notice of appeal was apparently an afterthought after he was advised by a different firm of advocates, that he could file a notice of appeal out of time.

14. The applicant has shifted the blame onto his former advocate for the delay in filing the notice of appeal. In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, Waki, JA dismissed an attempt to shift the blame onto an advocate stating as follows:

“It is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of 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”.

15. Moreover, the applicant does not explain why it took another two weeks from the time he learnt of the judgment, to the time that the application for extension of time was made. In addition, much as the



applicant maintains that his intended appeal has good chances of success, he has not demonstrated to this Court the possibility of his appeal succeeding.

16. I find that the applicant has failed to lay the basis upon which the Court can exercise its discretion in his favour. The application is accordingly dismissed.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

