



REPUBLIC OF KENYA



RS v DS (Civil Application E048 of 2022) [2023] KECA 478 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 478 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E048 OF 2022**

F SICHALE, JA

MAY 12, 2023

BETWEEN

RS APPLICANT

AND

DS RESPONDENT

(An Application for Extension of Time within which to lodge a Notice of Appeal against the judgment of the High Court of Kenya at Kericho (Ongeri J), dated 17th June 2022.) IN (Matrimonial Cause No. 16 of 2015 (OS))

RULING

1. RS (the applicant herein) has vide a motion dated July 29, 2022, brought pursuant to the provisions of Article 159 (2) (d) and (e) of the [Constitution of Kenya 2010](#), and Rule 4 of the [Court of Appeal Rules](#) sought the following orders:
 1. That the applicant be granted leave to lodge a Notice of Appeal from the judgment delivered by Lady J Asenath Ongeri on June 17, 2022, in HC Matrimonial Cause Number 16 of 2015 (OS) out of time.
 2. That costs of this application abide in the appeal.”
2. The motion is supported by the grounds on the face of it and the affidavits sworn by the applicant, RS and Fridah Jausiku, learned counsel who has the conduct of this matter on behalf of the applicant who deposed *inter alia* that being aggrieved with the judgment of Ongeri J dated June 17, 2022, she instructed the firm of her advocate to appeal against the same and requested for copies of the judgment and proceedings for purposes of filing an appeal vide a letter dated June 20, 2022.
3. She further deposed that before the lapse of the requisite 14 days to lodge a Notice of Appeal, her advocates visited the registry to lodge the same but unfortunately the registry and the other court’s departments were in the process of relocating to another place known as “Corner C” and thus the



filing of documents and other services had been suspended temporarily locking her out of the 14 days' period. She thus deposed that failure to lodge the Notice of Appeal was not intentional and that the instant motion had been brought within a reasonable time.

4. The motion was opposed vide a replying affidavit sworn by the respondent DS on October 7, 2022, who deponed, inter alia, that the exercise of this Court's discretion to extend time for lodging the Notice of Appeal was predicated upon set principles and that the applicant must demonstrate that he/she has an arguable appeal capable of succeeding on merit which the applicant had not demonstrated in the instant case.
5. It was submitted for the applicant that she had made out a case for enlargement of time and that the respondent would not be prejudiced if the same was allowed but on the contrary if the motion dated July 29, 2022, was disallowed, the same would effectively lock her out from exercising her right of appeal thus occasioning her prejudice. The respondent on the other hand did not file written submissions.
6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the applicant's submissions, the cited authorities and the law.
7. The applicant's motion is brought *inter alia*, under Rule 4 of this [Court's Rules](#). The said Rule provides:

"4. Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

8. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997 where the Court stated:

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

9. In the instant case, the impugned judgment was delivered on June 17, 2022. It is not in dispute that vide a letter dated June 20, 2022, which was well within the 14 days' period, the applicant through her advocates wrote a letter to the court requesting for copies of judgment and proceedings for purposes of filing an appeal. In addition, the annexures marked "FJ2a" and "FJ2b" in support of the contention that there were court disruptions which prevented the applicant from filing the Notice of Appeal on time shows that the court had actually been closed, albeit only for one day, that is, on June 24, 2022. The instant application is dated July 29, 2022. The applicant contended that failure to lodge the same within the requisite 14 days' period was due to the fact that the court's department were in the process of relocating to another place known as "Corner C" thus filing of court documents and other services had been suspended temporarily locking her out of the 14 days' period.



10. In my view, the applicant's actions cannot be said to be inordinate. Secondly, the interruption of the functions of the court registry is not denied. In my view, given that the delay was not inordinate coupled with the said interruptions, it is sufficient for me to exercise my discretion in favour of the applicant.
11. Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in *Leo Sila Mutiso* case (supra), to extend time and therefore extend time within which to file a Notice of Appeal.
12. Accordingly, the applicant's motion dated July 29, 2022 is hereby allowed.
13. Costs to abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

