



**Chepkwony v Chepkwony (Civil Application E037 of 2021)
[2023] KECA 801 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KECA 801 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E037 OF 2021
FA OCHIENG, JA
JUNE 30, 2023**

BETWEEN

JOSEPH CHERUIYOT CHEPKWONY APPLICANT

AND

JOSEPH KIPRONO CHEPKWONY RESPONDENT

*(An application for extension of time to file an appeal out of time
from the decision of the High Court at Kericho (Mumbi Ngugi,
J.) dated 31st October, 2017 in Succession Cause No. 165 OF 2014)*

RULING

1. Before me is an application dated June 22, 2021 by the applicant, Joseph Cheruiyot Chepkwony. The application seeks extension of time to file a notice of appeal and a memorandum of appeal within 7 days of the grant of such leave; and conservatory orders for the estate of Kipkemoi Chepkwony Meto alias Kipkemoi Arap Kimeto.
2. The application is premised on the grounds that: the applicant's sister, (objector) filed summons for revocation of grant before the High Court at Kericho. The court ordered the objector to file an appeal instead. The applicant is a person of straw and he was trying to raise legal fees. The applicant is also illiterate, he did not know that, despite being aggrieved, the time for lodging an appeal had lapsed. The applicant became aware of the possibility to enlarge time for filing an appeal after applying for the revocation of grant. The applicant seeks leave to file a notice of appeal and the intended appeal, and is ready to do so immediately, if he is granted leave.
3. The application was further supported by the applicant's affidavit in which he stated that: the delay in filing the appeal was not deliberate, he erroneously filed summons for revocation of grant, instead of filing an appeal. He was misadvised by his previous advocates on record to file summons for revocation of grant instead of filing an appeal. The delay was further contributed to by the corona virus pandemic.



His intended appeal is arguable, with high chances of success as set out in the draft memorandum of appeal. The respondent be temporarily restrained from dealing with the estate of the deceased in any way.

4. The applicant submitted that the delay in lodging an appeal was due to the mistake of his previous advocates, whom he wholly relied upon for advice, as he is illiterate. He urged that the mistakes of his counsel should not be visited on him. He further submitted that he is a person of no means, and he could not procure the services of his current advocates on time, to rectify the mistake. He has not been able to raise legal fees and his current advocates have taken up the matter pro bono. The appellant maintained that he has an arguable appeal. To buttress his submissions, the appellant relied on the case of *Vishva Stone Suppliers Co. Ltd v RSR Stone [2006] Ltd* [2020] eKLR.
5. I have carefully considered the application, grounds and affidavit in support thereof, submissions and the law. The issue for determination is whether the application is deserving of the orders sought.
6. Rule 4 of the *Court of Appeal Rules* does not provide for the factors which the court ought to consider in an application for extension of time, however, courts have devised appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters 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.”

7. The issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of, *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR where the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties,

whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”

8. In the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 where it was explained that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely



resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

9. There is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant to the leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, 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.”

10. The delay in filing the present application and the notice of appeal was approximately 4 years, and the summons for revocation of grant were filed 2 years after the impugned judgment was delivered. The applicant attributed the delay in filing a notice of appeal to the mistake of his then advocates on record, whom he blamed for having misadvised him on filing a revocation of grant, instead of filing an appeal. It is trite that an advocate should act swiftly to safeguard the rights of his client. In the case of *Greene MR in Gatti v Shoosmith* [1939] 3 ALL ER 916 at p. 919, the court held thus:

“On consideration of the whole matter, in my opinion, under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say “may be,” because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case.”

11. Similarly, in the case of *Eliud Buku Thuku v Beatrice Wambui Mwangi* [2013] eKLR, the Court stated thus:

“The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in *Njoka Muriu & Another vs Evan Githinji Muriu & Another*, Civil App. No. NAI 356 of 2003), a notice of appeal is a simple one-page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client’s interest”.

12. It is evident from the circumstances of this application that, a notice of appeal was not filed. The applicant has also not applied for typed proceedings and a certified copy of the judgment, to enable him prepare a record of appeal. He only states that he is ready to file an appeal. The applicant has also failed to explain what transpired between him and his then advocates on record, or why even the summons for revocation of grant were filed 2 years after the impugned judgment. The applicant has also not explained why, after being made aware that he could apply for enlargement of time to appeal, it took him another 2 years to file the current application. To my mind, this was not the mistake of the advocate but rather that of the applicant. Therefore, I do not find the reason advanced by the applicant to be plausible.



13. The applicant also cited a lack of funds as the reason for the delay in instructing new counsel, who took up the matter pro bono. In the case of *Joseph Maina Njoroge & 2 others v Paul Chege Mubabi* [2007] eKLR the court stated that, the main and only reason for seeking delay in filing the intended appeal in time is that the applicants, jointly and severally were financially unable to raise the money required for an advocate to represent them in filing and prosecuting the intended appeal. The Court in declining the application stated thus:

“Rule 112 of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security.

That explains why Omolo JA stated categorically in the case of Francis Mwai Karani v Robert Mwai Karani (Civil Application No. NAI. 246 of 2006) 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. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants’ explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”

14. I also find this was not a sufficient reason for the delay in lodging a notice of appeal.
15. As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In *Athuman Nusura Juma vs Afwa Mohamed Ramadhan*, CA No 227 of 2015 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.”

16. 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.
17. In my considered view, the applicant has failed to demonstrate the existence of the parameters set out in Leo Sila Mutiso (*supra*).
18. Therefore, I have come to the inevitable conclusion that the delay was not only inordinate but also inexcusable. Without expressing definitive conclusions, I find that the applicant has failed to demonstrate that the intended appeal has a probability of success, or even whether it will be a competent appeal. In the result I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF JUNE, 2023.



F OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

