



REPUBLIC OF KENYA



**KENYA LAW**  
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**Langat v Chepkwony (Suing as the administrator by limited grant of the Estate of Kaplachan Maritim) (Civil Application E005 of 2023) [2023] KECA 799 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KECA 799 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E005 OF 2023  
FA OCHIENG, JA  
JUNE 30, 2023**

**BETWEEN**

**SYLVESTER KIPKURUI LANGAT ..... APPLICANT**

**AND**

**RAEL CHEPKEMOI CHEPKWONY (SUING AS THE ADMINISTRATOR  
BY LIMITED GRANT OF THE ESTATE OF KAPLACHAN  
MARITIM) ..... RESPONDENT**

*(An application for extension of time to file an appeal out of time  
from the judgment of the Environment and Land Court at Kericho  
(M.C. Oundo, J.) dated 26th May, 2022 in ELC Case No. 8 of 2012)*

**RULING**

1. Before me is an application dated January 12, 2023. The applicant has sought five prayers. The jurisdiction of this court is limited to prayer (d); leave to file and serve a notice of appeal, and a record of appeal out of time.
2. The application is premised on the grounds that: the applicant's notice of appeal dated May 31, 2022 was struck out, having been lodged after the 14 days' statutory period, without leave of court. The delay was occasioned by the registry personnel, who failed to assess the said notice on time. Assessment was done on June 9, 2022 and the applicant immediately paid for it. However, there were delays with MPESA transactions and the payment reflected on June 10, 2022. At the time of lodging the appeal, the registries at Kericho had trouble assessing documents, processing payments and stamping documents due to internet connectivity, that was occasioned by the process of relocation of the court to Corner C. The intended appeal raises weighty issues of law. The delay was not deliberate. The ruling which struck out the applicant's notice of appeal was delivered on December 8, 2022. The applicant has moved timeously to file this application. The application was further supported by the affidavit of Omari Kefa, the applicant's counsel. He reiterated the grounds on the face of the application.



3. David Otieno, counsel for the respondent in his replying affidavit stated that: there can be no filing without payment of court fees, and as such the notice of appeal was lodged out of time on June 10, 2022. The invoice was issued on June 9, 2022, which was within the time for filing the notice of appeal. The applicant has not produced any evidence to show that there was a delay in MPESA transactions on June 9, 2022. Any doubts on whether or not the notice of appeal was filed out of time was dealt with in the application for striking out the said notice, which was served upon the applicant on July 12, 2022. The applicant has not moved the court timeously, or explained the delay in filing the present application.
4. The applicant submitted that Rule 4 of this *Court's Rules* allows for extension of time. To buttress this submission, the applicant relied on the decisions in the cases of *Leo Sila Mutiso vs Hellen Wangari Mwangi* [1999] 2 EA 231 and *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR. He maintained that the delay in filing the notice of appeal was one day and/or a matter of hours, as the same was to be filed on June 9, 2022 but it was filed on June 10, 2022. He reiterated that the delay was occasioned by the reasons outlined in the grounds on the face of the application and the supporting affidavit. He further submitted that the intention to lodge the notice of appeal was not an afterthought. He immediately moved this court after its determination on December 8, 2022 and filed the present application.
5. The applicant submitted that the intended appeal has high chances of succeeding as outlined in the draft memorandum of appeal; one of the grounds being, that the trial Judge erred in law in failing to make a determination that the respondent's suit was statutorily time barred, and that occasioned a miscarriage of justice. The applicant further submitted that the respondent will not suffer prejudice if the application is allowed. He invited the court to invoke its inherent power under Rule 1(2) and article 159(2) (d) of the *Constitution* to cure the procedural technicalities for the ends of justice to be met. (See: *Jaldesa Tuke Dabelo vs IEBC & another* [2015] eKLR, *Equity Bank Ltd v West Link MBO Ltd* [2013] eKLR and *Board of Governors, Moi High School, Kabarak & another v Malcom Bell* [2013] eKLR).
6. Opposing the application, the respondent submitted that despite being aware of that the notice of appeal had been filed out of time on June 10, 2022 and also being served with the application dated July 12, 2022 to strike out the notice of appeal for being filed out of time, the applicant made no effort to correct the said error. She contended that the delay in filing the present application was 1 month, and no reason has been explained for the said delay. She contended that time cannot be computed from December 8, 2022 when the court struck out the notice of appeal, the delay was for about 7 months. The respondent further submitted that the applicant has not indicated whether he has obtained the proceedings, to enable him lodge an appeal under Rule 84. She argued that if the order is granted, such an order will be in vain.
7. I have carefully considered the application, grounds and affidavit in support thereof, replying affidavit, submissions by counsel, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought.
8. 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 (supra)*, 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.”

9. 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.”

10. 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.”

11. 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 from getting 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.”

12. The delay in filing the present application after the December 8, 2022 was about 1 month. The whole period for delay, from June 10, 2022 was about 7 months. Meanwhile, the delay in filing the notice of appeal was approximately 1 day. The applicant attributed the delay in filing a notice of appeal to the difficulties which the registry at Kericho was facing at the time, and also to the delays in MPESA transactions. He maintained that the present application had been filed on time.

13. In the case of *Hamendra Mansukhalal Shah v Alnoor Kara & another* [2000] eKLR the court held as follows:

“I am inclined to agree with Mr. Mwangi that the explanation given for the 47 days’ delay has not been sufficiently explained to me. If indeed as claimed by the applicant the fault



laid with the registry of the superior court, there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged.”

14. In the case of *Mukabi v Mukabi* [2004] eKLR the court stated as follows:

“The court has unfettered discretion in an application such as the one before me, it having been brought under rule 4 of the Court of Appeal Rules. It is now settled law, however, that such discretion must be exercised judiciously upon reason. In this application, the main explanation given for the delay is that the file got lost immediately after the applicant had applied for copies of proceedings and judgment. That explanation has not been challenged and there is no replying affidavit filed by the respondent. There are exhibits namely correspondences between the applicant, his counsel and the then Chief Justice and the Registrar on the matter, as I have already stated hereinabove. I am satisfied that that explanation is genuine.”

15. In the present application, a notice of appeal was filed on June 10, 2022. However, the said notice was struck out on December 8, 2022 for being filed out of time. No reason has been given for the delay in filing the present application, save that there was a pending application to strike out the notice of appeal. The delay in filing the notice of appeal on the other hand was 1 day. I would not consider this to be inordinate delay. The reasons for the delay in filing the said notice with regard to issues arising from the court registry have not been controverted by the respondent. I find this to be a plausible reason for the delay.

16. As regards the chances of success of the intended appeal, it is not my role to definitively determine 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 v 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.”

17. 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 was aggrieved by the judgment of the trial court and is desirous of appealing against the said judgment. However, the time for him to exercise his right of appeal has since lapsed hence the present application.

18. I find that the applicant has demonstrated a plausible explanation for the delay in filing and serving the notice of appeal and record of appeal.

19. Accordingly, I find that the application is merited. I therefore grant an extension of time, and direct the applicant to file and serve the notice of appeal and the record of appeal within the next 14 days.

20. Costs of the application shall abide the outcome of the intended appeal.  
Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF JUNE, 2023.**



**F. OCHIENG**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

