



REPUBLIC OF KENYA



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**Kimathi & another v Muriuki & 12 others (Civil Appeal (Application)  
61 of 2020) [2023] KECA 666 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 666 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 61 OF 2020  
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA  
JUNE 9, 2023**

**BETWEEN**

**DR. NEHEMIAH KIMATHI ..... 1<sup>ST</sup> APPLICANT**

**STELLA NKATHA MWIRARIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GRACE WAMBUI MURIUKI ..... 1<sup>ST</sup> RESPONDENT**

**MARY NG'ENDO TIBA ..... 2<sup>ND</sup> RESPONDENT**

**JAQUELINE PAULINE WAIRIMU THARAO ..... 3<sup>RD</sup> RESPONDENT**

**RUTH WANJIRU THARAO ..... 4<sup>TH</sup> RESPONDENT**

**MUNGAI MBURU ..... 5<sup>TH</sup> RESPONDENT**

**MARGARET NJOKI RUTHA ..... 6<sup>TH</sup> RESPONDENT**

**DAVID ODANGA ..... 7<sup>TH</sup> RESPONDENT**

**OPONDO OTIENO PATRICK ..... 8<sup>TH</sup> RESPONDENT**

**GRACE KANGAI GACICI ..... 9<sup>TH</sup> RESPONDENT**

**DANIEL KURIA WAWERU ..... 10<sup>TH</sup> RESPONDENT**

**SAMUEL KIARIE MBURU ..... 11<sup>TH</sup> RESPONDENT**

**COMMISSIONER OF LANDS ..... 12<sup>TH</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR THIKA ..... 13<sup>TH</sup> RESPONDENT**

*(In the matter of the Reference of the Ruling of a single judge (Kiage, JA.)  
dated 18th December 2020 in the application dated 3rd March 2020)*



## RULING

1. Before us is a reference to a full bench of the ruling of Kiage, JA. dated December 18, 2020 dismissing an application by the applicants for leave to lodge an appeal out of time against the judgment and order of the Environment and Land Court (ELC) at Thika (Ong'ondo, J.) dated and delivered on June 14, 2019 in Cause No. 449 of 2017; and, that upon grant of the leave, the Record of Appeal lodged herein be deemed as duly filed and served upon the respondents. In his ruling, the learned Judge, inadvertently indicated that the application before him was dated May 3, 2020, whereas the record shows that it was dated March 3, 2020.
2. The reference is sought under rule 57 (1) of the [Court of Appeal Rules](#) vide a letter dated January 15, 2021 wherein, the applicants wrote to the Registrar expressing their dissatisfaction with the decision of the learned Judge, and thereby requesting that the application be placed before a full bench for hearing and determination.
3. The grounds upon which the applicants sought extension of time was that, upon the impugned judgment being delivered, they filed a Notice of Appeal and applied for certified copies of the proceedings, which were supplied after the time prescribed for filing an appeal had run out; that the appeal has high chances of success; and that the respondents would not be prejudiced if the application was allowed.
4. The application came up for hearing before us on February 7, 2023. Ms. Dave, learned counsel, appeared for the applicants, Ms Oluoch, learned counsel, held brief for Mr. Ngure who is on record for the 2<sup>nd</sup> respondent, and Mr. Makumi, learned counsel, appeared for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Counsel informed the Court that they would rely on filed written submissions dated January 31, 2023, April 19, 2021 and April 15, 2021 respectively, which they briefly highlighted. At the outset, we need to clarify that Ms. Oluoch and Mr Makumi referred to submissions dated differently from what was in our record, even though, in their highlights they referred to the contents of the submissions which were in the court file. The submissions and grounds of opposition on record for the 2<sup>nd</sup> respondent were dated November 6, 2020 while those of the 3<sup>rd</sup> and 4<sup>th</sup> respondents were dated November 17, 2020. We presume that the error of the mix-up of dates was an oversight on the part of counsel.
5. Ms. Dave submitted that the advocates previously on record for the applicants filed a Notice of Appeal within the stipulated timelines, but failed to serve it on the respondents in good time. They also failed to copy the respondents the letter requesting for the typed proceedings. The typed proceedings were ready for collection on October 9, 2019, but were collected on 19<sup>th</sup> November 2019. Dismissing the application, the learned Judge, held that the applicants were undeserving of the court's discretion, but that this is a case where this bench can interfere with the exercise of discretion of the judge as he failed to take cognizant of article 159 (2)(d) of the [Constitution](#) and sections 3A and 3B of the [Appellate Jurisdiction Act](#), which give a wide a discretion to a court to ignore procedural technicalities and do substantive justice. According to the counsel, the learned judge failed, inter alia: to consider the law applicable; to appreciate that the mistake was occasioned by the advocate and not the parties; and, that, prima facie, the appeal had chances of success.
6. Counsel placed reliance on the case of [Donald Odhiambo Rabala v Judicial Service Commission & another](#) [2020] eKLR which pronounced the conditions to be satisfied before a reference under rule 55 of the [Court of Appeal Rules](#) is allowed; [Abdirahman Abdi v. Safi Petroleum Products Ltd & 6 others](#) [2011] eKLR where this court considered the application of article 159(2) (d) of the [Constitution](#) and



sections 3A and 3B of the *Appellate Jurisdiction Act* by stating that failure of a party to copy counsel for other parties the letter requesting for proceedings was not fatal, and that it served no purpose; *Cosmos Limited v Kenya Revenue Authority* [2019] eKLR for the proposition that failure to serve the letter bespeaking proceedings to the opposing party lay with the advocate, and that a litigant should not suffer because of his advocate's oversight; and, *Ngei v Kibe & another* (Civil Appeal (Application) E359 of 2021) [2021] KECA 243 (KLR) highlighting this court's position this court that time should be extended where it is demonstrated that there exists an arguable appeal and that, in such an instance, it would be unjust to shut out a party from the doors of justice, unless the respondent would suffer injustice.

7. It was the applicant's case that the respondents would not be prejudiced if time to file the appeal was extended and that, in any case, any inconvenience likely to be suffered by them was compensable by way of damages.
8. According to Ms. Oluoch, the Notice of Appeal was lodged on June 18, 2019 and served on August 13, 2019. Further, the letter bespeaking proceedings was never served upon learned counsel for the respondents and, accordingly, the appeal ought to have been filed within 60 days of the delivery of the impugned judgment. The Certificate of Delay indicated that the applicants were notified that the proceedings were ready on October 9, 2019, but opted to collect them a month later. This delay was not explained. Reliance was placed on the case of *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others* [2016] eKLR for the proposition that a notice of appeal ought to be filed within the timelines provided by the law. We were accordingly urged to dismiss the application.
9. On his part, Mr Makumi submitted that the Notice of Appeal ought to have been filed within seven days of the delivery of the judgment; that the letter bespeaking proceedings was never served on them; and, as such, the length of delay computed in the Certificate of Delay should not be taken into account to exclude days of delay in filing the appeal. Furthermore, there was delay in collecting the proceedings and, even after the appeal was filed, it was served eight months later. This delay was not explained. To buttress their submissions, counsel relied on the case of *County Executive of Kisumu v. County Government of Kisumu & 8 others* [2017] eKLR.
10. We have appraised ourselves with the parties' respective submissions and the law. Rule 57(1) (b) of the *Court of Appeal Rules* provides that:
  1. Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—
    - (b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the court,  
That person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.
11. At the outset, we underscore that a reference is not an appeal and, as a fully constituted bench, we may only interfere with the exercise of the wide discretion bestowed on a single judge under rule 4 of this court's Rules on the basis of sound principles. The court has to consider whether the single judge took into account an irrelevant factor which he ought not to have taken into account; whether he failed to take into account a relevant factor which he ought to have taken into account; whether he misapprehended or failed to appreciate some point of law or fact applicable to the issues at hand; or whether the decision on the available evidence and law is plainly wrong.



12. In his ruling, the learned Judge held as follows:
- “The Rules of this Court must be adhered to by parties at all times. Their importance cannot be overstated and therefore a party that has a casual approach to their adherence is not deserving of this relief.”
13. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2015] eKLR, the Supreme Court had this to say:
- “... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favor of the applicant.”
14. The applicants submit that the delay in filing the record of appeal was occasioned by the registry’s delay in supplying them with certified copies of proceedings. Having had a look at the chronological events in this matter, it is trite that the impugned judgment was rendered on June 14, 2019. The applicants filed a Notice of Appeal on June 20, 2019, which they served upon the 2<sup>nd</sup> respondent two months later, on August 13, 2019, and on the 3<sup>rd</sup> and 4<sup>th</sup> respondents almost four months later on October 7, 2019. They also sought to be supplied with copies of certified proceedings on June 18, 2019. A glance at the Certificate of Delay shows that the proceedings were ready for collection on October 9, 2019. The applicants were duly notified but procrastinated, and it was not until November 19, 2019 when they collected the proceedings. Further, the application seeking leave was made on May 3, 2020, which was seven months after the proceedings were ready, and six months after the applicants had actually collected them.
15. From the foregoing sequence of events, we find the explanation proffered by the applicants not plausible. Indeed, the registry cannot be blamed for the delay. The period after the proceedings were collected and when the application was filed is not explained. The conduct of the applicants points to a systematic modus operandi of delay at all stages, presumably as a testament to crippling any step taken towards having the appeal ready for hearing. This aside, this reference was made too late in the day. The impugned ruling was delivered on December 18, 2020 while the reference was requested on January 15, 2021, which was almost a month later. Equity does not aid the indolent. A party must demonstrate that they are not just sitting and doing nothing, then approach the court for clemency. Justice cuts across both sides of a case. It must be balanced to favour all parties in a case.
16. Though Ms. Dave seeks to rely on article 159(2) (d) of the *Constitution* and sections 3A and 3B of the *Appellate Jurisdiction Act* on account that the oxygen principles override the procedural technicalities, we are of a different view, as this court differently constituted aptly stated in *KCB Bank Kenya Limited v Mwandoro* (Civil Application E044 of 2021) [2023] KECA 260 (KLR) that:
- “We must point out that the court can invoke the overriding principle only in well deserving cases, depending on the peculiar circumstances, as the overriding principle is not a panacea for all ills and in every situation. Its invocation is only justified upon a proper basis being laid and the court in exercising its discretion must do so judiciously and with proper and explicable foundation.”
17. Failure to observe and adhere to the stipulated timelines is not a procedural technicality, but rather a substantive one that goes to the core of dispensation of justice to all parties concerned. In other words, article 159(2) (d) does not sanitize delay. The relevant rules are couched in mandatory terms



and ought to have been followed. In our view, the learned judge took into consideration the length of the delay, and the reasons advanced for the delay and properly exercised his discretion in disallowing the application.

18. It is in view of the above that we find no merit in the Motion. We order that it be, and is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2023.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

