



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamondo v Maina (Civil Application E110 of 2022)
[2023] KECA 947 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 947 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E110 OF 2022**

F SICHALE, JA

JULY 28, 2023

BETWEEN

SAMUEL MUIRURI KAMONDO APPLICANT

AND

WILLIAM THENDI MAINA RESPONDENT

(An Application for extension of time to file an appeal out of time and for stay of execution and stay of further proceedings of the orders of the Environment & Land Court of Kenya at Nairobi (Oguttu Mboya, J.) dated 7th March, 2022 pending the hearing and determination of the intended appeal against the said orders INELC Case No. 371 of 2013 formerly, Machakos 277 of 2012)

RULING

1. The applicant's motion dated 5th April, 2022 seeks leave to file an appeal out of time and that the Notice of Appeal filed herein be deemed as duly filed. The rest of the prayers seeking orders of stay fall outside the purview of a single judge and hence, I shall not delve into them. The motion is supported by an affidavit of Samuel Muiruri Kamondo, the applicant herein sworn on 5th April, 2022.
2. In the supporting affidavit the applicant deponed that he was a respondent in ELC Case No. 371 of 2013; that on 7th March, 2022, the court ordered that he demolishes structures on the suit land within 30 days thereof, failing which he be forcefully evicted and be liable to serve 3 months' imprisonment and that he lodged a Notice of Appeal dated 1st April, 2022.
3. The respondent did not file a replying affidavit in opposition to the motion.

On record is an affidavit of service by one William Mwangi who depones that on 11th April, 2022, he served the Notice of Motion dated 5th April, 2022 upon the firm of Maguta Kimemia & Associates for the respondent.



4. The application before me is predicated upon Rule 4 of this Court's Rules. It provides:

"4. 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 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."

5. Needless to state the principles that guide the court in applications such as this one are well settled. In *Vishva Stone Supplies Company Limited v RSR Stone* Civil Application No. 55 of 2020, Nambuye, J. stated:

"The principles distilled from the above case law may be enumerated inter alia as follows:

- i. The mandate under Rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
- ii. Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.
- iii. The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered meaning on sound reasoning and not on whim or caprice see *Githere v Ndiriri*.
- iv. As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider as long as they are relevant to the issues falling for consideration before the Court.
- v. The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.
- vi. 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 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.
- vii. Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word "possibly".



- viii. 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 power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.
 - ix. Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.
 - x. An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;
 - xi. The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.”
6. The applicant is aggrieved by the orders made on 7th March, 2022. According to the record, and this is not denied, the orders were made in presence of “... counsel for the plaintiff, Samuel Muiruri Kamondo in person ...”. The reason for the delay in filing the Notice of Appeal in time is stated in paragraph 11 of the supporting affidavit. The applicant deponed:
- “That I am a 72-year-old man and I was acting in person all along in ELC 371 of 2013 and I was not conversant with the timelines for lodging appeals against rulings and orders to this Honourable Court”.
7. As has been stated times without a number, ignorance of the law is not a defence. It is unfortunate that the applicant was not aware of the timelines of lodging a Notice of Appeal. His ignorance however, is not a valid reason for the exercise of my discretion in his favor.
8. Consequently, I decline the invitation to allow for enlargement of time as I find the motion to be without merit. It is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

