



**Nairobi South Hospital v CKN & another (Civil Application
E177 of 2023) [2023] KECA 888 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 888 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E177 OF 2023
GWN MACHARIA, JA
JULY 24, 2023**

BETWEEN

THE NAIROBI SOUTH HOSPITAL APPLICANT

AND

CKN 1ST RESPONDENT

VAO 2ND RESPONDENT

(Being an application for leave to enlarge time within which to file a Notice of Appeal and Record of Appeal out of time against the Judgment of H. Ong'undi, J. delivered on 20th December, 2022 in Constitutional Petition No. E082 of 2021)

RULING

1. The applicant seeks enlargement of time to file a notice of appeal to the date of filing the Notice of Appeal dated February 5, 2023; that the same be deemed to have been properly filed; and that leave be granted to file the record of appeal within 7 days from the date of this court's ruling.
2. The application is supported by the grounds on the face of it and the affidavits sworn by Stephen Ndulu Mutavi and Mohamed Abdi Sallah, the administrative manager and advocate for the applicant respectively. They aver that upon being dissatisfied with the Judgment rendered on December 20, 2022, its advocate lodged the notice of appeal dated February 5, 2023 on February 16, 2023, which was outside the 14 days provided under the *Court of Appeal of Rules*. It is argued that the period between December 21, 2022 and January 15, 2023 was not reckoned, being the High Court Christmas recess. Further, that the delay was due to the fact that its former advocate fell ill and was admitted in hospital between January 4, 2023 to January 14, 2023, and upon discharge he was placed on bed rest for ten days. It was not until he (advocate) was served with the respondent's Party and Party Bill of Costs that he became aware of the mistake. Therefore, the delay is excusable; that the intended appeal raises



fundamental issues that are of public interest; and that the honest and excusable mistake of counsel should not be visited on the client.

3. The application is opposed by the respondents vide a replying affidavit sworn on May 16, 2023, by the 1st respondent who avers that the application is an afterthought, frivolous and vexatious; that the applicant is guilty of laches, and is undeserving of the orders sought as the notice of appeal has never been served upon them; that the applicant was aware of the strict timelines but chose to ignore them, and nothing would have stopped the applicant from filing his documents electronically through the court's e-filing system; that the applicant ought to have first filed the instant application immediately and not the notice of appeal; that he was only awoken from slumber upon receiving an email from the respondents' advocate; that the delay is deliberate and inexcusable; and that the intended appeal is not arguable.
4. The applicant filed submissions dated May 18, 2023, which are a reiteration of the averments in support of the application, and I shall not therefore rehash them.
5. I have accordingly considered the application, the response thereto, and the written submissions. Under rule 4 of the *Court of Appeal Rules*, 2022, this court has unfettered discretion to extend time for a party in an appeal to do what it was supposed to do within the time stipulated by the Rules. The court in *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR held thus:

“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 delay, (possibly) 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 this parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”
6. As regard to the period of delay, the applicant advanced the explanation that his former advocate was admitted to hospital from 4th to January 14, 2023, and upon discharge, he was given a bed rest for 10 days which stretched to January 24, 2023, and it was not until he received the Party and Party Bill of Costs that he became aware of his mistake. I find this explanation untenable, for the fact that if all along the applicant's former counsel was under the mistaken belief that he had duly filed the notice of appeal, it begs why the notice of appeal dated February 5, 2023 annexed to the application, is dated two days before he was made aware of his mistake through service of the Party and Party Bill of Costs by the respondent's counsel.
7. Though the notice of appeal is dated February 5, 2023, it was not lodged until the 16th of February 2023. This was eleven days later, which means that even though the applicant was aware of the mandatory timelines, it took no immediate action to remedy the error. Further, the notice of appeal having been filed on February 16, 2023, and this application having been lodged on May 9, 2023, is a testament that the delay in remedying the error was inordinate. A three-month delay was definitely inexcusable.
8. I say so because, although the applicant satisfactorily explained the delay in failing to file the notice of appeal outside the stipulated period, it failed to give a reasonable explanation for the delay in correcting the error upon realizing its inadvertent mistake. The systemic indolence is inexcusable, which the court cannot countenance. Consequently, the applicant is undeserving of the court's exercise of discretion in its favour.
9. The upshot of the foregoing is that the application is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.



G.W NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

