



**Thika Muslim Co-operative Society Limited v Zubeidi (Civil Application
E180 of 2023) [2023] KECA 899 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 899 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E180 OF 2023
GWN MACHARIA, JA
JULY 24, 2023**

BETWEEN

THIKA MUSLIM CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

HASSAN A ZUBEIDI RESPONDENT

*(Being an application for extension of time to file a Notice of Appeal
and Record of Appeal out of time from the Ruling of (M. Apondi,
J.) delivered on 20th December, 2010 in HCCC No. 493 of 2004)*

RULING

1. The applicant seeks enlargement of time to file a notice and record of appeal and that the Notice of Appeal dated and filed on March 27, 2023 be deemed to have been properly filed and served upon payment of the requisite court fees.
2. The application is supported by the grounds on the face of it and the affidavit sworn by Abdalla Saidi Ndope, the Chairman of the applicant. He deposes that the applicant's previous advocate on record, M/s Njoroge Kugwa & Co Advocates, did not inform it of the delivery of the Ruling and it was not until it enquired that it was informed that a summary judgment had been entered; the applicant then filed a notice of appeal on February 23, 2011, out of time. He avers that the counsel then on record failed to file an application for extension of time, and, instead, filed numerous applications in the High Court which caused delay in filing the present application; that the respondent's application seeking to strike out the initial notice of appeal was allowed on February 11, 2015; that the mistake of its former advocates should not be visited upon it and its members; that it took steps to remedy the error by changing its advocates immediately who have since been trying to trace the court file, but which was only available after an application for reconstruction was made; that the delay in filing the instant application was beyond its control, but due to the fact of the missing court file, its right to be heard and defend itself was fettered; that the intended appeal is arguable, has high chances of success and it



will be rendered nugatory if the orders sought are not granted; and that it is only fair and just that the application be allowed.

3. The respondent opposed the application vide a replying affidavit sworn on May 29, 2023, by the respondent. He contends that the application is a resplendent example of the maladroit efforts of the applicant to indulge in the abuse of the court process.; that the applicant has always been aware of the Judgment of the High Court, having filed two applications seeking stay of execution of the Judgment dated August 4, 2014 and August 20, 2015 respectively; that the applicant also filed an application dated August 20, 2016 for extension of time to lodge the notice of appeal which application was dismissed on January 27, 2016 in the High Court; that the current application is therefore res judicata and should be dismissed in limine; that there has been a 13-year delay which is inordinate, oppressive, contumelious and unexplained; and that the appeal stands no chance of success having not disclosed a single arguable ground.
4. The respondent further contends that the orders of June 20, 2016 issued by the High Court granted vesting orders over LR No 10821/53/Thika Municipality and it was transferred in favor of Screen Check Africa Limited; and that consequently, there is no subject matter to be litigated upon and the application should be dismissed with costs.
5. The respondent filed submissions dated May 29, 2023 which are a regurgitation of his response, and as such, I will not recall them.
6. The applicant did not file submissions.
7. I have considered the application, the response, the submissions and the law. 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.”
8. The applicant is seeking to appeal a judgment that was delivered on December 20, 2010 which is almost 13 years ago. A historical background is that upon being aggrieved by the Judgment, the applicant filed a notice of appeal on February 23, 2011, and took no further step leading to its striking out by this Court on February 11, 2015. He has now filed this application and a notice of appeal dated March 27, 2023. His excuse is that firstly, he was not aware of the Judgment and when he was made aware of it, his former counsel did not advise him accordingly. Secondly, that the court file went missing and it took a while for it to be traced.
9. With regard to the reason for the delay, the lack of information as to judgment being delivered is acceptable. However, the applicant cannot rely on this reason for the period after February 23, 2011 when he filed the first notice of appeal. It took no steps for 4 years and it was struck out. It has been held time and time again that litigation belongs to the litigant. It cannot be that for 4 years the applicant never sought out its counsel as to the status of the appeal. Its inaction shows a blatant disinterest in its own appeal. The proffered reason that the court file went missing, is not tenable for the fact that after the notice of appeal was struck out in 2015, action was only taken sometime in 2021. This is gleaned from the annexed letters and applications to the Deputy Registrar and the Court in the year 2021 when



it sought to change its advocates and reconstruct the court file. This again was 6 years after the Notice of Appeal had been struck out.

10. With regard to the length of the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that:

“..... 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 favor. There has to be valid and clear reasons upon which discretion can be favorably exercisable.”

11. I have said enough to demonstrate that I find the delay to be inordinate and inexcusable; to say the least, the explanation proffered by the applicant is untenable.

12. The respondent has brought to the Court’s attention the fact that the applicant had filed an application dated August 20, 2015, seeking stay of execution of the impugned Judgment and leave to lodge an appeal; the High Court dismissed the application vide its ruling dated January 27, 2016. I further take to mind that the suit property has since vested to a 3rd party who is not a party to the application and the intended appeal. This is a fact that the applicant had not made the Court aware of. What this implies is that the applicant is not approaching this Court with clean hands. He fails to disclose pertinent information for the Court’s consideration, which would aid in the Court in arriving at an objective decision. This makes me think that the application may have been taken by events and its hearing is no more than an academic exercise in futility.

13. Accordingly, I find that the respondent would suffer undue prejudice by any extension of time to lodge the intended appeal, more so having regard to the fact that the impugned Judgment has long been executed. In *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, the Court had this to say:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”

14. In conclusion, this is not a case where the Court would exercise its discretion in favour of the applicant. Accordingly, the Notice of Motion dated April 13, 2023 is hereby dismissed with costs to the respondent.

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

