



**Simotwo v Simba & 4 others (Civil Application E013 of 2022)
[2023] KECA 883 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KECA 883 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E013 OF 2022
LA ACHODE, JA
JULY 14, 2023**

BETWEEN

PATROBA JELAGAT SIMOTWO APPLICANT

AND

PHILLISTER AUMA SIMBA 1ST RESPONDENT

JOSEPH OTIENO OUMA 2ND RESPONDENT

DANIEL WA OBAMBO 3RD RESPONDENT

DOROTHY ACHIENG 4TH RESPONDENT

MICHAEL BUORE NGESA 5TH RESPONDENT

(Application for leave to file appeal out of time from the judgment and decree (Munyao Sila. J) issued on 9th April 2019) in Environmental and Land Case No 231 of 2013)

RULING

1. Patroba Jelagat Simotwo the applicant, filed a notice of motion dated February 28, 2022 under Rule 4, 22(1), and 47 of the [Court of Appeal Rules, 2010](#) for orders:
 - a. Spent
 - b. That this honourable court be pleased to allow the applicant to appeal the judgment and decree issued on April 9, 2019, by Munyao Sila J in Environment and Land Case 231 of 2013, Civil Case 291 of 2009 & Civil Case 197 of 2012 (consolidated), Patroba Jelagat Simotwo & 4 Others v Phillister Auma Simba [2019] eKLR and file the requisite Notice of Appeal out of time.
 - c. That this honourable court be pleased to order a stay of execution of the judgment delivered on April 9, 2019, pending hearing and determination of this Application and the intended appeal.



- d. That the cost of the application be provided for.
2. Phillister Auma Simba, Joseph Otieno Ouma, Daniel W.A Obamba, Dorothy Achieng and Michael Buore Ngesa are the 1st to 5th respondents respectively.
 3. The backdrop of this application is that the Environment and Land Court at Nakuru, delivered a consolidated judgment of three suits being Nakuru HCCC No 291 of 2009, HCCC 197 of 2012 and ELC 231 of 2013. The court held that the applicant had obtained titles to the land parcels Nakuru Municipality Block 14/708, 709, 710, 711, 713,714,715, 716,717, 718 & 719, by way of fraud and proceeded to cancel the titles. The applicant being aggrieved with the said decisions intends to appeal against it.
 4. As a result, the applicant filed the instant application on the grounds set out on the face thereof and supported by the appellant's affidavit sworn on February 12, 2022.
 5. The said grounds are that the applicant intends to prefer an appeal against the impugned judgement delivered on April 9, 2019 in favour of the respondents and against the applicant. However, the stipulated time for filing an appeal has run out. Further, that the applicant has an arguable appeal that raises serious triable issues and there is need to allow the appeal to be determined on merit.
 6. It was deposed that the applicant was unrepresented during most of the proceedings, and she was out of the country on the day of the judgment. This is because she works in Belgium and is only available to travel to Kenya in the months of January and February. She further, deposed that she instructed the firm of Kipruto Gitau & Co Advocates to follow up on the case and on April 15, 2019, after delivery of judgment, the said advocates requested for a copy of the judgment.
 7. The applicant also averred that she was held up following the testamentary /succession proceedings of her late husband's estate in Belgium and that is the reason why she could not come back to Kenya to follow up on the status of her case. Further, that the unprecedented COVID-19 pandemic which was first declared in Belgium on February 3, 2020 also foiled any plans to travel to Kenya, as there were travel restrictions in place. That after the delivery of the judgment she was mostly out of the country, hence she could not have lodged the Notice of Appeal, Memorandum of Appeal and Record of Appeal.
 8. The applicant further deposed that she was only able to travel to Kenya on November 21, 2021. Consequently, on December 14, 2021 she withdrew instructions from her then advocate on record, and made a formal request for the judgment. Later, on January 4, 2022, she made a formal request of the certified copy of the typed proceedings and judgment, which she received on February 7, 2022.
 9. Lastly, she deposed that the delay is not so inordinate as to be inexcusable, and that no prejudice will be occasioned upon the respondents if the orders sought are granted. However, she stands to suffer irreparable loss and harm if the orders sought are not granted.
 10. The respondent did not file a replying affidavit in response to the application.
 11. The application was disposed of by way of written submissions. The firm of Lilian and Koech Associates, LLP Advocates filed written submissions dated April 6, 2022 on behalf of the applicant. There were no written submissions on record on behalf of the respondent.
 12. In her submissions, the applicant relied on the Supreme Court decisions in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* eKLR, where the Court listed considerations for filing an appeal out of time as follows: (1) extension of time is not a right of a party.



It is an equitable remedy that is only available to a deserving party at the discretion of the court. (2) a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the

court. (3) whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis. (4) whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court. (5) whether there will be any prejudice suffered by the respondent if the extension is granted. (6) whether the application has been brought without undue delay; and (7) whether in certain cases, like election petitions, public interests should be a consideration for extending time.

13. The applicant urged that the explanation given for the delay in filing the Notice of Appeal was satisfactory. She reiterated what was deposed in the replying affidavit. She also submitted that due to the COVID-19 pandemic, court operations slowed down significantly and travel around Kenya was banned following strict enforcement of lockdown measures.
14. The applicant urged this Court to consider the fact that immediately after settling in Kenya on December 14, 2021, she personally made a formal request for a copy of the judgment and on January 4, 2022 she made a formal request of the certified copies of the proceedings. She added that the process of instructing the new advocates on record also explains the inordinate and excusable delay.
15. The applicant contended that there will be no prejudice to the respondents, since they are already and have been in possession of their respective properties. That as such, an order of stay and maintaining status quo would not prejudice the respondents in any way.
16. In conclusion, it was submitted that it is in the interest of justice for this Court to allow the applicant's application and grant her leave as prayed, to file and serve the Notice of Appeal, Memorandum and Record of Appeal within 60 days.
17. Both Counsel for the applicant and for the respondent were duly served with a Hearing Notice by way of email on February 6, 2023. However, the respondent did not file a replying affidavit and/or written submissions.
18. I have considered the application, the supporting affidavit, and the submissions on record. The application seeks a grant of orders for extension of time to file the Notice of Appeal, and for stay of execution of the orders granted by the Superior Court. As a single Judge, I have the mandate to determine the application for extension of time by dint of Rule 55(1) of this Court's Rules. However, the hearing of the application for stay of execution is within the mandate of a full bench as provided under Rule 55(2)
 - (b) of this Court's Rules.
19. Rule 4 of this Court's Rules gives the Court the unfettered discretion to extend time, otherwise limited by this Rules, or by a decision of this Court or a superior Court. Rule 4 stipulates that:

“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 or 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”
20. By dint of Rule 4, this Court has discretionary powers in the consideration of applications for extension of time. The judgment of the superior court was delivered on April 9, 2019. The applicant is required



to file the Notice of Appeal within 14 days of the judgment. This application was made on February 28, 2022. That is approximately 2 years 9 months after the judgment of the superior court.

21. Similar to the decisions of the Supreme Court relied on by the applicant in his submissions, this Court in *Karny Zabrya & another v Shalom Levi* [2018] eKLR, also stated the following as issues to be considered in an application under Rule 4 of this Court’s Rules:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal”.

22. In the replying affidavit, the applicant has explained why she failed to file the Notice of Appeal and the Memorandum of appeal within the prescribed time. In essence, she attributed it due to the fact that she was out of the country when the judgement was pronounced and thereafter, due to work, following up succession proceedings regarding her deceased husband’s estate and the occurrence of COVID-19 pandemic which restricted movement.

23. It is clear that this Court’s Rules do not prescribe the maximum or minimum period of delay. However, the reasons for the delay have to be plausible. In the decision of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court pronounced 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 favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

24. The applicant indicated that prior to the judgement, she instructed the firm of M/S Kipruto Gitau & Co. Advocates, who on April 15, 2019 requested for a copy of the judgement. At that juncture, the applicant was aware of the judgment, and her right to prefer an appeal against the said judgement. Nothing stopped her from filing the Notice of Appeal. She did not need to be present in the country to either file the said Notice and/or instruct an advocate do so on her behalf. In my view, two months shy of three years was inordinate delay, to file the instant application.

25. For the foregoing reasons, I decline to exercise my discretion to extend time to file and serve a Notice of Appeal. Accordingly, the Notice of Motion dated February 28, 2022 is found to lack merit and is hereby dismissed with cost.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF JULY, 2023.

L. ACHODE

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

