



**Kazungu v Rapam Limited (Civil Appeal (Application)
E037 of 2023) [2023] KECA 816 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 816 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E037 OF 2023**

JW LESSIT, JA

JULY 7, 2023

BETWEEN

KEITH NGALA KAZUNGU APPLICANT

AND

RAPAM LIMITED RESPONDENT

(An application for extension of time to file and serve an appeal and for stay of execution of the judgment of the Environment and Land Court at Mombasa, by Hon. Justice L.L Naikuni, J delivered on 9th February 2023 in ELC No. 186 of 2013)

RULING

1. Keith Ngala Kazungu, the Applicant has brought this Notice of Motion dated May 9, 2023 pursuant to Rule 73(4) and (5) of the Court of Appeal Rules, 2010, Section 3A of the Appellate Jurisdiction Act and Article 159(2) (d) of the Constitution of Kenya, 2010. The Applicant seeks:
 - i. That this Hon Court be pleased to extend time within which to file and serve a Notice and Record of Appeal.
 - ii. That this Hon Court be pleased to grant a stay of execution of the judgment of the Environment and Land Court delivered on February 3, 2023.
 - iii. In the alternative to prayer (ii) above, the Hon Court be please to grant an injunction against Rapam Limited, the Respondent herein restraining them from proceeding with the execution of the judgment of February 3, 2023 pending the hearing and determination of this application and the intended appeal.
 - iv. Costs of this application be in the cause.
2. The grounds of the application are that after the judgment was delivered on February 9, 2023, a copy was not availed to the Applicant's advocate on the said date as the judgment had typing errors that



- required correction by the court. That the judgment was availed on April 26, 2023, occasioning a delay of three (3) months. That the Applicant intends to appeal against the judgment, and that he has an arguable appeal. Further that the Respondent will not suffer any prejudice if the application is allowed.
3. The application is supported by the affidavit sworn by the Applicant on even date. The affidavit rehearses the grounds on the face of the application.
 4. The application was heard on the June 14, 2023. Present at the hearing was Mr Lewa for the respondent who relied on their filed submissions dated June 14, 2023. Mr Asige for the applicant was absent, However, he had filed submissions in support of the application dated May 31, 2023.
 5. I have considered the application, the submissions by counsel and the law and cases relied on. The principles the Court takes into account in considering orders of extension of time to file a notice of appeal and/or record of appeal are set out in many authorities of this Court. In *Turea Limited t/a Dr Mattress v Mohamed* (Civil Application E030 of 2022) [2022] KECA 1271 (KLR) (18 November 2022) observed that;

“The discretion of this Court to extend time under Rule 4 is unfettered, but must still be exercised judiciously. The factors that govern the exercise of the discretion to extend time under the said Rule were well stated in the case of Leo Sila Mutiso vs Rose Hellen Wangare Mwangi Civil Application No Nai 255 of 1997 (UR) as being the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted. Similar factors were also stated by the Supreme Court of Kenya in Nicholas Kiptoo Arap Salat vs IEBC [2019] eKLR”
 6. These key principles have been developed in the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) as follows;

“An applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.”
 7. I note that the applicant did not invoke Rule 4 of this Court’s Rules, which gives a Single Judge sitting in an application for extension of power the mandate to exercise his discretion for that purpose. However, since Article 159 (2) (d) of *the Constitution* was relied on, I will consider the jurisdiction of this Court as properly invoked.
 8. The applicant has stated that the delay in this case was a period of three months. He urges that the delay was ordinate and In the written submissions filed by the firm of M/s Asige Keverenge and Anyanzwa Advocates on behalf of the applicant counsel urged that the length of the delay is ordinate and excusable and secondly; that the reasons for the delay is sufficiently explained.
 9. The applicant submitted that once judgment was delivered on February 9, 2023, the applicant was to file notice of appeal within 14 days from the date of the judgment and a copy of the judgment was availed to the applicant’s advocates on record on April 26, 2023. That the application was filed in court on May 9, 2023 after a period of about 2 months and 18 days which period the applicant requests this Court to find is ordinate and excusable.



10. The applicant in response urged the Court to allow the application and not bar it because of procedural technicality occasioned by the delay in filing the notice of appeal and the record of appeal. It was urged that it is only fair and just and in the interest of the administration of justice, that the applicant is granted the orders sought. Counsel relied on the following cases: *Benson Maina Kabau* (2013) eKLR, *Oshwal Academy (Nairobi) and Another v Induvishwanath* (2011) eKLR, *Alshabahi Ali Mohamed v Maritime Freight Co Ltd* (2010) eKLR, and *Pattni v Ali and 2 Others* (2005) eKLR 269, were included in the list of authorities relied on by the applicant.
11. Mr Lewa in his submissions opposed the application and urged that it was not merited. He urged that the delay was at least 75 days and that no reasonable explanation has been tendered. Counsel submitted that the jurisdiction of the Court to grant the application was not cited in the application. Counsel urged that his client has been greatly prejudiced because it has not enjoyed quiet possession of the suit premises since it acquired them in 2009.
12. Regarding delay, this Court in *Andrew Kiplagat Chemaringo versus Paul Kipkorir Kibet* (2018) eKLR, J. Mohammed, JA observed that the law does not set out any minimum or maximum period of delay so long as the prerequisites for extension of time are satisfied. In this case the judgment for which the prayers for extension of time is sought was delivered on February 9, 2023, and the antecedent motion for extension was filed on May 9, 2023, at least 90 days from the date the judgment was delivered. The reason given for the delay was that after the judgment was delivered on February 9, 2023, a copy was not availed to the applicant's advocate on the said date for reason there were errors that required to be corrected by the court. That the judgment was availed on April 26, 2023, that occasioned a delay of 3 months.
13. The applicant needed to substantiate his explanation by cogent evidence. For instance, as he claims his advocate was not supplied with the judgment on time, he should have supported that claim with evidence. A letter requesting for the judgment, and another to show the date it was supplied was necessary. Without such evidence, the applicant's excuse becomes a mere allegation without support.
14. The applicant has urged that he is desirous to pursue his appeal. No memorandum of appeal is annexed to demonstrate the seriousness of his alleged pursuit. Even though this Court cannot make firm conclusions as to the arguability of the appeal, it would demonstrate that the applicant has interest to pursue his appeal and that he is diligent in that regard.
15. I find that the delay of over 70 days was inordinate. No reasonable explanation was offered for the delay. As to the prejudice to the respondent which is an important matter to consider; I have considered that it acquired the suit property the subject matter of the intended appeal in 2009. It has not been able to enjoy the suit property as long as the suit remained outstanding, including the appeal process. That is a period of 12 years. It is clear that there is great prejudice caused to the respondent with the continued delay in the finalization of this matter.
16. I find that the Notice of Motion application dated May 9, 2023 has no merit and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023.

J. LESIIT

.....

JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

