



REPUBLIC OF KENYA



**KENYA LAW**  
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**Office of the Director of Public Prosecutions v Mbugua & 6 others (Civil Application E110 of 2023) [2023] KECA 858 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 858 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E110 OF 2023  
HM OKWENGU, JA  
JULY 7, 2023**

**BETWEEN**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

**AND**

**ZACHARIAH NJENGA MBUGUA ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION COURT AT  
NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**SIMON KABOCHU KANGETHE ..... 3<sup>RD</sup> RESPONDENT**

**ANSALEM GACHUKIA WANJIKU ..... 4<sup>TH</sup> RESPONDENT**

**JOYCE NGINA MUTUAL ..... 5<sup>TH</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 6<sup>TH</sup> RESPONDENT**

**SAMUEL MUIGAI MUGO ..... 7<sup>TH</sup> RESPONDENT**

*(Being an application for leave to lodge an appeal out of time against  
the Ruling of the High Court of Kenya at Nairobi (Maina, J)  
delivered on 6th October 2022 in ACEC Petition No. E003 of 2022)*

**RULING**

1. By a notice of motion dated March 22, 2023, the applicant, Director of Public Prosecutions (DPP) seeks orders that the Court be pleased to grant him leave to lodge an appeal out of time against the judgment and resultant order of the High Court (Maina, J) delivered on October 6, 2022, and that the Court do make such other orders as it may deem fit in the interest of justice.
2. The DPP is aggrieved by the ruling of the superior court in a petition that had been filed by five employees of the County Government of Kiambu, against whom the DPP had initiated criminal



charges in the Chief Magistrate’s Court at Nairobi. The learned Judge found that the charge and proceedings against the petitioners in the Chief Magistrate’s court were unconstitutional and an abuse of the legal process.

3. The DPP filed a notice of appeal dated October 6, 2022 in the superior court and lodged the same in this Court on October 19, 2022. He contends that he has an arguable appeal with high chances of success as the intended appeal raises fundamental issues of law. The DPP applied for certified copies of proceedings and judgment on October 31, 2022 and the same were only supplied on January 19, 2023. The DPP therefore seeks extension of time to enable him lodge the record of appeal
4. The DPP has filed written submissions in which he reiterates that the delay to file the memorandum of appeal was not inordinate and that no prejudice will be occasioned to the respondent if leave is granted for it to lodge a memorandum of appeal outside time.
5. In response to the motion, the 1<sup>st</sup> to 5<sup>th</sup> respondents have filed grounds of opposition in which they urge that the application lacks merit and that the DPP has not satisfied the conditions for grant of extension of time. The 1<sup>st</sup> to 5<sup>th</sup> respondents have also filed written submissions in which they urge that the power of the Court to extend time under Rule 4 of the [Court of Appeal Rules](#) should be used carefully considering factors such as the cause and duration of delay, the chance of winning the appeal and any harm to the respondents.
6. The 1<sup>st</sup> to 5<sup>th</sup> respondents contend that the notice of appeal was filed on October 12, 2022 and therefore the DPP had up to December 11, 2022 to file the appeal, and that the DPP not having served the 1<sup>st</sup> to 5<sup>th</sup> respondents with the request for certified copies of proceedings and judgment, and also not having obtained a certificate of delay, the record of appeal had to be filed within 60 days. The 1<sup>st</sup> to 5<sup>th</sup> respondents also contend that the allegation that the applicant’s counsel was sick is uncorroborated as no proof has been provided. The respondents, therefore, urge the Court to dismiss the application as the same is unmerited, the delay being inordinate.
7. I have considered the motion. It is now settled that the Court has unfettered discretion to extend time for the filing of a notice of appeal or record of appeal, but that the DPP must lay the basis for the exercise of the Court’s discretion by establishing that the delay in filing the appeal or record of appeal was not inordinate; that there was a good explanation for the delay; and that the application for extension of time has been made without delay (See *Leo Sila Mutiso V Rose Hellen Wangari Mwangi*, Civil Appeal No 255 of 1997 and [Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR).
8. In this case, the judgment subject of the intended appeal was delivered on October 6, 2022. The DPP has exhibited a notice of appeal that was filed in the superior court on the same date. To this extent, the notice of appeal was filed in time. The DPP explains that they were not able to file the record of appeal because they had applied for copies of proceedings and judgment but did not receive the same until January 19, 2023 (according to the grounds on the body of the motion) and February 19, 2023 (according to the supporting affidavit by Delroy Mwasaru). Be that as it may, the application was not filed until March 22, 2023.
9. The issue is whether the delay in filing the record of appeal and the application for extension of time is inordinate and whether the DPP has provided a satisfactory explanation for the delay. In accordance with Rule 84(1) of the [Court of Appeal Rules](#), 2022 the record of appeal ought to have been filed within 60 days from the date of filing the notice of appeal. This means that the record of appeal ought to have been filed on or before December 5, 2022. The DPP moved this Court for extension of time on March 22, 2023. The explanation is that they were not availed copies of the proceedings and judgment until



January 19, 2023 (according to the grounds on the motion) or February 19, 2023 (according to the supporting affidavit).

10. The proviso to Rule 84(1) of the [Court of Appeal Rules, 2022](#) provides for the exclusion of time required for the preparation and delivery of a copy of the proceedings from the superior court in the computation of time for the filing of a record of appeal. However, this proviso is subject to three conditions. First, that the DPP had applied for a copy of the proceedings in writing within 30 days of the decision subject of the intended appeal. Secondly, that the DPP had served the respondent with a copy of the letter bespeaking the proceedings, and thirdly, that the DPP has obtained a certificate of delay duly signed by the Registrar of the superior court confirming that the period of delay was required for preparation and delivery of the ruling to the applicant.
11. In the supporting affidavit, it is deponed that the application for copies of the proceedings was made on October 12, 2022 and October 31, 2022 through email. There is an email dated March 22, 2023 forwarding an email dated October 31, 2022, which email appears to have been sent to Milimani Anti-Corruption Court. The email was requesting for the supply of certified copies of proceedings and judgment. Although that email appears to have been made within 30 days of the Ruling, it was not copied to the respondents.
12. The DPP has also not availed a copy of a certificate of delay confirming that the period of delay was required for the preparation and delivery of the proceedings. This means that the DPP has not met the requirement of the proviso to Rule 84 of the [Court of Appeal Rules, 2022](#) for exclusion of the time that was required to prepare the copies of the proceedings. It means that the delay was from December 6, 2022 to March 22, 2023 which is roughly 100 days. In addition, even assuming that the proceedings were supplied on 19<sup>th</sup> January or February 19, 2022, the DPP has not explained why it took more than 30 days to apply for extension of time.
13. The DPP has also explained that the delay was due to the illness of the counsel who was handling the matter. The DPP has however not given the name of the counsel nor provided any evidence of the alleged illness so that the Court can appreciate the extent of the advocate's inability to take appropriate action.
14. I reiterate what was stated by the Supreme Court in [Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR that:
  - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has a burden of laying a basis to the satisfaction of the Court”.
15. The upshot of the above is that the DPP has failed to lay the basis upon which this Court can exercise its discretion in his favour. Accordingly, the applicant's motion date March 22, 2023 is rejected.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

*Signed*



**DEPUTY REGISTRAR**

