



REPUBLIC OF KENYA



KENYA LAW
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**Mwaita v Ethics and Anti-Corruption Commission (Civil Application
E026 of 2021) [2023] KECA 1124 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1124 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E026 OF 2021
FA OCHIENG, JA
SEPTEMBER 22, 2023**

BETWEEN

HILLARY KIPKORIR MWAITA APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

(An application for extension of time within which to serve Notice of Appeal, Memorandum of Appeal and to file and serve the Record of Appeal against the judgment of the High Court of Kenya at Nakuru (R. V. P. Wendoh, J.) delivered on 7th April, 2016 in HCCC No. 43 of 2008)

RULING

1. The application before me is dated May 6, 2021. It is an application seeking the following reliefs;
 - “ a) That the notice of appeal dated April 15, 2016 and memorandum of appeal dated May 6, 2016 filed within time but served outside the time within which to serve the respondents be deemed as properly served.
 - b. That time within which to file and serve a record of appeal be extended to a period to be set by this honourable court.
 - b. That subject to a), the memorandum of appeal dated May 6, 2016 be amended at paragraph 19 and prayer (d) be amended as per the annexed memorandum of appeal and time be extended for service by this honourable court.
 - c. And for an order that the costs of and incidental to this application abide the result of the intended appeal.
2. The application was supported by the affidavit sworn by Andrew Kibiwott Mengich, the learned advocate who handled the applicant’s case before the High Court.



3. The application is further supported by the affidavit sworn by the applicant, Hillary Kipkorir Mwaita. The applicant's affidavit mirrors the affidavit sworn by his advocate.
4. According to the applicant the court file went missing at the time when the judgment was delivered.
5. But the applicant also told this court that he filed an application dated May 6, 2016, seeking stay pending appeal.
6. Shortly thereafter, on May 11, 2016, the 1st defendant filed an application seeking a review of the judgment.
7. On February 6, 2017 the High Court directed that the 2 applications be consolidated. On February 7, 2019, Hon Lady Justice J. N. Mulwa delivered her ruling, in which both applications were dismissed. It is noted that at paragraph 3 of the ruling, the court made an observation that the proceedings had already been typed.
8. However, the applicant told this court that it was not until September 14, 2020 that his advocate was notified that the proceedings were ready for collection. To support that position, the applicant annexed a copy of the letter dated September 14, 2020.
9. A look at the said letter reveals that it was written by the learned Deputy Registrar of the High Court, Nakuru, in response to the applicant's letter dated October 17, 2019.
10. The applicant has exhibited the receipt issued to him on October 17, 2019, when he paid for the proceedings; and the learned Deputy Registrar confirmed that that was the date when the applicant paid for the proceedings.
11. It is not clear why the applicant was writing to the court on October 17, 2019 to seek for the proceedings which had been ready prior to February 7, 2019 when J. N Mulwa J. delivered her ruling.
12. I find that the explanation provided by the applicant for the time taken to obtain an accurate certificate of delay, is reasonable.
13. But as regards the delay in effecting service of the notice of appeal, I hold the view that the applicant failed to offer any plausible reason. Even if the court were persuaded that the court file went missing shortly after the applicant had filed his notice of appeal and the memorandum of appeal, that could not be a bar to having the same served upon the respondents.
14. In any event, as the applicant and the 1st respondent both filed their respective applications soon after the court delivered its judgment, that is a clear manifestation of the fact that the court file was available.
15. The documents which the applicant sought to rely upon as proof that the court file was missing, all pre-date the date when the judgment was delivered. The said letters bear the dates May 12, 2014, April 29, 2015 and December 7, 2015: therefore, they do not provide any information concerning the material period of time.
16. In a nutshell, the delay of more than 5 years, between the date when the judgment was delivered, and the date when this application was lodged, is inordinate. The reasons advanced by the applicant, to explain the delay, are not plausible. Therefore, whilst I appreciate that I have a wide and unfettered discretion to extend time, there is no sound or judicious basis upon which I could exercise the said discretion in this case.
17. Accordingly, there is no merit in the application, and it is therefore dismissed.
18. Costs of the application shall be paid by the applicant, to the 1st respondent.



DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023.

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

