



REPUBLIC OF KENYA



**Chepkonga v Njoroge & 2 others (Civil Application E006 of 2022)
[2023] KECA 1293 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1293 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E006 OF 2022
WK KORIR, JA
OCTOBER 27, 2023**

BETWEEN

WILLIAM KEITANY CHEPKONGA APPLICANT

AND

MONICA WANJIKU NJOROGE 1ST RESPONDENT

JESSE NJOROGE GITHEMBE 2ND RESPONDENT

RACHEAL NYAMBURA NJOROGE 3RD RESPONDENT

*(Being an application for extension of time to file an appeal out of
time to the judgment and decree of High Court at Eldoret (H.Omondi,
J.) dated 3rd March 2022 in HC Succession Cause No. 209 of 2012)*

RULING

1. The applicant, William Keitany Chepkonga, has brought his application dated 20th July 2022 under Rule 4 of the [Court of Appeal Rules](#), 2022 seeking that the time for lodging an appeal against the decision of the High Court in Eldoret HC Succession Cause No. 209 of 2012 be extended and that the timelines within which to file the record of appeal be prescribed. The application is supported by an affidavit sworn by the applicant on the date of the application and his further affidavit sworn on 10th July 2023.
2. The applicant's case is that after several unfruitful attempts to reach his advocate on phone, he visited the advocate's chambers on 16th May 2022 where he learned that the judgment in Eldoret HC Succession Cause No. 209 of 2012 was delivered on 3rd March 2022. It is the applicant's averment that he immediately asked his advocate to file an appeal but his advocate told him to apply for the proceedings and instruct another advocate to act for him as the advocate was attending to a sick wife. The applicant averred that he promptly applied for the proceedings from the trial court and when he



received them on 14th July 2022, he immediately instructed his current advocate who filed the instant application. The applicant blames the delay on the filing of the appeal on the failure of his then counsel on record to inform him of the delivery of the judgment. He avers that the record of appeal is ready for filing if leave is granted. The applicant deposes that the intended appeal raises questions worthy of this Court's determination and the respondents will not suffer any prejudice if the orders sought are granted. He also attests that the application has been lodged without unreasonable delay.

3. In opposition to the application, Monica Wanjiku Njoroge, Jesse Njoroge Githembe and Racheal Nyambura Njoroge, the respective 1st to 3rd respondents, filed a replying affidavit sworn by the 3rd respondent. They respondents aver that the judgment of the High Court was delivered in the presence of the advocate for the applicant hence the applicant's claim of ignorance of the delivery of the judgment is baseless. It is also their averment that no reason for the delay has been put forth by the applicant. The respondents further contend that the intended appeal is subject to leave by this Court and no leave has been sought and granted to the applicant hence grant of the orders sought will a futile exercise. The respondents therefore pray that the application be dismissed with costs.
4. M/S Lusinde Khayo Advocates filed submissions on behalf of the applicant and stated that the delay was for a period of 5 months. According to counsel, the delay for the first two months was as result of the previous advocate's fault and should not be visited upon the applicant. As for the remaining three months, counsel submitted that this was the time when the applicant sought for the typed proceedings without which he could not prepare his appeal. Counsel urged that the intended appeal was arguable and not frivolous. It was further asserted that the respondents would not suffer any prejudice if the application is allowed. Counsel relied on the cases of *Visbva Stone Suppliers Co. Ltd v RSR Stone (2006) Ltd* [2020] eKLR and *John Karani Mwendwa v Japhet Bundi Chabari* [2021] eKLR and urged that extension of time being an equitable remedy was available in favour of the applicant.
5. The law firm of Wambua Kigamwa filed submissions on behalf of the respondents. They submitted that the applicant had not tendered any plausible explanation for failing to lodge the appeal within time. Counsel relied on the case of *Trade Bank Ltd In Liquidation v LZ Engineering Construction Ltd & Another*, Civil Application NAI. No. 282 of 1998 in support of the submission that delay in institution of an appeal ought to be explained in order to enable the judge exercise the discretion given by Rule 4.
6. Counsel referred to the decisions in *John Mwita Murimi & 2 others v Mwikabe Mwita & Another* [2019] eKLR and *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR and submitted that leave to appeal to this Court is a prerequisite in matters arising from succession proceedings. Counsel argued that as the applicant had not sought leave to appeal there is no arguable appeal and therefore extension of time will be an act in futility. Counsel also submitted that the respondents will suffer prejudice as the administration of the deceased's estate will be delayed yet the intended appeal is bound to fail. Counsel consequently urged me to dismiss the application with costs.
7. This application is premised on Rule 4 of the *Court of Appeal Rules* which states as follows:

“The Court may, on such terms as may be 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.”
8. The discretion to extend time though wide is exercised based on established principles. Some of the principles to be considered in the exercise of the discretion were listed by the Supreme Court in



- “ 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 respondents 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 interest should be a consideration for extending time.”
9. Having duly considered the motion, the affidavits and submissions by the parties, the issues that emerge for determination are whether the applicant has satisfactorily explained the delay in filing the notice of appeal and whether the respondents will suffer any prejudice if the application is allowed.
10. Before I proceed to consider the identified issues, it is important to address the submission by the respondents that granting the orders sought is an exercise in futility since the applicant has not sought leave to appeal the judgment which arises from proceedings under the Law of Succession Act. The answer to the respondents’ submission is found in Rule 77(4) of the Court of Appeal Rules, 2022 which provides that when an appeal lies only with leave, it shall not be necessary to obtain such leave before lodging the notice of appeal. My understanding of the provision is that an application for extension of time to file a notice of appeal can be canvassed and allowed even in circumstances where leave to appeal, though required, has not been obtained. This position finds support in the statement by the Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR that:
- “ A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”
- The cited rule and the statement of the Supreme Court should put the respondents’ concern to rest.
11. The judgment the applicant intends to appeal was rendered on 3rd March 2022 while the instant application is dated 20th July 2022. The notice of appeal ought to have been filed by 17th March 2023 considering that such a notice ought to have been filed within 14 days from the date of the delivery of the judgment. The delay therefore is for a period of 125 days. The applicant has put forth a two-pronged explanation for the delay, namely, that he was not aware of the delivery of the judgment and second, that he needed to acquire the typed proceedings prior to filing his notice of appeal. With regard to the explanation as to not being aware of the delivery of the judgment, the applicant faults his former advocate. On the delay post knowledge of the delivery of the judgment, he blames the Court registry for taking time in the preparation of the typed proceedings.



12. In opposition, the respondents argue that the applicant had knowledge of the delivery of the judgment as his advocate was present during the delivery of the judgment. No evidence, however, has been tendered in support of this averment. In any case, the applicant’s case is that he was not informed of the delivery of the judgment by his former advocate and whether his advocate was present or not during the delivery of the judgment is immaterial.
13. It is, nevertheless, important to observe that as was stated by this Court in Mobamed Shally Sese (Shah Sese) v Fulson Company Ltd & Another [2006] eKLR, it is not enough for a litigant to blame his advocate for failure to comply with the rules and statutory timelines. The Court stated thus:

“A litigant must be vigilant in the conduct of his affairs and the applicant should have made efforts to find out the progress of his case from his advocate. After all, extension of time is essentially equitable [See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. NAI. 255 of 1997] and equity aids the vigilant and not the indolent.”

14. However, in the case at hand, the applicant avers, and the statement has not been challenged, that he was not aware of the delivery of the judgment. Further, that upon learning of the judgment, he promptly, and in person, wrote to the Deputy Registrar of the High Court seeking typed proceedings. I find that this latter action by the applicant is sufficient to show that he was not indolent but proactive. That the applicant was keen in following up on his matter is supported by his testimony that upon failing to get his previous counsel on phone, he went to the office. The delay from the date of the delivery of the judgment to the date he knew of the judgment was 50 days. In my view, the further delay was due to factors beyond the control of the applicant as he was awaiting the availability of the proceedings from the registry. One may argue that the applicant ought to have filed an application for extension of time immediately he discovered that the judgment had been delivered. Indeed, this should have been the proper course of action. However, the attitude and actions of a party ought to be considered when exercising discretion. In this case, the actions of the applicant disclose a desire to pursue an appeal. He wrote to the Deputy Registrar bespeaking the proceedings on the day he knew of the judgment. Hardly 5 days after he received the proceedings he filed this application. The applicant’s actions from the date he learned that the judgement had been delivered cannot be said to be those of an indolent litigant. Where a litigant has by his actions shown a desire to pursue an appeal, there is good reason for the court to exercise discretion in his favour. The applicant has sufficiently explained the entire period of delay. In the circumstances, the Notice of Motion dated 20th July 2022 is allowed and orders shall issue as follows:

- a. The applicant is granted leave to lodge and serve a notice of appeal within 14 days from the date of the delivery of this ruling;
- b. The applicant will file and serve the memorandum of appeal within 30 days from the date the notice of appeal is lodged and served; and
- c. The costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF OCTOBER, 2023.

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

