



REPUBLIC OF KENYA



**Murunga v Barasa & another (Civil Application E053 of 2023)
[2023] KECA 1310 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1310 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E053 OF 2023
M NGUGI, JA
OCTOBER 27, 2023**

BETWEEN

SULEIMAN KASUTI MURUNGA APPLICANT

AND

DIDMUS WEKESA BARASA 1ST RESPONDENT

KENNETH ODHIAMBO T/A JENKS AUCTIONEERS 2ND RESPONDENT

(Being an application for extension of time within which to lodge an appeal against the ruling of the High Court of Kenya at Bungoma (D Kemei J) dated 26th January, 2023 in Civil Appeal No E069 of 2022)

RULING

1. In his application dated May 8, 2023 brought under section 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules 4, 75, 82, 83 and 86 of the [Court of Appeal Rules 2010](#), the applicant prays that the time within which to file a notice of appeal be extended, and that the notice of appeal filed on January 27, 2023 be deemed as duly filed. He also prays that time within which to file and serve the record of appeal and memorandum of appeal be extended, and that leave be granted to lodge the appeal out of time. In his prayer, finally, that the costs of the application abide the outcome of the intended appeal. I observe that though the application is expressed to be brought under the 2010 [Court of Appeal Rules](#), the 2022 [Rules](#) were already in force at the time of filing of the application. They are, however, essentially in the same terms as the 2010 Rules.
2. The application is supported by an affidavit sworn by the applicant on May 8, 2023. The applicant gives in this affidavit a rather lengthy background leading to the application before the trial court, the bulk of which, relating to the applicant's participation in the 2017 general elections, his loss at the elections, his unsuccessful petition in the High Court and the dispute relating to the taxation of costs in respect of his failed election petition, is not relevant to the present application. Of relevance is his averment



- that upon delivery of the impugned ruling on January 26, 2023, a notice of appeal together with a letter bespeaking proceedings was duly filed and served upon the respondent's counsel on February 28, 2023. The applicant avers that the certified typed proceedings were only procured on May 3, 2023 and the present application was filed without delay.
3. In submissions dated July 13, 2023, the applicant substantially reiterates the contents of the affidavit in support of his application. He contends that his intended appeal raises serious issues of law relating to contempt of court.
 4. The 1st respondent opposes the application by way of an affidavit which he swore on July 24, 2023. He raises in this affidavit and in his submissions dated July 24, 2023 two issues. First, that the notice of appeal filed by the applicant dated January 27, 2023 was never served on him or his advocates, contrary to the provisions of rule 77(2) of the *Court of appeal Rules*. He became aware of it when he saw it as an annexure to this application/ He contends, secondly, that the applicant did not serve the letter bespeaking the proceedings on his advocates, nor was it copied to his advocates on record. Accordingly, the applicant is in breach of the Rules of this Court and cannot therefore get the benefit of the certificate of delay provided for under rule 82(2)(now 84(2)).
 5. The 1st respondent avers that the applicant has delayed for over four months in filing his appeal and has not given any explanation for the delay to warrant the exercise of discretion in his favour.
 6. In submissions dated July 24, 2023, the 1st respondent reiterates his averments that the notice of appeal dated January 27, 2023 was never served on him, nor was the letter bespeaking the proceedings served on his advocates. The applicant has also delayed for over four months before filing the present application and has not given any explanation for the delay. Accordingly, he has not placed before this court reasons that would enable the Court exercise discretion in his favour.
 7. I have considered the application and the annexures thereto, as well as the response from the 1st respondent, the 2nd respondent not having filed any response to the application. In an application for extension of time under rule 4, the court is required to consider the length of the delay, the reasons for the delay and (possibly) the possibility of success of the intended appeal and, finally, the prejudice that the respondent would suffer if the orders for extension of time are granted-see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231.
 8. The decision that the applicant seeks to appeal against was delivered on January 26, 2023. The applicant filed a notice of appeal dated January 27, 2023. He was required, under rule 84(1) of this *Court's Rule*, to file his record of appeal within 60 days after the date of lodging of the notice of appeal. This means that he should have filed the record of appeal by the 27th of March 2023. He did not do so, and he filed the present application for extension of time more than a month after the date on which he was required under the Rules to file his record of appeal.
 9. The applicant could have sought refuge under the provisions of rule 84(1) of this *Court's Rules*, assuming, which I find not to be the case, that he had given sufficient explanation for the delay in filing his record of appeal. The proviso to this rule, however, is not available to the applicant. He sent to the Deputy Registrar, Bungoma High Court, the letter dated 2nd February 2023 requesting to be supplied with the copies of the proceedings in the matter at issue for purposes of appeal. The letter was not, as the proviso to rule 84(1) requires, copied to the respondent's advocates. The applicant could not therefore, as provided under rule 84(2), get the benefit of the proviso to rule 84(1).
 10. That being the case, the application dated May 8, 2023 is without merit. It is hereby dismissed with costs to the 1st respondent.



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

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

