



Kiarie (Suing on Behalf of Lucy Wangari Njenga, the Legal Representative of the Estate of the Late Amos Njenga Gikonyo) v Lands Registrar Nakuru & 4 others (Civil Application E001 of 2023) [2023] KECA 1195 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1195 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E001 OF 2023
WK KORIR, JA
OCTOBER 6, 2023**

BETWEEN

GRACE WANJIKU KIARIE APPLICANT

**SUING ON BEHALF OF LUCY WANGARI NJENGA, THE LEGAL
REPRESENTATIVE OF THE ESTATE OF THE LATE AMOS NJENGA
GIKONYO**

AND

LANDS REGISTRAR NAKURU 1ST RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 2ND RESPONDENT

**EVANS RURENGOH THUKU & BERNADETTE BJOKI
MAMBO 3RD RESPONDENT**

VALLEY OF TUMAINI CHILDRENS HOME 4TH RESPONDENT

CATHOLIC DIOCESE OF NAKURU 5TH RESPONDENT

(Being an application for extension of time to file an appeal out of time to the decision of Environment and Land Court at Nakuru (M. Njoroge, J.) dated 4th October 2022 in ELC Case No. 014 of 2022)

RULING

1. The application before me has been erroneously brought under order 42 rule 6 and order 41 rule 1 of the [Civil Procedure Rules](#), Sections 3 and 3A of the [Civil Procedure Act](#), as well as article 146 of the [Constitution](#). In this Court, the proceedings are majorly premised and guided by the [Court of Appeal Rules, 2022](#). Counsel should endeavor to appreciate and be acquainted with the rules that govern proceedings in the different stages of our judicial hierarchy. As a reminder to counsel for the applicant,



the Supreme Court in [Daniel Kimani Njibia v Francis Mwangi Kimani & another](#) [2015] eKLR and [Michael Mungai v Housing Finance Co. \(K\) Ltd & 5 others](#) [2017] eKLR has stressed that litigants must be clear as to the terms of the jurisdiction they are invoking and that they should invoke the correct constitutional or statutory provisions as failure to do so is not a mere procedural technicality to be cured under Article 159 of the [Constitution](#).

2. Having said that, an application for extension of time is ordinarily premised on Rule 4 of the [Court of Appeal Rules, 2022](#). On the face of the application, the applicant is seeking orders under rules 4 and 5(2)(b) of the [Court of Appeal Rules](#). Sitting as a single judge, I can only consider the prayer under Rule 4, to wit, an application for leave to appeal out of time which is prayer number 2 in the notice of motion dated January 10, 2023. I will also render myself on the issue of costs of the application.
3. The application is premised on the ground that the trial court did not inform the applicant of the existence of the orders which are the subject of the intended appeal. The applicant further avers that the delay period is not inordinate as the impugned ruling of the trial court was rendered on October 4, 2022 and the present application was filed on January 10, 2023. The application is also supported by the affidavit of the applicant in which she reiterates the grounds as already stated on the face of the motion.
4. The application is opposed through the affidavit sworn by Father Bernard Ngaruiya on behalf of the 5th respondent. The opposition is on the grounds that the application is misconceived, frivolous, and oppressive; and, that it lacks merit and amounts to an abuse of the court process. It is also averred that it is a matter of practice and tradition that rulings emanating from Njoroje J. of the Environment and Land Court (E&LC) are always delivered via email. The 5th respondent further deposes that the applicant has not tendered any plausible explanation for the delay of 3 months and 6 days. The 5th respondent consequently prays that the present application be dismissed with costs.
5. When this matter came up for hearing on July 3, 2023, the applicant, the 4th respondent and the 5th respondent had filed their submissions. The submissions for the 1st and 2nd respondents were filed on July 4, 2023. For the applicant, the law firm of Amadi & Associates submitted that the period of delay of 79 days was not inordinate. Counsel reiterated that the reasons for delay were that the impugned ruling was delivered electronically and without notice to the applicant and that the applicant only came to know of the existence of the ruling after the time for filing a notice of appeal had lapsed. Counsel relied on the case of [County Executive of Kisumu v County Government of Kisumu & 8 others](#) [2017] eKLR to buttress the submissions. In conclusion counsel urged that I exercise my discretion and grant leave to file the appeal out of time.
6. Rodi, Orege & Co. Advocates filed submissions dated March 6, 2023 on behalf of the 5th respondent. In opposing the application, counsel submitted that there had been unexplained, inordinate and inexcusable delay on the part of the applicant. Counsel submitted that the applicant did not disclose when she became aware of the ruling which was delivered via email. Counsel also argued that the applicant had not tendered any explanation for the delay between the time she knew of the existence of the ruling and the time of filing this application. Counsel referred to the case of [County Executive of Kisumu v County Government of Kisumu & 4 others](#) [2017] eKLR as cited in [Kioko Muthoka v Kalembwani & another](#) [2021] eKLR to submit that the whole period of delay ought to be declared and explained. In the end, counsel urged that the application be dismissed with costs.
7. For the 4th respondent, the law firm of Seth & Wathigo filed submissions dated June 19, 2023 in opposition to the application. Counsel submitted that there had been a delay for a period of 5 months which had not been properly explained by the applicant. Counsel relied on the case of [Nginyanga Kavole v Mailu Gideon](#) (Misc Application No 401 of 2018) to submit that the delay of 5 months was



susceptible to the doctrine of laches and was therefore untenable and could not be cured by the oxygen principles. Counsel further pointed out that the applicant had not tendered any plausible explanation for the delay. Counsel consequently urged that the present application is without merit and should be dismissed.

8. For the 1st and 2nd respondents, the Attorney General submitted that there was inordinate delay which was not explained on the part of the applicant. Counsel referred to the case of *Charles Wanjohi Wathuku v Gitbinji Ngure & another* [2016] eKLR to buttress this submission. Counsel urged that the present application should be dismissed with costs.

9. Rule 4 of the *Court of Appeal Rules, 2022* 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.”

10. Rule 4 as reproduced above accords me a wide and unfettered discretion whose objective is to breathe life to matters that have been overtaken by the timelines stipulated in the rules or issued by the Court. In exercising the discretion, I am to do so judiciously and upon reason and not arbitrarily, capriciously or upon sympathy. This Court and the Supreme Court have established certain principles to be considered in determining an application for extension of time. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles as follows:

- “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.”

11. The stated principles are not exhaustive. Again, the Court is not bound to consider all of them in every application. The discretion extends to deciding which considerations are applicable in the circumstances of a particular case. This Court said as much in *Margaret Muthoni Muchiga v Esther Kamori Gichobi* [2010] eKLR when it stated as follows:

“Although there is no limit to the number of factors available for consideration so long as they are relevant, there is no requirement that all these factors be considered in any application. The facts and circumstances of each application will normally dictate the



exercise of the Court’s discretion; see Samuel Kinyua Mutugi v. Eutyclus Muthui (Civil Application No Nai 334 of 2004 (unreported), underlining emphasized.”

12. I have reviewed the application, the replying affidavit and submissions by all parties in line with the principles enshrined in the above cited authorities. In my view, the issues for my determination are whether the delay was inordinate and whether the applicant has tendered sufficient reason for the delay.
13. The Supreme Court in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR highlighted the requirement to declare and explain the whole period of the delay as follows:
 - “(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court...
 - (26) ... It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.”
14. The period within which an application for extension of time should be brought is not provided by *Court of Appeal Rules, 2022*. Therefore, whether the delay is inordinate or not remains a matter to be assessed by the judge seized of the application based on the circumstances of the particular case. According to the applicant, the period of delay was 79 days. The ruling subject of the intended appeal was delivered on October 4, 2022. The applicant was supposed to have lodged the notice of appeal by October 18, 2022. The present application is dated January 10, 2023. Considering that in between October 18, 2022 and January 10, 2023, there was the Christmas recess which Rule 3(e) of the *Court of Appeal Rules, 2022* indicates shall not be reckoned in the computation of time, I am inclined to find that the period of delay in the circumstances is not inordinate.
15. The second issue is whether the applicant has tendered sufficient reasons for the delay in filing the notice of appeal. From the application and the supporting affidavit, the only reason advanced by the applicant for the delay is that she was not served with the notice of the delivery of the judgment. However, it is not clear when the applicant got to know of the existence of the same. In my view, the reasons advanced by the applicant are unsatisfactory. It is a bare claim not supported by any tangible evidence. Additionally, the applicant being a litigant ought to have keenly and diligently followed up on her case. It also remains a mystery to the Court as to when the applicant knew of the impugned ruling. In *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22, the South African Labour Court addressed the importance of plausible explanation thus:
 - “There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”
16. I find the decision persuasive so that a slight delay if not satisfactorily explained should result in the dismissal of an application for extension of time. Candor is of importance where a party is asking the Court to exercise its discretion. Without plausible explanation from an applicant, the Court will lack the foundation upon which it can be said to have judiciously exercised its discretion.
17. Having found the reason for the delay as advanced by the applicant to be unsatisfactory, the fate of the instant application is sealed. The notice of motion dated January 10, 2023 is without merit and is hereby dismissed. The respondents shall have the costs of the application.

DATED AND DELIVERED AT NAKURU THIS 6TH 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

