



REPUBLIC OF KENYA



**Kungu v Waiganjo & 3 others (Civil Application E083 of 2022)
[2023] KECA 1229 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1229 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E083 OF 2022
WK KORIR, JA
OCTOBER 6, 2023**

BETWEEN

PAUL KAGIA KUNGU APPLICANT

AND

BIDAN KAMAU WAIGANJO 1ST RESPONDENT

PAUL KUNGU WAIGANJO 2ND RESPONDENT

JOHN MUREITHI WAIGANJO 3RD RESPONDENT

EUNICE WAIGANJO WAINAINA 4TH RESPONDENT

*(Being an application for extension of time to file an appeal out of time
to the decision of Environment and Land Court at Nyabururu (J.M.
Angima, J.) dated 10th February 2022 in ELC Case No. 358 of 2017)*

RULING

1. The application for my consideration is said to be brought under Order 42 Rule 6(1), (2) & (3) and Order 50 Rule 6 of the [Civil Procedure Rules](#), and Section 79G of the [Civil Procedure Act](#).

The application is an omnibus one because the applicant seeks two separate prayers, namely, stay of execution and any further proceedings arising from the judgment and decree of the trial court; and leave to file an appeal out of time. In a preliminary way, I find it prudent to point out to the applicant that in this Court, the proceedings are majorly premised and guided by the [Court of Appeal Rules](#), 2022. Under the Rules of this Court, the two prayers sought are dealt with under Rule 5(2)(b) for stay of execution or proceedings, and Rule 4 for extension of time. Under Rule 55 of the Court of Appeal Rules, 2022, applications under Rule 5(2)(b) are to be heard by a full bench of this Court while those under Rule 4 are to be heard by a single judge. Ideally, the two prayers cannot be heard together unless pursuant to the proviso to Rule 55(1), a matter that should be heard by a single judge has been adjourned by



the single judge for determination by the Court. Another reason why an application for extension of time cannot be heard together with an application for stay, is that an application under Rule 4 has the effect of restoring an applicant's right of audience before the Court after the same has lapsed by failure to lodge a notice of appeal or an appeal in time. It is important for litigants to endeavor to appreciate and be acquainted with the rules governing proceedings in this Court. As a reminder to counsel for the applicant, the Supreme Court in *Daniel Kimani Njibia vs Francis Mwangi Kimani & Another* [2015] eKLR and *Michael Mungai vs 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 provision and failure to do so is not a mere procedural technicality to be cured by Article 159 of the [Constitution](#).

2. Having said that, it follows that the only application rightly before me is the one for leave to appeal out of time which ordinarily is premised upon Rule 4 of the [Court of Appeal Rules](#), 2022. I will therefore restrict myself to addressing prayer number 4 of the notice of motion dated November 9, 2022. The application is based on the grounds on its face, as well as those contained in the supporting affidavit of the applicant. In a nutshell, the applicant avers that the judgment of the Environment and Land Court (E&LC) at Nyahururu was delivered on February 10, 2022 in his absence and without notice. He is dissatisfied with the said judgment and wishes to appeal to this Court. The applicant avers that he is willing to abide by any conditions that the Court might deem fit to impose. He urges the Court to exercise its discretion and grant him leave to file his appeal out of time.
3. The application is opposed through an affidavit sworn on behalf of all the respondents by the 1st respondent, Bedan Kamau Waiganjo. The respondents aver that the applicant has not tendered a satisfactory reason for the delay spanning over 9 months. The respondents further aver that the applicant was actively represented by the firm of Ndegwa Wahome & Co Advocates at the trial and should therefore have been aware of the delivery of the judgment. The respondents contend that the period of delay is inordinate and not explained thus the prayer for leave to appeal out of time is without merit. The respondents also point out that the present application was incompetent for its omnibus nature and should therefore be dismissed with costs.
4. This application was disposed of by way of written submissions.

For the applicant, his submissions were dated 23rd November 2022. He relied on the cases of [Mwangi vs. Kenya Airways Ltd](#) [2003] KLR 486 and [Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet](#) [2018] eKLR to point out that among the principles guiding the determination of an application for extension of time is that any delay should be satisfactorily explained. According to the applicant, the delay is not inordinate. As to the reason for the delay, the applicant submitted he did not receive notice of the impugned judgment and was therefore not aware of its existence. Further, it was submitted that the respondent will not suffer any prejudice if the application is allowed as the respondents are in possession of the suit property. The applicant urged that application be allowed.
5. E.W. Ndegwa, counsel for the respondents, filed submissions dated 16th February 2023. In opposing the application, counsel relied on the case of [George Mwenda Muthuri vs. Mama Day Nursery & Primary School Ltd](#) [2014] eKLR to point out that among the factors that the court should take into account when considering an application for extension of time are the duration of delay, reasons for delay, chances of the intended appeal succeeding and the degree of prejudice to the respondent. Counsel submitted that the reason put forth by the applicant for the delay was not justifiable as the applicant was properly represented by an advocate who was aware of the judgment date. It was additionally counsel's submission that even if the applicant was not aware of the judgment date, the delay of nine months was inordinate and it demonstrates that the applicant was not a diligent litigant. Counsel urged that the present application be dismissed with costs to the respondents.



6. The discretion exercised by a single judge under Rule 4 of the *Court of Appeal Rules*, 2022 is wide and unfettered. The judge exercising such discretion must do so judiciously and upon reason and not arbitrarily, capriciously, or on whim. Some of the factors that a judge considers were highlighted by the Court in *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR as follows:

Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal."

7. As the factors to be considered are diverse, this Court has similarly pointed out that there is no specific requirement that all these factors be considered. A judge seized of the matter is at liberty to assess which considerations are applicable based on the circumstances of the case. In that regard, this Court in *Margaret Muthoni Muchiga vs. Esther Kamori Gichobi* [2010] eKLR pointed out that:

"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. Eutyebus Muthui* (Civil Application No. Nai 334 of 2004 (unreported), underlining emphasized."

8. Guided by the principles enunciated above, I have reviewed the notice of motion, the replying affidavit as well as the submissions of the parties. This application turns on the resolution of the issues as to whether the delay by the applicant is inordinate, whether the applicant has proffered sufficient reasons for the delay in filing a notice of appeal, and whether the respondent is bound to suffer any prejudice if the application is allowed.

9. The sole reason for the delay advanced by the applicant is that the judgment which he intends to appeal was delivered without notice on February 10, 2022

10. On the need to satisfactorily explain the period of delay, the Supreme Court in *County Executive of Kisumu vs. County Government of Kisumu & 8 others* [2017] eKLR stated thus:

"(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."

11. I find that the applicant's explanation for the delay falls short of being satisfactory in light of the length of the delay. Litigation must come to an end and a party in whose favour a judgment has been issued should be able to enjoy the fruits of judgment unless for good reason the matter is reopened either by



way of a late appeal or retrial. The applicant having failed to satisfactorily explain the delay in seeking leave to file an appeal out of time, it would be prejudicial to the respondents to reopen a concluded matter eight months after the applicant's right of appeal had expired.

12. In *Kenya Railways Corporation vs. Quicklubes E.A. Limited* [2015] eKLR, this Court stated that:

It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent.

This was well stated in the case *M/s Portreitz Maternity V James Karanga Kabia*, Civil Appeal No. 63 OF 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised.”

13. In the matter at hand, the applicant has not advanced any plausible reason in support of his averment that he knew of the judgment eight months after its delivery. As submitted by counsel for the respondents, the applicant had an advocate on record and he is presumed to have been informed of the delivery of the judgment. He has not rebutted that presumption so that it may be said that the mistake was on the part of his counsel then on record. I therefore find that the applicant has not demonstrated the existence of sufficient reason to warrant the exercise of my discretion in his favour by granting him leave to file a notice of appeal out of time. The result is that the Notice of Motion application dated November 9, 2022 is hereby dismissed with costs to the respondents.

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

