



**Nzyoka v Munyalo (Civil Application E038 of 2023)
[2023] KECA 1231 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1231 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E038 OF 2023
WK KORIR, JA
OCTOBER 6, 2023**

BETWEEN

JOYCE MWIKALI NZYOKA APPLICANT

AND

ABU BAKAR MUSYOKA MUNYALO RESPONDENT

(Being an application for extension of time to file an appeal out of time to the decision of Environment and Land Court at Kericho (M.C. Oundo, J.) dated 2nd February 2023 in ELC Case No. 102 of 2017)

RULING

1. The applicant, Joyce Mwikali Nzyoka, is before me by way of a notice of motion lodged pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 4 and 42 of the [Court of Appeal Rules](#). The applicant seeks leave to lodge an appeal out of time against the decision delivered on February 2, 2023 by M C Oundo J of the Environment and Land Court (E&LC) at Kericho. The applicant also prays that the timelines for lodging the said appeal be provided for in the event that the motion succeeds.
2. The application is premised on the grounds enumerated on its face, as well as those contained in the supporting affidavit of the applicant. In a nutshell, the applicant avers that despite the judgment in the said matter having been delivered on February 2, 2023, her previous advocates did not inform her of the delivery of the judgment. Her averment is that she came to know of the existence of the said judgment on or about April 15, 2023 when she was served with a demand notice to vacate the suit property. She further avers that had she known of the delivery of the said judgment, she would have lodged an appeal within the period provided in law. Additionally, she deposes that she has an arguable appeal with high chances of success and that it is in the interest of justice that the application be allowed so that her intended appeal can be heard on merit.



3. This application was not opposed and despite being served, the advocates for the respondents neither filed a response nor submissions.
4. Counsel for the applicant through the submissions dated June 12, 2023 states that the failure to lodge the appeal against the judgment of the E&LC within the prescribed time was as a result of indolence on the part of the applicant's previous advocates. Counsel submits that had the applicant been aware of the delivery of the judgment, she would have filed an appeal within the prescribed period. It is counsel's assertion that the explanation tendered for the delay is sufficient and that the delay is not inordinate therefore excusable in the circumstances. Counsel relied on the case of *Visbva Store Suppliers Company Ltd vs RSR Stores (2006) Ltd* [2020] eKLR to highlight the considerations in an application for extension of time. Counsel cited the cases of *Liberato Kivanga Manga vs Prime Bank Ltd* [2021] eKLR and *Andrew Kiplangat Chemaringo vs Paul Kipkoris Kibet* [2018] eKLR to urge that there is no minimum period set by statute for applying for extension of time and of more importance is the explanation tendered by an applicant. In the end, counsel urged that I allow this application.
5. The rules of this court do not explicitly provide for the factors to be considered in an application for extension of time. However, through judicial pronouncements certain principles and considerations have been devised to aid in the disposition of applications for extension of time. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time 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.”

6. Similarly, this court in *Paul Wanjohi Mathenge vs Duncan Gichane Mathenge* [2013] eKLR stated as follows:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”



7. I have considered the notice of motion, the supporting affidavit, and the submissions by counsel for the applicant in light of the principles established in the cited decisions. The question is whether the applicant has satisfied the prerequisites for extension of time.
8. The first element that I address is whether the applicant has tendered a satisfactory explanation for the failure to lodge the intended appeal within the prescribed timelines. The judgment subject of the intended appeal was delivered on February 2, 2023. The notice of appeal ought to have been filed by February 16, 2023. From the grounds in support of the application, the main explanation tendered by the applicant is that her previous counsel never communicated the delivery of the judgment to her. The applicant averred that she only came to know about the existence of the said judgment on April 15, 2023 when she was served with a demand notice to vacate the suit property. In mistakes allegedly arising of inaction by a party's advocate, this court in *Rajesh Rughani vs. Fifty Investments Limited & another* [2016] eKLR stated as follows:

"In *Habo Agencies Limited -v- Wilfred Odhiambo Musingo* [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In *Mwangi -v- Kariuki* (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude."
9. As gleaned from the cited case, mere allegation of counsel's indolence is not enough to warrant grant of extension of time. The applicant should also demonstrate that there was no carelessness on his or her side. In this case, the applicant moved swiftly to have her current counsel file the application upon learning of the delivery of the judgement. In the absence of evidence to the contrary, I am unable to find indolence in the acts of the applicant hence the explanation offered for the delay is sufficient. Additionally, I also note that based on the applicant's averment, the delay as occasioned was attributable to the fault of the advocate who was then in the conduct of the matter.
10. The next limb of my interrogation is whether there will be any prejudice suffered by the respondent if the orders are granted. This application being unopposed, no allegation whatsoever of any prejudice has been made. Similarly, I am unable to find that any prejudice will be visited upon the respondent if the orders sought are granted. The applicant having moved the court for leave within a reasonable time, and also considering that the subject matter of the intended appeal is land, I find that it is in the interest of justice that the applicant be accorded an opportunity to have a second opinion from this court.
11. In the circumstances, I find that the application for extension of time has merit and is hereby allowed. The final orders are as follows:
 - i. That the applicant is hereby granted leave to file and serve his notice of appeal within 7 days of the date of this ruling;
 - ii. That the applicant is hereby granted leave to file and serve the record of appeal within 30 days from the date of service of the notice of appeal upon the respondent; and
 - iii. That the costs of this application be in cause.
12. It is so ordered.

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

