



REPUBLIC OF KENYA



KENYA LAW
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Busuru & Busuru Investments Limited v Waraba & another (Civil Application E094 of 2023) [2023] KECA 1371 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KECA 1371 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E094 OF 2023
HA OMONDI, JA
NOVEMBER 17, 2023**

BETWEEN

BUSURU & BUSURU INVESTMENTS LIMITED APPLICANT

AND

PIUS BARASA WARABA 1ST RESPONDENT

JOY AMBICHE 2ND RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal from the Judgment and Decree of Bungoma Environment & Land Court (Olao, J.) dated 15th February 2023 in ELC Case No. 34 of 2018)

RULING

1. The notice of motion application dated July 31, 2023 brought pursuant to order 42 rule 6 of *Civil Procedure Rules*, 2010 [I must point out from the onset that this provision does not apply in this Court, the proper provision is rule 4 of the *Court of Appeal Rules*] seeks: -
 - i. That there be a stay of execution from the judgment in Bungoma ELC NO. 34 of 2018 on the 15th May 2023 pending hearing and determination of the application and appeal.
 - ii. The Court enlarges time to enable the applicant file his appeal out of time.
 - iii. Costs in the cause.
2. The application is supported by the affidavit of even date sworn by Busuru Richard Mark.
3. The applicant filed a suit being Bungoma ELC. No. 34 of 2018 seeking cancellation of a title that had been issued to the respondents; and an order of injunction to restrain them from interfering with the



land. On 15th May 2023 the ELC (Baari, J.) delivered its judgment dismissing the applicant’s case with costs.

4. The applicant explains that the judgment was delivered electronically to the applicant’s then counsel’s official email address; however, the then counsel Mr. Benjamin Jeremiah Otsiula (who is currently a member of the Bungoma County Assembly) did not access the judgment on time and the same only came to his knowledge after being served with a taxation notice. That the applicant is aggrieved with the judgment and is desirous to appeal, which has an overwhelming chance of success; and the delay was not deliberate.
5. The application is opposed vide a replying affidavit and grounds of opposition both dated 20th September 2023, on grounds that the applicant has not given sufficient reason for the delay, as the decision was sent to all parties by email, and there was adequate time to file an appeal; and in any event, the respondent has already commenced satisfying the decree.
6. Rule 4 of the *Court of Appeal Rules* gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso vs. Rose Wangari Mwangi* Civil Application No. Nai. 255 of 97 (unreported) held that the discretion of a single Judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others* [2013] eKLR.
7. M’Inoti, J, had this to say concerning rule 4 in *Imperial Bank (IR) & Anor vs Alnashir Popat and Others* [2017] eKLR “A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favour. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”
8. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR sets down these principles as follows:
 - i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
 - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case- by-case basis.
 - iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the Respondent if extension is granted.
 - vi. Whether the application has been brought without undue delay.
 - vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of *Julius Kamau Kitheka* (supra) is whether prima facie the intended Appeal/Appeal has chances of success or is a mere frivolity.



9. The above principles should be born in mind whilst determining this application. It is the applicant's contention that the impugned judgment was delivered electronically to his counsel's official email and that said counsel was a member of the Bungoma County Assembly and further that said counsel did not see the email containing the judgment in time, and neither did his associate who was running the firm.
10. From the email of the court of May 15, 2023, delivering the judgment to the time the notice of taxation came through on 23rd May 2023, the applicant filed the instant application on 31st July 2023, which in my view was not inordinate delay. The applicant points out that the email delivering the judgment was sent to the then counsel's official email address. I take note that the email address is not disputed, yet the applicant avers that the email containing the judgment was never seen. In my view this was negligence on the part of the then counsel. Which then begs the question whether the mistake of counsel should not be visited on the client. The benefit of doubt may be given. In ordinary circumstances I would quickly fall back on article 159(2) (d) and say substance over procedure, but in the present case, there are too many lapses that portray indolence starting off at a tangent by citing the *Civil Procedure Rules*, then failing to check the email. Equity does not aid the indolent, despite its foot being longer than that of the Chancellor, and I find no basis on which to exercise any favourable discretion. The application is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

