



M'ambutu v Samuel Mutuma (On Behalf of EAPC Church) & another (Civil Application E062 of 2023) [2023] KECA 1608 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KECA 1608 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E062 OF 2023
W KARANJA, JA
NOVEMBER 17, 2023**

BETWEEN

CORNELIUS MWORIA M'AMBUTU APPLICANT

AND

SAMUEL MUTUMA (ON BEHALF OF EAPC CHURCH) 1ST RESPONDENT

EAST AFRICAN PENTECOSTAL CHURCHES 2ND RESPONDENT

(Being an application for extension of time to file notice of appeal and memorandum of appeal out time against the ruling and order of Nzili, J. at Meru High Court delivered on 30th November, 2021. in ELC No. 55 OF 2015)

RULING

1. Cornelius Mworua M'ambutu (the applicant), was the defendant in ELC Case No 55 of 2015 before the Meru Environment and Land Court (ELC). Judgement was entered against him in a judgment rendered on 30th November, 2023, virtually.
2. Aggrieved by the judgment the applicant moved with dispatch and filed a Notice of Appeal before the ELC registry on 15th December, 2022; which was within the time allowed by the [Court of Appeal Rules](#).
3. The Notice of Appeal was nevertheless not signed by the Deputy Registrar until 21st December, 2022. The reason given for this, by the applicant is that the registry was waiting for the physical file which had gone away with the Judge. He deposes that he applied for a copy of the proceedings to enable him prepare and file the record of appeal but it was not until 23rd June, 2023 that the proceedings were supplied to him. He has annexed to his affidavit a copy of the certificate of delay to that effect. He says that he has a good appeal with high chances of success and the delay involved is not inordinate. He is asking for a chance to be heard and for his appeal to be determined by this Court on its merits, hence



the instant application. Those depositions are contained in his affidavit sworn on 17th July, 2023, in support of the application.

4. The application is opposed through a replying affidavit sworn by Samuel Mutuma, (the 1st respondent) on 2nd November, 2023. The respondent avers that the application is an afterthought and the same was only filed after the applicant was served with an application seeking the striking out of the appeal. It is the respondent's position that the applicant has not demonstrated that he sent the letter requesting for the proceedings to the Deputy Registrar as required by the *Court of Appeal Rules*, and further, that they were never served with such a letter. He avers that the applicant has failed to attach a payment receipt to show that he paid for the Notice of Appeal or the proceedings. He says that the delay is inordinate and the same has not been sufficiently explained. He states further, that as there is no letter bespeaking the proceedings, the certificate of delay does not aid the applicant and the application is for dismissal. He maintains that the respondents will suffer great prejudice if the extension sought is granted.
5. There is a legion of cases on extension of time emanating from this Court over the years. For instance, in *Imperial Bank Ltd (inreceivership) and another v Alnasir Popat and 18 others* [2018] eKLR, this Court stated that –

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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 taking into account the last consideration however, 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.”

6. Rule 4 of the Rules of this Court gives the Court unfettered discretion to:

“... 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 ...,” on such terms as it thinks just.
7. In its decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that it is clear that the discretion to extend time is indeed unfettered and it is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”
8. It is against the principles set out in the above cases that I must consider this application, even as I exercise my unfettered discretion

I am prepared to find that the Notice of appeal was lodged within the allowed timelines, because in computation of time, the first and last days are excluded, and also because I take judicial notice of the fact that there was a public holiday in between. I appreciate that the notice of appeal was signed by the deputy registrar outside the 14 days. The reason given for this being that the physical file had not been returned to the registry after judgment was delivered virtually. This Court has held often times that delays occasioned by the registry cannot be visited on the applicant.



9. This brings me to the issue on the extension of time to file the record of appeal. As correctly submitted by counsel for the respondent, the letter bespeaking the proceedings is not annexed to the applicant's affidavit. We have no evidence whatsoever that such a letter was sent to the registry; there is no evidence that such a letter was ever copied to counsel for the respondent and more importantly that the respondent was ever served with such a letter within 30 days as prescribed by Rule 84 of the Court of Appeal Rules.
10. The certificate of delay annexed to the applicant's affidavit does not aid him at all. It is also evident that this application was filed only after the applicant was served with the application for striking out the appeal. There are no receipts annexed to the applicant's affidavit to support the certificate of delay; nor has he attached any correspondence to the deputy registrar to demonstrate that there was any follow up on the proceedings. The delay of 131 days is, in my considered view inordinate and no plausible explanation has been given for the said delay.
11. Although it is not my place to determine whether the intended appeal has high chances of success, a cursory look at the judgment and the grounds of appeal raised by the appellant leaves me in doubt on whether the chances of success of the appeal are "overwhelming" as claimed by the appellant.
12. His conduct of filing this application only after being nudged by the respondent through the application for striking out the appeal casts doubt on the applicant's seriousness in pursuing this appeal.

On the whole, I am not persuaded that the applicant deserves the exercise of my discretion in her favour. Accordingly, this application is found to be devoid of merit and is hereby dismissed with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

