



Egunza v Lihanda (Suing on behalf of Pentecostal Assemblies of God) (Civil Application E069 of 2023) [2023] KECA 1362 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1362 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E069 OF 2023
HM OKWENGU, JA
NOVEMBER 10, 2023**

BETWEEN

FREDRICK MANOA EGUNZA APPLICANT

AND

REV PATRICK LIHANDA (SUING ON BEHALF OF PENTECOSTAL ASSEMBLIES OF GOD) RESPONDENT

(Being an application for extension of time to file a memorandum of appeal and record of appeal in regard to the judgment of the Environment and Land Court of Kenya at Vihiga (E. Asati J.) dated 14th June, 2022 in ELC Cause No. 17 of 2021 Formerly Kakamega ELC Cause No. 118 of 2019)

RULING

1. On 14th November, 2022, the Environment and Land Court (ELC) (Asati, J.) delivered a judgment in ELC No 17 of 2021 dismissing a suit that had been filed by Fredrick Manoah Egunza, the applicant herein. Being dissatisfied with the judgment the applicant filed a notice of appeal on 15th June 2022. He is now before this Court a year later, with a notice of motion dated 14th June, 2023 seeking leave to have time extended to enable him file his memorandum of appeal and record of appeal out of time.
2. The applicant has sworn an affidavit in support of his application in which he deposes inter alia that his advocate Mr Ben Aduol Nyanga applied for certified copies of proceedings on 15th June 2022. A certificate of delay duly signed by the Deputy Registrar of ELC has been exhibited. It shows that the proceedings were ready for collection on 11th January 2022.
3. The applicant explains that He obtained the proceedings and collected the certificate of delay on 8th February 2023, but his attempts to file the memorandum of appeal and record of appeal at Kakamega Law Court, were not successful as the Court of Appeal registry in Kakamega was not functioning. On 6th March 2023 he tried to file the documents at the Court of Appeal Registry in Kisumu, but



the system was not working. He was advised to file the documents through the e-filing portal of the Judiciary, but this was not possible as his advocate had a mapping problem. Immediately thereafter the applicant fell ill and was unable to communicate with his advocate until 15th May 2023 when he instructed the advocate to follow up the matter.

4. The applicant adds that although his notice of appeal was filed in good time, he was unable to file the memorandum of appeal on time as he was pursuing an application that he had filed seeking review of a Ruling delivered by the ELC in the same matter on 12th September 2022, which application was rejected by the Court on 10th November 2022.
5. The applicant filed written submissions in which he argued that the intended appeal is not frivolous and that the motion for extension of time was filed in good time. He pleaded that technical hitches are a mistake that should not be visited upon an applicant who is seeking justice. Citing *Richard Nchapi Leiyagu v IEBC and 2 Others* [2013] eKLR for the exercise of the Court's mandate under Rule 4 of the *Court of Appeal Rules*, the applicant urged the Court to find that he had met the pre-requisite for granting the relief sought under Rules 4 and 82 of the *Court of Appeal rules*. He urged the Court to allow the applicant to exercise his constitutionally underpinned right of appeal.
6. The respondent Rev. Patrick Lihanda (suing on behalf of Pentecostal Assemblies of God), opposed the applicant's motion through a replying affidavit sworn by his advocate Karani O. Aggrey. The advocate deposes that the applicant has never served the respondent with the notice of appeal or the letter requesting for proceedings as required by the *Rules of the Court*. Nor have they ever served the respondent with a notice of appointment of an advocate from the firm of Ben Aduol Nyanga & Company Advocates or any other advocate. The advocate deposes that assuming the proceedings and the certificate of delay were issued on 6th February, 2023, time began to run from 8th February, 2023 and expired on 5th April, 2023 and the Memorandum of Appeal and the record of appeal ought to have been filed and served by 7th April, 2023.
7. The respondent's advocate stated that the applicant has not given any sufficient reasons for the delay in filing the memorandum and record of appeal, as he has not demonstrated any efforts to show that the documents were ready for filing. Nor has he substantiated his claims that he made efforts to file the documents or provided any evidence to show that he was very sick or was admitted in Hospital. He urges the Court that no good or justifiable cause has been advanced by the applicant to warrant the Court granting the extension of time.
8. I have considered the motion before me and the contending affidavits and submissions. In *Vishva Stone Suppliers Company Limited v RSR Stone* [2006] Limited [2020] eKLR which was cited by the applicant, Nambuye JA., addressed the exercise of the Court's powers under section 4 of the *Court of Appeal Rules* as follows:

“The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations in case law both binding and persuasive. I take it from the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2E A 231, *Fakir Mohamed v Joseph Mugambi & 2 Others*; [2005] eKLR; *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees* [2020] eKLR; *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and *Athuman Nusura Juma v Afwa Mohamed Ramathan* CA No. 227 of 2015.

See also *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR; *Nyaigwa Farmers' Co-operative Society Limited v Ibrahim Nyambare & 3 Others* [2016] eKLR; *Hon. John Njoroge Michuki & Another v Kentazuga Hardware Limited* [1998] eKLR; *Cargil Kenya Limited*



Nawal v National Agricultural Export Development Board [2015] eKLR; *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR; and *Richard Nchapi Leiyagu v IEBC & 2 Others* [2013] eKLR among numerous others. The principles distilled from the above case law may be enumerated inter alia as follows:

- i. The mandate under Rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
- ii. Orders under Rule 4 of the *Court of Appeal Rules* should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond par adventure, that the intended appeal is not an arguable one.
- iii. The discretion under Rule 4 of the *Court of Appeal Rules* must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see *Githere vs. Ndiriri*.
- iv. As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.
- v. The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.
- vi. 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 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;
- vii. Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word “possibly”;
- viii. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.
- ix. Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the *Rules of the Court* so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.



- x. An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;
 - xi. The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.”
9. Applying the principles stated by Nambuye, JA., for the applicant to succeed in his application for extension of time, he must satisfy the Court that he is not guilty of inordinate delay, that he has a plausible explanation for such delay, that in all the circumstances of the case balancing the interests of both parties, it would be fair and just to grant the application.
 10. It is apparent that the applicant filed a notice of appeal on 15th June 2022 which was just a day after the judgment subject of the intended appeal was granted. The delay subject of the application before me, concerns the institution of the appeal through the filing of the memorandum of appeal and the record of appeal. Under Rule 84 of the [Court of Appeal Rules 2022](#), the memorandum of appeal and the record of appeal were required to be filed within 60 days from the date of filing of the notice of appeal, with a proviso that on certain conditions being fulfilled, time required for the supply of certified copies of the proceedings, may be excluded from the computation of time.
 11. The applicant has shown that he applied for certified copies of the proceedings on 15th June 2022. He has also exhibited a certificate of delay duly signed by the deputy registrar of the ELC showing that the proceedings were ready for collection on 6th February 2023. There is an issue as to whether the applicant served the respondent with a copy of his letter applying for certified copies of the proceedings, but assuming that he did serve the respondent, the 60 days started running on 8th February 2023 and as calculated by the respondent, time for instituting the appeal ran out on 8th April 2023. As at the time of filing the application on 15th June, 2023, there was a delay of 67 days.
 12. The applicant has claimed that his efforts to file the documents were frustrated by technology, however there is nothing to substantiate this allegation. The applicant also claims that the situation was exacerbated by his serious illness and admission to hospital, but once again nothing has been produced to confirm the alleged illness, or when and how long he was admitted to hospital.
 13. From the Ruling delivered by Asati J on 10th November 2022, it is evident that the applicant, filed a notice of appeal in this Court, but was focused on having the judgment subject of the intended appeal reviewed, and it is only when this failed that he turned his focus back to the appeal. The applicant has not exhibited a draft memorandum of appeal nor has he indicated in his affidavit the grounds upon which the intended appeal is anchored. Thus, it is not possible to tell whether he has an arguable appeal.
 14. I find that the period of delay of 67 days is inordinate, and other than generalized assertions, the applicant has not given a plausible explanation for this delay. In the circumstances I find no justification to exercise my discretion in extending time to file the memorandum of appeal and record of appeal. Accordingly, the application dated 24th June, 2023 is dismissed with costs

DATED AND DELIVERED AND KISUMU THIS 10TH DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

