



**Kitur v Kitur & another (Civil Application E010 of 2023)
[2023] KECA 1339 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1339 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E010 OF 2023
WK KORIR, JA
NOVEMBER 10, 2023**

BETWEEN

HILLARY KITUR APPLICANT

AND

ELIZABETH CHELAGAT 1ST RESPONDENT

CHARLES KITUR 2ND RESPONDENT

*(Being an application for extension of time to file and serve record of appeal
out of time to the decision of Environment and Land Court at Kapsabet
(M. Mwanyale, J.) dated 19th January 2023 in ELC Case No. 68 of 2021)*

RULING

1. The applicant, Hillary Kitur, has brought the notice of motion dated 13th March 2023 under Rule 4 of the *Court of Appeal Rules*. The applicant seeks leave to file an appeal out of time against the judgment delivered on 19th January 2023 by Mwanyale, J. of the Environment and Land Court (ELC) at Kapsabet in Case No. 68 of 2021. The applicant also prays That the costs of the application be provided for. The application is supported by an affidavit sworn by the applicant on the date of the application.
2. The application is premised on the grounds That the applicant being dissatisfied with the judgment of the ELC has written to the Deputy Registrar of That Court requesting for the certified copy of the proceedings but is yet to receive the proceedings. The applicant avers That the reason for the delay is beyond his control as his request for proceedings is subject to trial Court's registry operations. He also deposes That if the prayers sought are not granted, he will suffer grave injustice as the impending appeal is arguable and has high chances of success. Finally, he avers That the application has been made timeously and the respondents stand to suffer no prejudice if the application is allowed.
3. Charles Kitur, the 1st respondent and Elizabeth Chelagat, the 2nd respondent, did not respond to the application.



4. When this matter came up for hearing, none of the parties had filed their submissions. This was despite the directions issued by the Deputy Registrar on 26th June 2023 with regard to the timelines for filing submissions. Pursuant to the provisions of Rule 58(1) of the *Court of Appeal Rules, 2022*, the application was therefore for dismissal or adjournment as the parties had failed to comply with directions. However, for purposes of doing substantive justice in this matter, I will consider the applicant’s application as it is.
5. The principles governing an application for extension of time have been considered in several cases. For instance, in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court enumerated the principles 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. In specific reference to Rule 4, this *Court* in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231 stated the matters to be taken into account in an application for extension of time as

“first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
7. The factors were reiterated in *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 thus:

“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.”
8. It is therefore upon an applicant to satisfy the court That he has met the conditions for extension of time. In all this, an applicant must remember That the power being a discretionary one must be sought with clean hands. Candor is therefore important in such circumstances.



9. In this matter, the notice of appeal annexed as “HK2” to the applicant’s supporting affidavit was lodged on 10th March 2023 yet the judgment of the ELC was delivered on 19th January 2023. A notice of appeal which was ordinarily supposed to have been filed by 2nd February 2023 was filed 36 days after the time had lapsed. The application for extension of time is therefore based on the notice of appeal and the letter addressed to the ELC bespeaking proceedings. In the affidavit sworn in support of the application, the applicant explains the reasons for the delay in filing his appeal as follows:

- “3. That I decided to file an appeal against the said judgment and as such instructed my advocate on record to lodge a notice of appeal. (See annexed herein a copy of the notice of appeal marked “HK 2”).
4. That I instructed my counsel on record to apply to the Environment and Land Court to supply me with certified copies of court proceedings and judgment so as to enable me to file an appeal; I am still waiting to be supplied with the said copies of court proceedings and judgment. (See annexed herein a copy letter to the Deputy Registrar marked “HK 3” and payment receipts marked “HK 4”).
5. That ever since the above steps were made, the court registry has never released the proceedings and Judgment That will facilitate me to move further with the suit.
6. That my advocates on record and their paralegal have been literally camping at the court registry all this time without any success.
7. That the time reserved to file the appeal has lapsed and there is need to extend the same.
8. That the delay in filing an appeal has been caused by factors beyond my control.
9.
10.
11. That I swear this affidavit in support of the instant application.”

10. A perusal of the affidavit shows That the applicant squarely blames the trial court’s registry for the delay in filing the appeal. But is the trial court to blame for the delay in the filing of the appeal? The answer is in the negative. By the time the applicant was filing the notice of appeal and writing the letter bespeaking proceedings, he was late by 36 days. How then can the trial court be blamed for That delay which the applicant has not bothered to explain. In any event, the applicant’s explanation That the delay in filing the appeal was because of the delay in procurement of proceedings is in itself not valid. Nowhere do the rules of this Court require That proceedings be obtained before a notice of appeal is filed. Rule 84(1) does indeed foresee delay in obtaining a copy of the proceedings hence the proviso That in computing the time within which the appeal is to be instituted, there shall be exclusion of such time as may be certified by the Registrar of the superior court as having been required for the preparation and delivery to the appellants of a copy of the proceedings. The reason advanced by the applicant for the delay in filing the notice of appeal is therefore not convincing.

11. In this case, the delay may not be said to be inordinate but That alone is not sufficient reason to allow the application. The applicant is also called upon to advance satisfactory reasons in order to convince the Court That the discretion to extend time should be exercised in his favour. As already demonstrated the applicant has not done so. All he has done is to shift the blame for the delay from himself to very



innocent court officers. In *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, it was held that:

“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 favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

12. The period of delay is therefore immaterial so long as the delay is satisfactorily explained. The onus was upon the applicant to demonstrate that he had plausible reasons for the delay in filing the appeal. He has not done so. Therefore, there is no basis upon which I can exercise discretion in favour of the applicant. Consequently, I decline to exercise my discretion to extend time for filing an appeal. The application is therefore dismissed with no order as to costs.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF NOVEMBER 2023

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

