



REPUBLIC OF KENYA



KENYA LAW
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**Makokha v Maende (Civil Application E029 of 2023)
[2023] KECA 1345 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1345 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E029 OF 2023
FA OCHIENG, JA
NOVEMBER 10, 2023**

BETWEEN

CLEOPHAS MAENDE MAKOKHA APPLICANT

AND

STELLA WATENDE MAENDE RESPONDENT

(An application for extension of time to file a notice of appeal out of time from the decision of the High Court at Kericho (A.N. Ongeri, J.) dated 10th February, 2023 in Succ. Cause No. 3 OF 2017)

RULING

1. Before me is an application dated 20th March, 2023. The applicant prays for orders that; the Honourable Court be pleased to extend time for filing an appeal; and that the notice of appeal dated 9th March, 2023 already filed be deemed as properly filed.
2. The application is supported by the applicant's affidavit and premised on the grounds that:
 - a. The impugned judgment was delivered in the absence of the applicant. His advocate did not communicate the date of delivery of judgment and the said advocate also failed to attend court on the said date.
 - b. The applicant was made aware of the judgment by the respondent. His previous advocates on record informed him that the matter was still pending delivery of judgment.
 - c. The applicant immediately filed the notice of appeal and requested for typed proceedings and judgment.
 - d. The failure to file the notice of appeal within 14 days was not intentional.



- e. The memorandum of appeal discloses an arguable appeal with high chances of success, and unless the application is allowed, the applicant will be driven from the seat of justice, unheard.
- f. The applicant stands to suffer irreparable harm incapable of compensation in damages, as matrimonial property is involved.
- g. The application is brought without undue delay.
- h. The respondent will suffer no prejudice.

3. The respondent in her replying affidavit stated as follows:

- a. The impugned judgment was delivered on 10th February, 2023 but the applicant failed to lodge an appeal within the specified timelines, despite being fully aware of the judgment date.
- b. It is not true that the applicant was not aware of when judgment was delivered, since both the applicant and his counsel were present in court at the time the judgment was delivered, as can be seen from the court record.
- c. The applicant sent the respondent's counsel a text message acknowledging the outcome of the judgment, and so the applicant cannot be seen to allege that he was not aware of the judgment.
- d. A party that comes to court seeking discretionary orders must do so with clean hands, and not with lies with the aim of misleading the court. This is an abuse of the court.
- e. Even if the applicant was not aware of the judgment, he ought to have been diligent in the pursuit of his case and known of the date when judgment was to be delivered.
- f. The applicant has not explained the reason for the delay in filing the present application upon being aware of the judgment, that is, when he alleged that he was called by the respondent to vacate the premises which he occupied; in accordance with the impugned judgment.
- g. The discretion to enlarge time is only exercised in favour of a litigant who has been diligent in the pursuit of his appeal, as opposed to the applicant who has presented an application with half-truths.
- h. The applicant has not put forth an appeal that has a high probability of success, as the issues raised in the draft memorandum of appeal were properly and comprehensively determined by the High Court.
- i. The intended appeal seeks to introduce new issues which were not before the trial court.
- j. The application is frivolous as the applicant has not explained the delay in filing the application, and it ought to be dismissed with costs.

4. Parties relied on their respective written submissions.



5. Citing the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2015] eKLR the applicant pointed out that this court has discretion to extend time under Rule 4 of the *Court of Appeal Rules*. He maintained that he was not aware of the judgment as the said judgment was delivered in his absence. His attempt to reach his former advocates proved futile. The applicant submitted that, upon learning of the judgment, he without any undue delay instructed his advocates on record who then filed the instant application. The delay was for 24 days.
6. The applicant submits that the mistake of counsel should not be visited on him. He relies on the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR.
7. Relying on the case of *Kiu & Another v Khaemba & 3 Others*, [2021] KECA 318 KLR, the applicant was of the view that the annexed memorandum of appeal raises arguable grounds, with high chances of success. He contended that the grounds raised are deserving to be interrogated by the court. He urged that the application be allowed.
8. The respondent submitted that since the applicant had failed to prove diligence in the pursuit of his case before the trial court, he was not deserving of this court's discretion in his favour. The respondent pointed out that the applicant had not explained the delay between the date on which he became aware of the judgment, and the date when this application was filed. The respondent was of the view that the applicant had not come to court with clean hands, and that he lied to the court. In this regard, the respondent submitted that the applicant was not entitled to the discretion of the court. To buttress this submission, the applicant relied on the cases of *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR, *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2015] eKLR, *Mohamed Shally Sese (Shah Sese) v Fulson Company Limited & Another* [2006] eKLR, *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR and *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR.
9. I have carefully considered the application, the grounds and affidavit in support thereof, replying affidavit, written submissions, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought.
10. Rule 4 of the *Court of Appeal Rules* does not provide for the factors which the court ought to consider in an application for extension of time, however, courts have devised appropriate principles to be applied in achieving a just decision in the circumstances of each case. The Rule states that:

“The Court may, on such terms as it thinks just, by order 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, and a reference in these *Rules* to any such time shall be construed as a reference to that time as extended.”
11. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the *locus classicus*, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: 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.”



12. The issues I am called upon to consider are both discretionary and non-exhaustive as was addressed by this Court in the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR when the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”

13. In the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 the court observed as follows:

“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.”

14. It is trite that there is no maximum or minimum period of delay set out under the law. However, an inordinate delay is more likely than not to disentitle the applicant to the leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“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.”

15. The applicant conceded that he did not file a notice of appeal within 14 days. The delay in filing the present application and the notice of appeal was approximately 24 days. This in itself was not an inordinate delay.

16. The applicant attributed the delay in filing a notice of appeal to being unaware of the date when the impugned judgment was delivered. In the case of *Bi-Mach Engineers Limited v James Kaboro Mwangi* [2011] eKLR the court held inter alia that:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”



17. Similarly, in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR the court stated as follows:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.

18. I note that the applicant has exhibited an email and a screen shot of the text message which he wrote to his erstwhile advocate. The text message reads as follows;

“Ndugu we are into the 2nd week and we don’t have the ruling. If we were to appeal, time is running out. At the same time kindly let me know in terms of finances what is expected.”

The said message is dated 20th February, presumably in the year 2023.

19. A literal reading of the message persuades me that by then, the applicant was already aware of the ruling. Indeed, he knew that as at 20th February 2023, the matter was already in the second week.

20. Considering that the ruling was delivered on 10th February 2023, the applicant was absolutely correct to indicate that as at 20th February, 2023 the matter was running into the 2nd week.

21. My further understanding is that the applicant was only asking his advocate to make available a copy of the ruling. He already knew that the ruling was not favourable to him; hence his reference to the need for an appeal.

22. My said understanding is fortified by the contents of the email dated 1st March 2023, which was in the following words;

“Upto now I have not receiving ruling of the case in Kericho. Have you received it? Kindly share with me.”

23. The applicant cannot have been requesting his advocate to share with him a copy of a ruling which had not yet been delivered. In my considered opinion, those two messages are more in consonance with the respondent’s deposition, that both the applicant and his former advocates were present in court when the ruling was delivered.

24. At any rate, it is clear from the exhibits that the applicant did not inquire from his former advocates on the status of the matter. And there is certainly no evidence which the applicant has made available to me, to show that he;

“ . . . was informed that the judgment was still pending, yet the judgment had already been delivered.”

25. It is noteworthy from the applicant’s submissions, that he appears to have changed his tune. I say so because whilst he had deponed that his advocate had failed to tell him about the decision rendered by the learned Judge, the applicant had this to say in his submissions.

“5. . . .

It is also obvious that Applicant had informed its former advocate on the need to appeal and which issue was never taken up by his former advocates.”



- 26. Surely, the applicant cannot have informed his former advocates to file an appeal unless he had not only known about the delivery of the judgment, but also about the fact that it was not favourable to him.
- 27. Accordingly, I find no plausible explanation from the applicant, for the delay in lodging the notice of appeal.
- 28. As regards the intended appeal, I find that it raises issues which are arguable.
- 29. Nonetheless, because the applicant has failed to tender a plausible explanation for the delay in lodging the notice of appeal, I decline to exercise my discretion to extend the time for filing the said notice of appeal.
- 30. In the result, the application lacks merit, and is therefore dismissed.

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

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar

