



REPUBLIC OF KENYA



**Obonyo v Koske & another (Civil Application E039 of 2023)
[2023] KECA 1344 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1344 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E039 OF 2023
FA OCHIENG, JA
NOVEMBER 10, 2023**

BETWEEN

MARTIN MAURICE ODHIAMBO OBONYO APPLICANT

AND

CHARLES KIPLANGAT KOSKE 1ST RESPONDENT

PASCALIA CHEPKORIR CHUMA 2ND RESPONDENT

(An application for extension of time to file a notice of appeal out of time from the decision of the Environment & Land Court at Kericho (M.C. Oundo, J.) dated 27th February, 2023 in ELC Case No. 71 of 2018)

RULING

1. Before me is an application dated 8th May, 2023. The applicant prays for orders that; the Honourable Court be pleased to extend time for filing a notice of appeal and record of appeal out of time; and also that there be a stay of execution of the impugned judgment pending the hearing and determination of the application herein.
2. The application is premised on the grounds that:
 - a. The applicant did not file a notice of appeal within 14 days as a result of being sick. He suffered a stroke, and he was hospitalized on 3rd March, 2023, and discharged on 28th April, 2023. He is still undergoing treatment.
 - b. The learned Judge erred in ordering the applicant to pay the balance within 14 days even though it was not one of the terms of the agreement during mediation.
 - c. The learned Judge misinterpreted paragraph 3 of the mediation agreement, which only required the applicant to give information from his bankers.



- d. The learned Judge erred in ordering the applicant to pay interest at 20% of the principal amount.
 - e. The time frame and mode of payment of the refund was not agreed upon during mediation.
 - f. The mediator be ordered to produce proceedings taken during mediation.
 - g. The intended appeal has high chances of success, it is arguable and not frivolous.
 - h. The respondents will not be prejudiced in any way as the applicant has already refunded Kshs. 3,000,000/-.
 - i. Costs abide the outcome of the appeal.
3. The application was further supported by the applicant's affidavit in which he stated that:
- a. When the applicant failed to obtain spousal consent as required under Section 12(1) of the *Matrimonial Property Act*, he wrote to the respondents informing them that the transaction could not hold and that he had contacted his bank for a refund.
 - b. The respondents did not agree to his proposal for a refund.
 - c. The letter of offer for the loan was for the sum of Kshs. 10,000,000/-.
 - d. The applicant has since made part payment of Kshs. 3,000,000/- and a balance of Kshs. 2,509,272/- is pending. He has made arrangements with the bank for payment of the same.
 - e. The mediation agreement dated 6th October, 2022 did not give a proper account of the proceedings.
 - f. The applicant be given time to finalize with the bank for the payment of the balance.
 - g. The intended appeal will be rendered nugatory if the respondents proceed with execution.
4. In their replying affidavit, the respondents contended that the reason given for the delay in filing the notice of appeal was inexcusable as the annexed discharge summary showed that the applicant was admitted on 30th March, 2023 and not 3rd March, 2023 as he alleged. They also contended that the discharge summary did not have an inpatient number.
5. Parties relied on their respective written submissions.
6. The applicant pointed out that the court in exercising its discretion is guided by Rule 4 of the Court of Appeal Rules. In deciding whether to grant extension of time, the court takes into account; the length of the delay, reason for the delay, the chances of the appeal succeeding, and whether the respondents will be prejudiced.
7. The applicant submitted that the reason for the delay in filing the appeal was because he suffered a stroke and he was admitted in hospital from 3rd March, 2023 to 28th April, 2023. On being discharged, the applicant filed a notice of appeal on 2nd May, 2023 and served the same upon the respondents on 4th May, 2023 through their advocates' email addresses.
8. The applicant contended that paragraph 3 of the mediation agreement only gave him 14 days to give information from his bankers before the final agreement could be reached. The applicant further submitted that the law does not set out any minimum or maximum period of delay, the delay need only be satisfactorily explained. The applicant was of the view that he had given a plausible explanation for the delay. The applicant relied on the case of *Susan Akinyi v Mumiflora Limited t/a Baraka Roses*



Ngorika, Civil Application No. 56 of 2020 to support this submission. He urged that the application be allowed.

9. The respondents pointed out that under Rule 75 of the Court of Appeal Rules, the applicant ought to have filed a notice of appeal within 14 days of delivery of the impugned judgment. In this instance, the applicant ought to have filed the notice by 13th March, 2023. The notice of appeal filed on 2nd May, 2023 was filed out of time.
10. Submitting on the discretion of the court to extend time, the respondents relied on Rule 4 of the *Court of Appeal Rules*, *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2015] eKLR, and *Abdul Azizi Ngoma v Mungai Mathayo* [1976] KLR 61,62. The respondents were of the view that the reason for the delay was inexcusable. According to them, the applicant was admitted almost a month after the impugned judgment was delivered. They further submitted that they will be prejudiced if the application is allowed as the applicant will continue to enjoy proprietary rights over the suit property while denying the respondents the refund of part of the purchase price.
11. The respondents consider the present application to be fatally defective and untenable in law. They relied on the decision in the case of *Winston Makokha v Aggrey Wanjala Musima* [2016] eKLR. They urged that the application be dismissed with costs.
12. I have carefully considered the application, 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.
13. 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:

“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.
14. 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.”
15. 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, (possible) 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.”

16. 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.”

17. It is trite that there is no maximum or minimum period of delay set out under the law. However, a prolonged and 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.”

18. 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 2 months and one week. The applicant attributed the delay in filing a notice of appeal to being sick, having suffered a stroke. He annexed a discharge summary showing that he was admitted on 30th March, 2023 and discharged on 28th April, 2023. The respondents contend that the applicant ought to have filed the notice of appeal by 13th March, 2023 before he was taken ill on 30th March, 2023.

19. In the case of *Joseph D Halake v Yunis Malik* [2008] eKLR the court in reviewing the actions of the applicants advocate during the course of his illness stated that:

“It should also be noted that whatever sickness was ailing Mr. Omae, it was not such that he would not have filed a notice of appeal, which is a simple document. He was able to address a letter to Mr. Kimatta on 24th January, 2008. It has not been suggested that the letter was not signed by him. I am not in any way trying to downplay the sickness Mr. Omae may be having. Mr. Kagucia stated from the bar that Mr. Omae suffered a stroke. That may well be so, but that he was able to draft and sign his letter of 24th January, 2008, is clear evidence that he was up and about. For the foregoing reasons, it is my view that this is not a case in which I should exercise my discretion in favour of the applicant.”

20. In the circumstances of the present application, a notice of appeal was not filed within 14 days. The applicant told the court that he was admitted on 3rd March, 2023. However, the discharge summary attached to the applicant’s affidavit indicates that the applicant was admitted on 30th March, 2023. I further note from the discharge summary that the applicant was 64 years old. He was suffering from Alzheimer’s disease amongst other ailments. It is indicated that he was confused at the time the



doctor attended to him. I have taken those factors into consideration, and the applicant appears to be in definite need of help. Nonetheless, I find no explanation as to why he misstated the date of his admission.

21. I also note that the applicant has not requested for typed proceedings and a certified copy of the judgment, to enable him prepare a record of appeal. He only states that he has an arguable appeal with high chances of success. The applicant has also indicated that he is making payments towards refunding the respondents. He stated that what remains in a balance of Kshs. 2,509,272/- and he has made arrangements with the bank to pay the same. It is in this regard that I am unable to reconcile these actions with what the applicant would want to appeal against, since he is already in the process of honouring the judgment.
22. As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. In *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.
23. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension.
24. In my considered view, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso* (supra). The delay herein has not been satisfactorily explained. Secondly, the applicant has not demonstrated that he has an arguable appeal.
25. As regards the prayer for stay of execution, this court sitting as a single Judge has no jurisdiction to determine the same as the said prayers requires the court to be constituted of a 3-Judge bench. Rule 55 of the *Court of Appeal Rules* provides thus:

“(1) Each application, other than an application specified in sub-rule (2), shall be heard by a single judge:

Provided that such application may be adjourned by the judge for determination by the Court.

2. This rule shall not apply to—
 - a. an application for leave to appeal;
 - b. an application for a stay of execution, injunction, or stay of further proceedings;
 - c. an application to strike out a notice of appeal or an appeal; or
 - d. an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of a hearing.”



26. In the result I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application with costs to the respondents.

Orders accordingly.

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.

DEPUTY REGISTRAR

