



REPUBLIC OF KENYA



KENYA LAW
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**Mulli v Mulli (Civil Appeal (Application) E290 of 2023)
[2023] KECA 1651 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1651 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E290 OF 2023
PM GACHOKA, JA
DECEMBER 15, 2023
[IN CHAMBERS]**

BETWEEN

BENEDETTA MUTUNGE MULLI APPLICANT

AND

ANNAH ITUMBI MULLI RESPONDENT

*(An application for extension of time from the Judgment of the
Environment and Land Court of Kenya at Nairobi (E.K. Wabwoto,
J.) delivered on 19th January 2023 in ELC Case No. 205 of 2019)*

RULING

1. Before me is a Notice of Motion application dated 27th June 2023 made under rule 4 of the [Court of Appeal Rules](#), seeking leave to file and serve the record of appeal out of time.
2. In support of the application, the applicant, Steven Nzaku, learned counsel for the applicant, has filed a supporting affidavit sworn on 27th June 2023. The grounds advanced in support of the application are that:
 - i. judgment was delivered on 19th January 2023 by the Environment and Land Court (ELC), Nairobi (Wabwoto, J.);
 - ii. the notice of appeal was filed and served on 23rd January 2023;
 - iii. the applicant applied for certified proceedings on 19th January 2023;
 - iv. the typed proceedings were ready for collection on 29th March 2023;
 - v. the certificate of delay was issued on 23rd June 2023;



- vi. the delay to file the record of appeal was occasioned by the unavailability of the typed proceedings and the certificate of delay and;
 - vii. that the appeal raises arguable issues.
3. The applicant has also filed written submissions dated 17th July 2023. Citing *Muchugi Kiragu v. James Muchugi Kiragu & Another* [1998] eKLR, the applicant submits that the discretion order provided in rule 4 is unfettered, that the Court will extend time where an intended appeal is arguable and that an applicant should not be shut out, unless it can fairly be shown that his action in the circumstances is inexcusable and that his opponent is prejudiced by it. The applicant also cites Article 50 (1) of the *Constitution* on the right to a fair hearing.
 4. In opposition to the application, the respondent has filed a replying affidavit sworn on 18th July 2023. She depones that:the applicant is guilty of delay and that the intended appeal is an afterthought; that the typed proceedings were ready for collection on 29th March 2023 and the applicant only applied for the certificate of delay on 16th June 2023; no reasons have been advanced for the delay to collect the proceedings; and that therefore the application lacks merit.
 5. The respondent has also filed written submission dated 7th November 2023, which reiterates the contents of the replying affidavit and I will not rehash the same. The respondent relies on the case of *Kioko Muthoka v. Kalembwani & another* [2021] eKLR.
 6. With this background, I now turn to the question whether the application has satisfied the conditions for exercise of the discretion donated by rule 4 of the *Court of Appeal Rules*. Many legal battles have been fought in the arena of rule 4 of the *Court of Appeal Rules* and well settled principles that guide the Court have crystallized. In *Muringa Company Limited v. Archdiocese of Nairobi Registered Trustees* [2020] eKLR, the Court expressed itself in the following terms:

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.”

7. Similarly, in *John Onger Mariaria & others v. Paul Matundura* (Civil Application No, Nai 301 of 2003) (unreported) O’kubasu, JA referred to the decision of this Court in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* (Civil Application No Nai 251 of 1997) (unreported) where it was stated:

“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 the extension of time are first the length of the delay, secondly the reason given for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly the degree of the prejudice to the respondent if the application is granted.”



8. It is not doubt that rule 4 does not set the number of days that would be considered inordinate and each case has to be determined on its facts. In *Andrew Kiplagat Chemaringo v. Paul Kipkorir Kibet* [2018] eKLR the Court expressed itself as follows:

“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.”

9. I have considered the application, the rival affidavits, the written submissions and the law. As the Court has held severally, the discretion enshrined in rule 4 is unfettered. It is the party, that prays for the exercise of that discretion, with the onus to give a plausible and reasonable explanation for the delay. A general statement that one has a right to a fair hearing under Article 50(1) of the *Constitution* is not enough. Constitutional edicts on the right to a fair and expeditious hearing of a suit applies to all the parties to a suit. Where a party delays in filing a notice of appeal, it must explain the delay as the door to a hearing under the *Constitution* is always wide open and the rules or the regulations of various statutes give directions on the timelines that are available for doing so. A party who fails to file the notice of appeal or intended appeal on time must explain the delay once the door closes. It is not enough to knock and demand that it may be opened without explaining the delay by giving plausible reasons. Rule 4 of the Court of Appeal rules is generous as it allows each party to explain the delay, in the circumstance of each case and the reasons that led to the non-compliance.

10. Now, to the reasons that the applicant has given for the delay. It is common ground that the impugned judgment was delivered on 19th January 2023 and the notice of appeal was filed and served on 23rd January 2023. The applicant states that it requested proceedings vide a letter dated 19th January 2023. Before addressing the issue that the applicant has raised in the delay in obtaining the certificate of delay, it is imperative for the applicant to bring itself within the provisions of rule 84 (1) & (2) of the *Court of Appeal Rules* which provides as follows:

84.

(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—

- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.



- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent."

11. I have looked at the letter dated 19th January 2023 addressed to the deputy registrar of ELC. The letter is not copied to the respondent and there is no evidence of service on the respondent. In the absence of such evidence, it means that the applicant had 60 days from 19th January 2023 to file and serve the record of appeal, that is on or before 18th March 2023.
12. The applicant has not stated when she was notified that the proceedings were ready. The certificate of delay indicates that the applicant was notified on 29th March 2023 that the proceedings were ready for collection. The applicant does not dispute this fact. Instead, the reason given for the delay in filing the record of appeal is the unavailability of the certified proceedings and the certificate of delay. The question is whether the applicant is candid with this explanation. In the affidavit in support of the urgency, Mr. Nzaku learned counsel states as follows:

"... the typed proceedings were ready for collection on 29th March 2023.

.... the typed proceedings of the trial court delayed to be supplied to the applicant due to pressure of court work."

In the supporting affidavit, the learned counsel for the applicant states as follows:

"...the typed proceedings were ready for collection on 29th March 2023.

.... the certificate of delay was issued by the deputy registrar on 23rd June 2023.

...the delay in filing the record of appeal was not deliberate but occasioned by the non-availability of the typed proceedings and certificate of delay."

13. The above explanation preferred by the applicant is in my view devoid of candidness. This is because, and giving rise to my next question that arises, did the applicant give a plausible and satisfactory explanation for the delay? I do not think so. In the replying affidavit, the respondent has annexed a letter dated 16th June 2023 by the applicant's counsel requesting the certificate of delay. No explanation has been given for the 79 days delay in applying for the certificate of delay. The applicant does not even disclose the date that it collected the proceedings. A close look at the reasons that the applicant has raised show a lame attempt to shift the delay to the court. It is clear that the proceedings were ready as early as 29th March 2023 and the applicant only applied for the certificate of delay on 16th June 2023 and it was availed to her on 23rd June 2023. The delay in this matter cannot be attributed to the court.
14. In *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the court laid down the following principles that should guide a court in exercise of the discretion to extend time:
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.
15. Having considered the application, the respective submissions and supporting affidavits, it is my considered view that the applicant has been less than candid. Even if I was wrong on the issue of whether the applicant can invoke rule 84(2) of the *Court of Appeal Rules*, there is no reason or explanation that has been given that justifies the delay of over 79 days. The exercise of discretion under rule 4 of the *Court of Appeal Rules* has to be exercised judiciously and not capriciously or arbitrarily. It is not an automatic act of mercy as all parties are equal before the Court. The applicant has been indolent and has deliberately or inadvertently failed to explain the delay.
16. In the circumstances, I am unable to exercise discretion in favour of the applicant. Accordingly, this application has no merit and is dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

M. GACHOKA CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

