



**M'Marete (Substituted by Marete Maingi wa Mugambi & Mugambi Mirithi Maingi) & 5 others
v Gatembu (Sued as legal representative of the Estate of Joseph Muguna - Deceased) (Civil
Appeal (Application) E108 of 2021) [2023] KECA 1573 (KLR) (11 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1573 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E108 OF 2021
J MOHAMMED, JA
DECEMBER 11, 2023**

BETWEEN

**M'MUGAMBI M'MARETE (SUBSTITUTED BY MARETE MAINGI WA
MUGAMBI & MUGAMBI MIRITHI MAINGI) 1ST APPELLANT
JAPHET GAKURU M'ABURIA 2ND APPELLANT
M'KIRERA M'ANGARE 3RD APPELLANT
JASPHAT MURIUKI KIURA 4TH APPELLANT
FREDRICK KIOGORA GITONGA 5TH APPELLANT
GEOFFREY KOOME MBAYA 6TH APPELLANT**

AND

**GEORGE GATEMBU RESPONDENT
SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH MUGUNA -
DECEASED**

*(Being an application for extension of time to file a notice of Address of service and the applicant
be enjoined as a 2nd respondent in the appeal from the Judgment of the Environment and Land
Court of Kenya at Meru (Njoroge, J.) dated 31st October 2019, in Meru ELC No. 70 of 2012)*



RULING

1. Shedrach Kiruki M'Laaria, (the applicant), has filed this application by way of a notice of motion dated 8th July, 2022, expressed to be brought under Rules 4, 42, 44, 79 and 90 of the *Court of Appeal Rules, 2022* (this Court's Rules). The applicant seeks orders in the main:

- “ 1. That this Honourable Court be pleased to extend the time within which the applicant is to file a notice of his address of service in respect of this appeal.
2. That this Honourable Court be pleased to extend the time within which the appellants are to serve the applicant with the Record of Appeal herein.
3. That this Honourable Court be pleased to enjoin the applicant as the 2nd respondent herein.”
4. That the costs of and incidental to this application abide the result of the said appeal.”

M'Mugambi M'Marete - Deceased (Substituted by Marete Maingi wa Mugambi & Mugambi Murithi Maingi), Japhet Gakuru M'Aburia, M'Kirera M'Angare, Japhat Muriuki Kiura, Fredrick Kiogora Gitonga and Geoffrey Koome Mbaya and George Gatembu (Sued as legal representative of the estate of Joseph Muguna (Deceased), and Shedrach Kiruki M'Laaria, are the 1st to 6th respondents herein.

2. The application is premised on the grounds inter alia that although the appellants were his co-defendants in the Environment and Land Court (ELC), they neither enjoined him as the 2nd respondent herein nor served the record of appeal herein as mandated by this Court's Rules; that the applicant is an affected party affected by this appeal within the meaning of Rule 79 of this Court's Rules.
3. The application is supported by the applicant's affidavit where he deponed inter alia that the judgment of the ELC was delivered on 31st October, 2019 and the appellants' advocates on record filed the instant appeal but have failed to serve the applicant with the record of appeal or include him as a party in the appeal. The applicant depones that he was aware of the delivery of the judgment and lodged his notice of appeal on 8th November, 2019; that he applied for proceedings and the trial court failed to give him notice that the proceedings were ready for collection; and that he collected copies of the proceedings on 8th February, 2022 when he learnt that they were ready.
4. The applicant filed written submissions which reiterate the contents of his supporting affidavit. The appellants and the respondent did not file any reply or written submissions.

Determination

5. I have considered the motion, the grounds thereof, the supporting affidavit, the applicant's written submissions, the authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought.



6. The discretion that I am called to exercise in the determination of this application is provided under Rule 4 of the *Court of Appeal Rules* which provides as follows:

“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.”

7. Rule 4 of the *Court of Appeal Rules* does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving an objective decision in the circumstances of each case. 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.” [Emphasis supplied].

8. The issues I am called upon to consider are both discretionary and non- exhaustive as was explained in the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR where 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 factor.”

9. This was reiterated further in the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 where it was explained that:

“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.”

10. There is no maximum or minimum period of delay set out under the law.

However, the reason or reasons for the delay must be reasonable and plausible.



11. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR as was cited by the applicant, 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.”

12. Pursuant to Rule 77 of this *Court’s Rules*, the notice of appeal should have been filed within fourteen (14) days from the date of the impugned decision. In the instant application, the applicant claims that although the appellants herein were his co-defendants in the ELC they neither enjoined him as the 2nd defendant nor served on him the record of appeal. It is his claim that he is an affected party under Rule 79 of this Court’s Rules.

13. Rule 79 of this Court’s Rules provides as follows:

“79.

(1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

(2) Where any person who is required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”

14. The applicant deposed that he filed the notice of appeal but could not file the record of appeal as he was not informed that the typed proceedings were ready.

15. Pursuant to Rule 82 of this *Court Rules*, the record of appeal should have been filed within sixty (60) days from the date when the notice of appeal was lodged. The notice of appeal was lodged on 8th November, 2019. The instant application was filed on 8th July, 2022. The applicant claims that the main reason for the delay is that he was not informed that the proceedings were ready and that he collected the same on 8th February, 2022 when he learnt that they were ready.

16. The applicant contends that he has an arguable appeal.

17. In *Muchugi Kiragu v James Muchugi Kiragu & another* Civil Application No. NAI. 356 of 1996, this Court had the following to say as regards this Court’s discretion under Rule 4:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context,



this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.” (Emphasis supplied).

18. 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. The applicant is aggrieved by the judgment of the ELC and is desirous of appealing against the said judgment out of time. In the case of *Richard Nchapi Leiyagu vs IEBC & 2 Others*, Civil Appeal No. 18 of 2013, this Court expressed itself as follows:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

19. From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in *Leo Sila Mutiso* (supra). The upshot is that the notice of motion dated 8th July, 2020 is allowed as prayed.

20. The applicant has also sought to be enjoined in Civil Appeal (Application) No. E108 of 2021 as the 2nd respondent. As a single Judge, I do not have jurisdiction to consider and determine the application for joinder.

21. Accordingly, I make the following orders:

- a. That leave is hereby granted to the applicant to file a notice of address for service on all the parties in this appeal within seven (7) days from the date hereof;
- b. That leave is hereby granted to the applicant to file and serve the record of appeal and memorandum of appeal out of time within fourteen (14) days from the date hereof;
- c. The Court registry to list the hearing of the applicant’s application for joinder before a 3 Judge Bench after case management; and
- d. Costs of this application to abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER, 2023

JAMILA MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

