



**Joreth Limited v Mbugua & 3 others (Civil Application
E219 of 2021) [2022] KECA 163 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 163 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E219 OF 2021
RN NAMBUYE, JA
FEBRUARY 18, 2022**

BETWEEN

JORETH LIMITED APPLICANT

AND

FRASHYA NJERI MBUGUA 1ST RESPONDENT

NAOMI NYAMBURA MWANGI 2ND RESPONDENT

GEOFFREY MACHARIA MURAYA 3RD RESPONDENT

THOME FARMERS NO. 5 LIMITED 4TH RESPONDENT

(An application for extension of time within which to file and serve a notice of appeal from the Judgment of the Environment and Land Court (S. Okong'o, J.) dated 24th September, 2020 in Nairobi ELC No. 367 of 2012)

RULING

1. Before me is a notice of motion dated 4th June, 2021, brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, Rule 4 of the *Court of Appeals Rules*, and all other enabling provisions of the law. The motion substantively seeks an order that the Court be pleased to grant leave to the applicant to file and serve a notice of appeal out of time against the judgment of S. Okong'o, J. dated 24th September, 2020 in the Environment and Land Court (ELC) at Nairobi in ELC Case No. 367 of 2012 together with an attendant order that costs of the application be provided for.
2. It is supported by grounds on its body, a supporting affidavit sworn by Grace Wangui Koech from the firm of Nyiha, Mukoma & Co. Advocates, on record for the applicant together with annexures thereto, written submissions dated 3rd February, 2020 and a legal authority annexed to the written submissions. It has been opposed by a replying affidavit sworn by Victoria Wanjiku Kariuki from the



firm of Kihara & Wyne Advocates on record for the 1st and 2nd respondents together with annexures thereto, written submissions dated 4th February, 2020 together with legal authorities.

3. The application was canvassed through rival pleadings, written submissions and legal authorities filed by the advocates for the respective parties herein without oral highlighting, in the absence of the advocates for the parties herein pursuant to directions given in the hearing notice issued by the Deputy Registrar of this Court and served electronically on the parties on Friday, January 28, 2022 at 12.04pm.
4. Supporting the application on the facts, the applicant asserts cumulatively that, it is genuinely aggrieved by the intended impugned judgment. The delay in initiating the appellate process was not deliberate and therefore excusable. It was occasioned by the delivery of the judgment in their absence due to challenges occasioned by the Covid-19 pandemic which forced their advocates to close down their offices in compliance with the Ministry of Health directions.
5. It was only in May, 2021, when their advocates came to learn of the existence of the judgment. Time for initiating an appellate process as of right had long lapsed, prompting the application under consideration. The intended appeal is not frivolous. It has high chances of success. No prejudice will be suffered by the respondent if the relief sought were granted.
6. On the law, the applicant relies on the case of *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees [2020] eKLR*, in which Ouko, JA (as he then was) explicitly restated the prerequisites for granting relief in an application of this nature; the case of *Jayesh Vijay Patel vs. Samuel Watuka Muindi [2020] eKLR* in which the Court took cognizance of closure of courts and other public and private offices due to the Covid-19 pandemic challenges and granted extension of time within which to comply. Lastly, the case of *Athuman Nusura Juma vs. Afwa Mohammed Ramadhan, 2016] eKLR* for the proposition that consideration of the arguability of the intended appeal as a prerequisite for granting relief in an application of this nature is merely a possibility.
7. In opposition to the application, the 1st and 2nd respondents assert on the facts that the applicant has not been truthful in its assertions in support of its application as their advocate was aware of the date of the delivery of the judgment given in court. It was also delivered virtually. The applicant's advocates could have logged into the platform even from the comfort of their homes to receive the judgment.
8. Further, that it is not correct as contended by the applicant that it only came to learn of the delivery of the judgment in May, 2021 as they served them with their application seeking to review the very judgment they now seek to appeal against via email on 9th March, 2021. That service was duly acknowledged by the applicant's advocate on the same date. On 29th April, 2021 they followed up the above process by physically serving on the applicant's advocate a mention notice for the application for review, which the applicant's advocate also acknowledged service of by stamping on the hard copy.
9. They therefore, argue that the applicant is undeserving of this Court's exercise of its discretionary mandate in their favour as prayed, for their failure to explain the period of delay from 9th March, 2021 when they were served with their application for review and the 24th June, 2021 when they filed the application under consideration. Neither is there explanation as to why the application and its supporting affidavit dated 4th June had to wait until more than twenty (20) days later on 24th June, 2021.
10. Lastly, that the applicant's seriousness in their pursuit of their intended appellate process is in doubt for their failure to call for a typed copy of the proceedings for appellate purposes six (6) months after the delivery of the judgment.
11. To buttress the above submissions, the 1st and 2nd respondents rely on the Supreme Court of Kenya decision in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries*



Commission & 7 Others [2014] eKLR crystallizing the parameters for granting relief prayed for in the application under consideration; the case of *Church of God East Africa & Another vs. Dinah Buluma [2019] eKLR* for the holding that “whereas the law does not set the minimum or maximum period of delay, an applicant in an application of this nature is expected to account for every single day of delay”; the case of *Ecobank Kenya Limited vs. Meya Agri Traders Limited [2021] eKLR* for the holding, inter alia, “that an applicant in an application of this nature is obligated to satisfactorily declare and explain the whole period of delay to the court.” Lastly, they rely on the case of *Chairman Kenya National Union of Teachers & Another vs. Henry Inyangala & 2 Others [2018] eKLR* in which the Supreme Court declined to grant leave for extension of time within which to comply because all the parties were aware of the date of the delivery of the judgment. The Court is therefore urged to decline the relief sought.

12. My invitation to intervene on behalf of the applicant has been invoked under sections 3A and 3B of the Appellate Court Act, Cap 9 Laws of Kenya, enshrining the overriding objective of the Court whose impact on the delivery of justice has now been crystallized by case law. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)*; and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009* in all of which the principles enunciated therein was summarized as one donating power to the court to dispense justice with greater latitude.
13. The substantive provision for access is however Rule 4 of the Court of Appeal Rules, which provides as follows:
 - “ 4. 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 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 principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations of this court and as crystallized by the Supreme Court.
15. I take it from the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ.) decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [supra]* in which these were restated 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 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 respondent of the extension is granted.

(6) Whether the application has been brought without undue delay; and



(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

16. From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
17. Starting with the delay, it is not in dispute that the judgment was delivered on 24th September, 2020, while the application under consideration dated 4th June, 2021 was filed on 24th June, 2021 a period of nine (9) months.
18. In *George Mwendu Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)*, extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months, while in *Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014] eKLR*, the relief for extension of time was declined for the applicant’s failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.
19. Applying the threshold in the above referred case law to the rival positions herein, it is my finding that the length of delay under interrogation herein is not as long as that which was the subject in the *Mama Day Nursery School case* [supra] that led to the Court declining relief therein, but slightly longer than the length involved in the *Aviation Cargo case* (supra) which also resulted in the Court declining to exercise its discretion in favour of the applicant therein. The above finding alone is not however sufficient to warrant granting the applicant the relief sought. There is therefore need for me to consider the other prerequisites conjunctively with the one touching on the period of delay before making a final conclusion either way. The above now leads me to interrogate the issue of reasons for the delay and which I fully adopt are as already highlighted above. These have been controverted by the 1st and 2nd respondents advocate but not rebutted by the applicant.
20. I therefore take it that what the 1st and 2nd respondents have put forth in opposition to application is the correct position on what actually transpired after the delivery of the judgment. It therefore follows that the applicant has not accounted for the three (3) months and fifteen (15) days delay in seeking the court’s intervention. In my opinion, this demonstrates lack of seriousness in their alleged desire to progress their intended appellate process.
21. On arguability of the intended appeal, the position in law is that any proven existence of either a draft memorandum of appeal or grounds in the body of the application or supporting affidavit would suffice. I have traced no draft memorandum of appeal on the record or grounds the applicant intends to take up on appeal either in the grounds in the body of the application or the supporting affidavit. This also creates an impression of lack of seriousness in the applicant to pursue its intended appellate right notwithstanding that this prerequisite is a mere possibility.
22. As for prejudice to be suffered by the opposite party, the respondents have raised issue of incurring losses and prejudice. I appreciate the existence of the right of appeal endowed to the applicant. I am also aware that this right has now been crystalized by case law. I take it from the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR*; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003*; in which it was variously held inter alia that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and



that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

23. I have revisited the above exposition crystallizing the right to be heard, I find nothing therein to suggest that the right to be accorded an opportunity to be heard on appeal should be granted as a matter of course. There must be demonstration of seriousness in the pursuit of such right by an applicant before the same can be accorded, which is lacking herein.
24. The upshot of the above assessment and reasoning is that I find no merit in the application. It is accordingly dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

