



REPUBLIC OF KENYA



**Matika v Atwoli (Civil Application E109 of 2021)  
[2022] KECA 116 (KLR) (11 February 2022) (Ruling)**

Neutral citation: [2022] KECA 116 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E109 OF 2021  
PO KIAGE, JA  
FEBRUARY 11, 2022**

**BETWEEN**

**ALFESTUS MULWALE MATIKA ..... APPLICANT**

**AND**

**WILSON MUKWANA ATWOLI ..... RESPONDENT**

*(Application for extension of time to file and serve Notice of appeal and Record of Appeal in an intended appeal from the Judgment of the Environment and Land Court at Kakamega (Matbeka, J.) dated 22nd June, 2021 in Environment & Land Court No. 264 of 2017)*

**RULING**

1. The applicant Alfestus Mulwale Matika asks me by his motion dated 22<sup>nd</sup> July, 2021 brought under Rule 4 of the Rules of this Court for orders that;
  - a) The applicant be given leave to file its Notice of Appeal out of time and the Notice of Appeal dated 19<sup>th</sup> July, 2021 and filed in court on the same day be deemed to have been filed within time.
  - b) Upon prayer one above being granted, time for filing the Record of Appeal be extended.
  - c) A time be named within which the said Record of Appeal should be filed.
  - d) Costs of this application abide with the result of the said Appeal, or be dealt with as the justice of the case shall seem to require.
2. The application is predicated on grounds on the face of the motion and the affidavit of the applicant in support thereof. The applicant explains that he learnt that judgment had been delivered in the matter after delivery, on 19<sup>th</sup> July, 2021 when he went to inquire about the same. He was informed that judgement had been delivered to the email address he had provided, and upon being apprised of the



outcome of the case, he lodged a notice of appeal on the same date. In his written submissions dated 1<sup>st</sup> December, 2021, the applicant claims that he does not have internet connectivity, and the email address that he had provided to the court was for a relative, who did not inform him on time when the judgment was sent.

3. The respondent opposes the application through a replying affidavit dated 3<sup>rd</sup> August, 2021, stating that both parties had fixed the judgment date by consent and provided their email addresses for communication, hence it was not true that the applicant didn't know that judgment had been delivered.
4. I have given this application with its supporting and opposing affidavits and the applicant's submissions due consideration. An application under Rule 4 is a plea to a single Judge of this Court to exercise his discretion so as to allow a party who has run afoul the time lines imposed by the Rules to be able to file or lodge documents out of time. The discretion is a judicial one to be judiciously exercised on the basis of principle, not capriciously.
5. The discretion is of course wide and unfettered but in deciding whether or not to extend time, some of the matters I consider include the length of the delay; the reason for the delay, (possibly) the likelihood of the appeal or intended appeal succeeding, and the prejudice, if any, that the respondent may be subjected to. As it is an equitable intervention that is sought, I would also consider the full circumstances of the application including the conduct of the applicant. See *Mwangi -vs- Kenya Airways [2003] KLR 486*.
6. In the instant matter, judgment was delivered on 22<sup>nd</sup> June, 2021 and the applicant lodged his application for extension of time on 22<sup>nd</sup> July, 2021, almost two (2) weeks past the stipulated time for lodging an appeal. The applicant avers that he lodged his notice of appeal on 19<sup>th</sup> July, 2021, the same day he learnt that judgment had already been delivered. Although he did not attach a copy of the notice to his application, I am inclined to give him the benefit of doubt, and find the length of the delay not inordinate.
7. Moreover, the applicant's explanation that the trial court judgment was delivered to him via email, and because he had used a relative's email address he was not aware of it in time to lodge an appeal, seems plausible to me, particularly because the applicant seemingly was not represented by Counsel.
8. In the result the motion dated 22<sup>nd</sup> July, 2021 is allowed. I accordingly extend time to the end that the notice of appeal lodged on 19<sup>th</sup> July, 2021 is deemed duly filed. The applicant shall lodge and serve the record of appeal within thirty (30) days of today.
9. Costs shall be in the intended appeal. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*SIGNED*

**DEPUTY REGISTRAR**

