



REPUBLIC OF KENYA



KENYA LAW
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**Mugalitsi v Busutu (Civil Application 43 of 2021)
[2022] KECA 123 (KLR) (11 February 2022) (Ruling)**

Neutral citation: [2022] KECA 123 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 43 OF 2021
PO KIAGE, JA
FEBRUARY 11, 2022**

BETWEEN

JULIUS SAVA MUGALITSI APPLICANT

AND

CHARLES IMBWAGA BUSUTU RESPONDENT

(An application for extension of time to file and serve Notice of Appeal, Memorandum of Appeal and Record of Appeal from the Judgement of the Environment and Land Court at Kakamega (Matheka, J) dated 30th April 2020 in ELC CASE NO. 246 OF 2017)

RULING

1. Julius Sava Mugalitsi, the applicant herein moved the Court by a Motion dated 18th March 2021, seeking the following orders;
 - a. THAT this Honourable Court be pleased to grant leave to file and serve Notice of Appeal, Memorandum of Appeal and compile Record of Appeal respective challenging the Judgment delivered on 13th April 2020 in Kakamega HC ELC No. 246 of 2017.
 - b. THAT costs of this application be provided for.
2. Whereas the Court of Appeal Rules do not provide for factors to be considered in a Rule 4 application, Judges of this Court, have over the year's devised principles to be applied as they exercise their free discretion for the attainment of the ends of justice in each case. In *Muringa Company Ltd -vs- Archdiocese Of Nairobi Registered Trustees* [2020] eKLR Ouko, JA (as he then was) expressed them thus;

“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."

3. In the matter before me, the applicant contends that the trial court judgment ought to have been delivered on 24th March, 2020 but it was not delivered until 30th April, 2020 and without notice to the parties. The applicant allegedly learnt about the judgment on 17th July, 2020 when he made inquiries at the registry, and he proceeded to apply for certified copies of the proceedings and judgment. He also filed a notice of appeal on the same date. The applicant further claims that it was not until 18th November, 2020 that the certified proceedings were signed and furnished on 18th March, 2021. There is no reply on record for the respondent.
4. Even though there is no set period in numerical days, weeks, months, or alas, days, beyond which delay becomes inordinate or inexcusable, anyone seeking this relief under Rule 4 must plausibly explain the cause of the delay. See *Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet* [2018] eKLR.
5. From the proceedings, it is apparent that judgment in the matter was supposed to be delivered on 24th March, 2020. The record also bears a letter from the applicant's counsel to the Deputy Registrar of the High Court at Kakamega, complaining of the delivery of judgment without notice. On that account, I am inclined to accept as plausible the explanation that the applicant may not have been aware that judgment had been delivered.
6. Being of that mind I am inclined to exercise my discretion in favour of the applicant, a task made easier by the absence of opposition to the application. I thus allow the application and deem the notice of appeal filed on 17th July, 2020 as properly filed. I also order that the applicant shall file and serve the record of appeal within 30 days of the date hereof.

Costs of this motion shall be in the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 11TH 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

