



REPUBLIC OF KENYA



**KENYA LAW**  
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**Aga Khan Education Service Kenya v Ekirapa & 10 others (Civil Application  
E024 of 2020) [2022] KECA 463 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 463 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E024 OF 2020  
K M'INOTI, JA  
MARCH 18, 2022**

**BETWEEN**

**AGA KHAN EDUCATION SERVICE KENYA ..... APPLICANT**

**AND**

**ALBERT EKIRAPA ..... 1<sup>ST</sup> RESPONDENT**  
**AHMED SHEIKH TAKOY ..... 2<sup>ND</sup> RESPONDENT**  
**ROSE MUTHONI ..... 3<sup>RD</sup> RESPONDENT**  
**ANTHONY MORAGWA ..... 4<sup>TH</sup> RESPONDENT**  
**HENRY NJAGE ..... 5<sup>TH</sup> RESPONDENT**  
**PATRICK LUMUMBA. .... 6<sup>TH</sup> RESPONDENT**  
**JANE OMARI ..... 7<sup>TH</sup> RESPONDENT**  
**MARY APOLA ..... 8<sup>TH</sup> RESPONDENT**  
**JULIUS KIITI ..... 9<sup>TH</sup> RESPONDENT**  
**MWANGI SALIM ..... 10<sup>TH</sup> RESPONDENT**  
**THE AGA KHAN FOUNDATION ..... 11<sup>TH</sup> RESPONDENT**

*(Application for extension of time to file and serve record of appeal  
from the decision of the Environment and Land Court at Nairobi  
(Bor, J.) dated 28th October 2019 in ELC C No. 455 of 2008)*



## RULING

1. By the Motion on notice dated 21st July 2020, applicant, Aga Khan Education Service Kenya, seeks extension of time to file its record of appeal out of time. The supporting and supplementary affidavits sworn respectively by Mr. Grishon Ng'ang'a Thuo, Advocate and Mr. Ancut Muumbi Munyao on 21st July 2020 in support of the application make it clear that the record of appeal has already been filed; it was filed on 11th June 2020, followed by a supplementary record of appeal on 25th June 2020. So, for all intents and purposes, what the applicant is asking the Court is to deem the appeal that is already file - Civil Appeal No. 229 of 2020, Aga Khan Education Services Kenya Ltd v. Albert Ekirapa & 10 Others, to have been filed on time.
2. The judgment that the applicant seeks to appeal was delivered on 28th October 2019. On 11th November 2019, within 14 days from the date of the decision as required by rule 75 (2) of the *Court of Appeal Rules*, the applicant lodged a notice of appeal. On 26th November 2019, again within 30 days as required by rule 82(2) of the same Rules, the applicant applied to the registrar in writing for certified copies of the proceedings and judgment, and copied the letter of application to the respondents' advocates. By dint of the proviso to rule 82(1), the applicant was obliged to file the record of appeal within 60 days from the date the registrar certified to have been required to avail the certified copies.
3. The applicant's advocates aver that the registrar notified them orally on 16th March 2020 that the proceedings were ready for collection, but they were not able to collect the proceedings because the Judiciary was in lock-down following the report of the first case of Covid-19 in Kenya. A formal letter dated 16th March 2020 advising the applicant's advocates that the proceedings were ready for collection and stating the amount of money to be paid was received on 7th May, 2020 and the appellant ultimately paid and received the proceedings on 12th May 2020. The certificate of delay issued by the Registrar excluded time up to 16th March as the period required to avail the proceedings, meaning that by the time the record of appeal was filed on 11th June 2020, it was out of time. The applicant's explanation for the delay is the closure of the courts due to Covid 19 and innocent belief that the Registrar would exclude the time up to 7th May 2020 when the applicant's advocates received the letter advising them that the proceedings were ready for collection.
4. In its written submissions in support of the application, the applicant rehashed the above factual background and relied on the decisions of this Court in *Moroo Polymers Ltd. v. Wilfred Kayak Willis* [2019] eKLR and *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR on the principles that guide this Court in applications for extension of time. The applicant further submitted that the delay was not inordinate and was reasonably explained by the Covid-induced lock-down of the Judiciary and the honest confusion whether time ought to be computed from when its advocates were orally advised that the proceedings were ready for collection, without indication of the amount payable, or when the proceedings were actually collected on 12th May 2020. Lastly, the applicant submitted that the intended appeal was not frivolous, this Court having already so found in granting an application for stay of execution and that the dispute over conversion of a private education institution that had operated as such for over fifty years, to a public institution, was a matter of great public interest. On prejudice, it was the applicant view that it stood to suffer greater prejudice that the respondents if it was denied the opportunity to exercise its right of appeal.
5. Except for the 11th respondent who swore a replying affidavit and submissions, all the other respondents did not respond to the application. As regards the 11th respondent, it filed a replying affidavit sworn on 16th October 2020 by Mr. Hashil Shah, Advocate, who confirms the challenges



experienced in accessing the courts during the Covid-19 lock-down. Mr Shah adds that the delay is not inordinate and notes that the record of appeal has already been filed. He concedes too that the intended appeal is not frivolous. In its written submissions, the 11th respondent essentially supports the application for extension of time.

6. I have carefully considered the application and borne in mind that it is supported by the 11th respondent and that none of the other respondents has come forward to oppose it, even though duly served with the application and hearing notice. In an application for extension of time, the Court's discretion is wide and unfettered, the only caveat being that the discretion should be exercised judiciously and on reason, rather than whimsically or capriciously. The considerations that guide the Court were stated as follows in *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others (supra)*:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. The applicant filed the record of appeal on 11th June 2020, which is a delay of less than a month. The delay is in my view not inordinate and is in any case fully and candidly explained on the grounds that are in the public domain, namely the Covid-19 lock-down of the Judiciary which for a while restricted not only judicial services, but also physical access to the courts themselves. The intended appeal is clearly not frivolous because in a ruling dated 25th September 2020, the Court of Appeal concluded that the intended appeal is arguable and granted an order of stay of execution of the impugned judgement of the Environment and Land Court. As regards prejudice, none of the respondents has adverted to any prejudice that they stand to suffer if this application is granted. Indeed, the only respondent who responded to the application does not oppose it.
8. In these circumstances, I am persuaded this is a fitting case in which to exercise my discretion in favour of the applicant and extend the time for filing the record of appeal. Accordingly, I allow the motion dated 21st July 2020 and deem the record of appeal filed on 11th June 2020 and the supplementary record of appeal filed on 25th June 2020 to have been filed on time. Costs of this application will abide the outcome of Civil Appeal No. 229 of 2020, *Aga Khan Education Services Kenya Ltd v. Albert Ekirapa & 10 Others*.

It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2022**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

*Signed*



**DEPUTY REGISTRAR**

