



REPUBLIC OF KENYA



**Maina v Kamweti (Civil Application 12 of 2019)
[2022] KECA 390 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 390 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 12 OF 2019
DK MUSINGA, JA
MARCH 4, 2022**

BETWEEN

LAWRENCE KIMANI MAINA APPLICANT

AND

SAMUEL MURIITHI KAMWETI RESPONDENT

(An application for extension of time to file the Record of Appeal out of time in an intended appeal against the Ruling of the High Court of Kenya at Nyeri (M. T. Matheka, J) dated 20th March 2018 in Misc. Succession Cause No. 14 of 1994)

RULING

1. Before me is a Notice of Motion dated 10th January 2019 and filed in Court on 22nd February 2019 under rule 4 of this Court's Rules seeking leave to file the record of appeal out of time against the judgment of M. T. Matheka, J. delivered on 20th March 2018.
2. The application is premised on grounds that upon delivery of judgment by the trial court, the applicant filed a notice of appeal on 3rd April 2018 and on the same day requested for certified copies of the proceedings and judgment from the High Court. The applicant argues that the certified copies of the proceedings and judgment were availed to him on 17th December 2018, by which date the sixty (60) days period within which he was required to have filed his record of appeal had lapsed.
3. The application is supported by a supporting affidavit sworn by the applicant. The applicant avers that the application has been brought without any delay. In the affidavit, the applicant did not say anything about arguability of the intended appeal, or whether the respondent will suffer any prejudice if the order sought is granted. He however addressed himself to those issues in his submissions.
4. The applicant avers in his supporting affidavit that as soon as he obtained certified copies of the proceedings, he prepared the appeal which is now ready for filing. The applicant urges this Court to grant him the prayers sought in the interest of justice.



5. The applicant has filed his written submissions which are dated 10th May 2021. The applicant argues that this Court has discretionary powers to extend time where the applicant has demonstrated that he has an arguable appeal. In this connection, the applicant cites *Gitau v. Muriuki* [1986] KLR 21. It is also the applicant's further argument that he has an arguable appeal and that no prejudice would be suffered by the respondent if the order sought is granted. He cites this Court's decision in *Consolidated Finance Bank Limited v. Kapurchand Depar Shah* [2014] eKLR.
6. The application is opposed by way of a replying affidavit sworn by the respondent on 30th April 2021. The respondent argues that the delay between 3rd April 2018 when judgment was delivered by the High Court and 17th December 2018 when the applicant alleges to have been supplied with certified copies of the proceedings is grossly inordinate. In this connection, the respondent states that the applicant has not availed a copy of the certificate of delay. Further, even after obtaining certified copies of the proceedings on 17th December 2018, the applicant has not stated why it took him more than two (2) months to file this application. On whether the intended appeal has any chances of success, the respondent argues that the same is hopeless. It is the respondent's further argument that parties have been litigating for close to 30 years now; that the estate which was the subject matter of the suit before the trial court is yet to be distributed; and that some of the beneficiaries have passed on without benefiting from the estate. The respondent did not file any written submissions.
7. I have considered the application, the grounds in support thereof, the submissions as well as the applicable law. The principles upon which this Court determines an application for extension of time under rule 4 are well settled. The Court considers, among other factors, the length of the delay; the reason for the delay; possibly the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999] 2 EA 231; *Fakir Mohammed v. Joseph Mugambi & 2 Others* [2005] eKLR; and *Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019.
8. The power to extend time is a discretionary one. However, the discretion must be exercised judiciously and on sound factual and legal basis. See *Njuguna v. Magichu & 73 Others* [2003] KLR 507.
9. It is not in dispute that there was delay by the applicant in instituting the appeal. The applicant having filed a notice of appeal on 3rd April 2018 was supposed to have filed the record of appeal by 1st June 2018. The applicant however did not have certified copies of the proceedings from the High Court which he alleges to have applied for on the date he filed the notice of appeal. The applicant did not provide a copy of the letter requesting for certified copies of the proceedings.
10. The applicant argues that the High Court delayed in availing certified copies of the proceedings. I agree with the respondent that in the absence of a certificate of delay, it is not possible for this Court to determine when the request for the proceedings was made and the time taken to prepare and supply the proceedings. The certificate of delay would have enabled this Court to determine the date when the proceedings were ready for collection and therefore establish the exact period of delay. The applicant argues that certified copies of the proceedings were availed to him on 17th December 2018. The respondent has also relied on this date to urge this Court to find that there was inordinate delay. I am therefore prepared to take this date as the date when certified copies of the proceedings were availed to the applicant. Going by this date, there is a time gap of about 68 days to the date of filing this application. The applicant has not offered any explanation for this time gap.



11. In *County Executive of Kisumu vs County Government of Kisumu & 8 Others* [2017] eKLR the Supreme Court stated as follows:

“[25] The issue of delay of typed proceedings is well known in our legal system and on this basis; this Court has previously extended time and held that such a delay is not on part of the party but the court and that this issue consists of facts beyond a party’s reach. In *Hassan Nyanje Charo vs Khatib Mwashetani and 3 Others*, eKLR [2014] this Court stated:

“[27] Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail..

[28] Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court’s administrative machinery? We think not.”

[26] However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.

[27] In the present case, while there is indeed a certificate of delay from the Deputy Registrar of the Court of Appeal, this alone does not suffice for the Court to indulge the applicant and grant an extension. The proceedings were availed to the applicant on 4th December, 2015. It filed its application more than two months later. While it submits that it filed the application on 8th February, 2016, the record (from the receipt of payment and the stamp on the face of the application) shows that the application was in fact filed on 12th February, 2016. The question that begs for an answer is whether this ‘further’ delay after receipt of the typed proceedings has been explained?

12. The circumstances in the *Consolidated Finance Bank case (supra)* are distinct from the ones herein. In the *Consolidated Finance Bank case*, the applicant was not aware that judgment had been delivered by the trial court. The delay was also for a period of three days. The court held that the applicant had given satisfactory reasons for the delay and that the delay was not inordinate and allowed the application. The applicant in this case has not explained or tendered any reasons for the delay of about 68 days. The onus was on the applicant to explain to this Court the reason for this delay. In the absence of an explanation for the delay, I find that the delay was inordinate.

13. In the circumstances of this application and in view of my findings as regards delay, I need not consider any other factor. In the end, I decline to exercise my discretion to grant the orders sought by the applicant and accordingly dismiss this application with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

