



**Otieno v Funds Account Manager, Mathare National Constituency Development Fund & 2 others; Public Procurement Review Board & 12 others (Interested Parties) (Application E207 of 2022) [2022] KECA 711 (KLR) (20 May 2022) (Ruling)**

Neutral citation: [2022] KECA 711 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
APPLICATION E207 OF 2022  
S OLE KANTAI, JA  
MAY 20, 2022**

**BETWEEN**

**EZEKIEL OTIENO ..... APPLICANT**

**AND**

**FUNDS ACCOUNT MANAGER, MATHARE NATIONAL CONSTITUENCY DEVELOPMENT FUND ..... 1<sup>ST</sup> RESPONDENT**

**MATHARE NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND BOARD MATHARE NG-CDF OFFICE ..... 2<sup>ND</sup> RESPONDENT**

**CDF COMMITTEE, MATHARE NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND-MATHARE NG-CDF OFFICE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PUBLIC PROCUREMENT REVIEW BOARD ..... INTERESTED PARTY**

**PUBLIC PROCUREMENT AND REGULATORY AUTHORITY .. INTERESTED PARTY**

**ANTHONY OLUOCH ..... INTERESTED PARTY**

**ORIS & SONS CONTRACTORS LIMITED ..... INTERESTED PARTY**

**FIXKAR EA GROUP LIMITED. .... INTERESTED PARTY**

**LAVILLE ENTERPRISES LIMITED ..... INTERESTED PARTY**

**FLEX (K) LIMITED ..... INTERESTED PARTY**

**GRAVILLE ENTERPRISES ..... INTERESTED PARTY**

**SAFA SERVICE PROVIDERS LIMITED ..... INTERESTED PARTY**



**MERCOW ENGINEERING AND GEN SUPPLIES LIMITED .... INTERESTED PARTY**

**PROPERTY SUSTAINABILITY & SERVICE SOLUTION LIMITED ..... INTERESTED PARTY**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**

**KEVIN MCAKECH ..... INTERESTED PARTY**

*(Being an application for extension of time to file a Notice of Appeal against the Judgment of the High Court of Kenya at Nairobi)*

## **RULING**

1. The applicant, Ezekiel Otieno (suing on his own behalf and on behalf of the general public) prays in the Motion brought under Sections 3, 3A and 3B of the *Appellate Jurisdiction Act*; rules 4 and 75(1) and (2) of the *Court of Appeal Rules*, 2010 prays in the main that the Court extend time limited by rules of Court for filing Notice of Appeal out of time against the ruling of the Constitutional Division of the High Court (Ongudi, J.) delivered on 22nd March, 2022 in Constitutional Petition No. E035 of 2022 and that Notice of Appeal filed on 11th April, 2022 and served on the same day he deemed as properly filed and served. In grounds in support of the Motion and in a supporting affidavit by the applicant it is said inter alia that after delivery of Judgment (on 22nd March, 2022) the applicant filed a notice of appeal on 11th April, 2022 which the applicant admits was outside the time limited by rule 75 of the *Court of Appeal Rules* which required that such notice (of appeal) be filed by 5th April, 2022; that the applicant had to travel to his upcountry home to attend to health issues of his ailing father who needed hospitalization; that the applicant travelled back to Nairobi on 7th April, 2022 but that during his absence he could not communicate with his lawyers; that a delay of 5 days is not inordinate; that the applicant has obtained certified proceedings and Judgment; that the intended appeal is of public interest filed on behalf of residents of Mathare Constituency and the public at large seeking to stop embezzlement of funds and that the intended appeal is arguable. The applicant intends to argue on appeal that the High Court was wrong to hold that it had no jurisdiction where it upheld preliminary objection to that effect. Further, that delay in serving notice of appeal was occasioned by various factors including delay by the High Court in returning the filed notice of appeal and delay occasioned by COVID-19 pandemic factors which have affected court operations.
2. I have seen a hearing notice by Lehmann Associates, the lawyers on record for the applicant, with a date of 28th April, 2022 at 8.06 a.m. addressed to various parties stating amongst other things the hearing date and asking the parties file written submissions within the specified timelines.
3. I have seen written submissions by the applicant; the 3rd respondent and the 10th respondent and their lists of authorities.
4. Moses Akaalo, in a replying affidavit for the 3rd respondent (CDF Committee, Mathare National Government Constituency Development Fund – Mathare NG – CDF Office) says that he is the chairperson of that Fund; that the Motion is an abuse of the process of the Court and is defective and incompetent; that the application offends rules 4 and 75 of the Court of Appeal Rules; that notice of appeal was not filed or served on time.
5. In a replying affidavit Wycliff Odongo Owuor, a director of the 10th Interested Party (Mercow Engineering and General Supplies Limited) also depones that the Motion before me is an abuse of the



process of the Court and is incurably defective, that notice of appeal was not filed within the stipulated time and that prayers sought cannot be issued.

6 I have looked at the Motion and affidavits in support and may I say in passing that I cannot see any defect in the said documents. They are not incompetent and I have not been told how they are an abuse of the process of the Court the applicant having approached the Court to consider his plea that time limited by rules of Court be extended.

7 The principles that govern consideration of an application of this nature are well known and were well summarized in the oft-cited case of *Fakir Mohamed v Joseph Mugambi & 2 Others* Civil Application No. 332 of 2004 as:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See *Mutiso v Mwangi*, Civil Application No. NAI. 255 of 1997 (ur), *Mwangi v Kenya Airways Limited* [2003] KLR 496, *Major Joseph Mwereri Igweta v Murika Methare & Attorney General* Civil Application No. NAI 8 of 2000 (ur) and *Murai v Wainaina (No. 4) 1982 KLR 38.*”

5. There is further the duty imposed on the Court by Sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that factors considered are consonant with the overriding objectives of civil litigation which is to ensure just, expeditious, proportionate and affordable resolution of disputes before the Court.

6 In the matter before me the High Court rendered its decision on 22nd March, 2022. The applicant says that he had to travel to his upcountry home to attend to the health needs of his ailing father who required hospitalization. He has attached various documents to support that assertion. A notice of appeal was filed on 11th April, 2022, a few days shy of the 14 days required to file such a notice. I am prepared in those circumstances to accept the explanation advanced by the applicant why notice of appeal was not lodged on time and I hold that delay was excusable and was not inordinate. The respondents have not satisfied me that they would be prejudiced in any way if I allow the application. The Motion succeeds and is allowed. Let the applicant lodge Notice of Appeal within 10 days and file appeal 10 days thereafter. Costs of the Motion will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2022.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

