



REPUBLIC OF KENYA



KENYA LAW
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**Marwa v Otieno & another (Civil Application E174 of 2021)
[2022] KECA 849 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 849 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E174 OF 2021
PO KIAGE, JA
MAY 13, 2022**

BETWEEN

THOMAS MWITA MARWA APPLICANT

AND

MARTIN OTIENO 1ST RESPONDENT

KENYA REVENUE AUTHORITY 2ND RESPONDENT

(Being an application for extension of time to lodge the notice of appeal and record of appeal against the Judgment and Decree of the High Court at Migori (A.C. Mrima, J.) delivered on 19th September, 2019 in Civil Appeal No. 169 of 2018)

RULING

1. The applicant, Thomas Mwita Marwa, has filed a Notice of Motion dated 14th December, 2021 seeking the following orders;
 2. That this Honourable court be pleased to extend the time within which the applicant may file (sic) notice of appeal and record of appeal out of time.
 3. That costs of the application be in the cause.
2. As I exercise my free and unfettered discretion, I bear in mind the well-known principles that govern Rule 4 applications. The oft cited *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 crystallizes the principles as devised by the Court over the years as; first, the length of the delay; second, the reason for the delay; third (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.
3. The application is based on 15 grounds and is supported by two affidavits, one sworn by the applicant and another by his learned counsel Cephias Agure Odero. As read together, the affidavits give accounts



of a series of misfortunes occasioned to both the applicant and his Counsel which, according to them, were the reasons for the delay.

4. Once the impugned judgment was delivered on 19th September, 2019, a notice of appeal was filed by Counsel. Though I cannot ascertain when it was filed, it was dated 14th December, 2019. Immediately after lodging the notice, the initial misfortune befell Counsel when his wife was taken ill at St. Luke's Orthopedic Hospital in Eldoret from October, 2019 to November, 2019. Counsel confirmed that he was fully attending to his wife from that October to December, 2019 hence all his matters stalled. This is why he was unable to serve the respondents with the notice of appeal as stipulated in Rule 77 (1) of the *Court of Appeal Rules* (Rules).
5. The applicant was also arrested in Tanzania on 27th January, 2019 under Economic Crimes Case No. 9 of 2019 and Case No. 60 of 2020. I am not sure the date of the arrest is proper as it does not chronologically flow with the accounts in the narrative. In any case, the applicant claims that he served a two-year sentence, which from the record shows that he was released on 25th September, 2020. Upon his release, the appellant claimed that he fell ill from March, 2021 to October, 2021. The applicant lamented that due to all the foregoing reasons he was unable to give his Counsel proper instructions to lodge the appeal. I was therefore urged to allow this application as the delay was a result of unfortunate circumstances beyond the applicant's and his Counsel's control.
6. The reasons proffered by the applicant and Counsel are plausible and satisfactory. The matters that led to the delay were beyond their control. The appellant being imprisoned in a foreign country was evidently not able to attend to his appeal. I am prepared to accept that the cause of the delay was not due to indolence, rather to a series of misfortunes that made it impossible for the applicant to deal with the appeal on time. The delay is undoubtedly long but it is trite that there is no maximum or minimum period of delay set by the law. A person seeking this relief may satisfactorily explain the cause of delay in order to unlock this Court's discretionary favor. See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
8. In the result, I allow the prayer sought and grant the applicant 14 days within which to file and serve the notice appeal and record of appeal.

Costs shall be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022

P. O. KIAGE

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JUDGE OF APPEAL

I confirm that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

