



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Njeru (Civil Application E325 of 2021)  
[2022] KECA 689 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 689 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E325 OF 2021  
DK MUSINGA, JA  
JULY 22, 2022**

**BETWEEN**

**JAMES MUKIRI KARIUKI ..... APPLICANT**

**AND**

**JOSEPH NGUCHU NJERU ..... RESPONDENT**

*(Being an application for extension of time to file a record of appeal  
against the Judgment of the High Court of Kenya at Nairobi  
(Tuiyott, J.) dated 21st September 2018 in H.C.C.C No. 159 of 2007)*

**RULING**

1. By an application dated September 7, 2021, the applicant seeks the following order:  

“The time within which the applicant should file an appeal against the judgment in Nairobi, High Court Civil Suit No. 159 of 2007 between James Mukiri Kariuki and Joseph Nguchu Njeru be extended for a period of 30 days from the date of the order made by this Court.”
2. In the affidavit sworn in support of the application by Kiragu Kimani, Senior Counsel and partner in the firm of Hamilton Harrison & Mathews Advocates who are on record for the applicant, he states that the judgment in Nairobi HCCC No. 159 of 2007 was delivered on September 21, 2018 when the applicant’s claim for Kshs.7,426,300.00 was dismissed with costs; that on October 4, 2018, the applicant filed a notice of appeal and requested for typed proceedings to enable him prepare and file the record of appeal; that there was a delay at the High Court in delivering the typed proceedings and the applicant’s firm offered to type the proceedings on behalf of the court.
3. Letters dated April 3, 2018, October 17, 2019, March 12, 2020, October 16, 2020 and January 22, 2021 addressed to the trial court by the applicant’s advocates have been annexed to the affidavit in support of the application. The typed proceedings were eventually received on February 22, 2021.



4. On February 23, 2021, Mr. Kimani instructed a clerk in his firm to prepare a certificate of delay and the record of appeal and avail them to him for consideration and the clerk did so but inadvertently, the file was filed away. It was not until August 23, 2021 that Mr. Kiragu's assistant, Caroline Chepkwony, came across the file and she brought it to Mr. Kimani's attention.
5. Senior Counsel states that the delay in filing the record of appeal was as a result of the matter being inadvertently overlooked and urges this Court to excuse the same so that the applicant can pursue his right of appeal. The applicant's counsel further believes that the intended appeal is arguable and has reasonable prospects of success. In that regard, he has annexed a draft memorandum of appeal to his affidavit.
6. The respondent opposes the application. He argues that there has been inordinate delay of 144 days in filing the application, and the delay has not been sufficiently explained. The respondent further states that the intended appeal has no chances of success. He adds that the typed proceedings having been received from the High Court on February 22, 2021, the intended appeal ought to have been instituted before April 23, 2021. Having failed to do so, the applicant is deemed to have withdrawn his notice of appeal. The respondent further argues that the inadvertence, indolence and general disorganization as disclosed in the affidavit by the applicant's counsel is not sufficient to warrant grant of the orders sought and urges the court to dismiss the application.
7. I have considered the application and the affidavits by both parties. The principles that guide the exercise of this Court's discretion in an application for extension of time are well settled. The Court considers among others, 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 may be occasioned to the respondent if the application is allowed. See *Nyaigwa Farmers' Co-operative Society Limited v. Ibrahim Nyambare & 3 others* [2016] eKLR.
8. In *Hon. John Njoroge Michuki & Another v Kentazuga Hardware Limited* [1998] eKLR, Pall, J.A. stated that a party has a right to apply for extension of time to file a notice and record of appeal under rule 4 of this Court's Rules; that such an order should be granted liberally unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, or where the Court is otherwise satisfied that the intended appeal is not arguable.
9. In this application, the applicant's learned Senior Counsel has candidly explained the inadvertent circumstances in his office that led to the delay in filing the intended appeal. It is not in dispute that the fault does not lie on the part of the applicant personally but with his advocate's office. The length of the delay in filing the application for extension of time is 144 days, which is inordinate. However, in my view, that delay has been explained by the applicant's counsel. It is not an inexcusable mistake or inadvertence. Ordinarily, parties should not be made to suffer for mistakes made by their advocates, even though there may be instances when parties themselves ought to bear the consequences of such mistakes. In *Philip Keiptoo Chemwolo & Another v Augustine Kubende* [1986] eKLR, this Court held that:

“blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”
10. Taking into consideration the explanation for the delay advanced by the applicant's counsel, I am of the considered view that the delay per se should not disentitle the applicant from grant of the orders sought.



11. Turning briefly to the issue of chances of success of the intended appeal, all I wish to state is that the draft memorandum of appeal reveals that the intended appeal is arguable. I need not interrogate in any details the chances of success of the same.
12. Lastly, the respondent has not contended that he will suffer such prejudice as may not be compensated by an award of costs if the orders sought are granted. I am alive to the fact that very element of delay in the finalization of a legal dispute is prejudicial to the parties, and particularly to a party who has obtained a decision in his favour like the respondent in this matter. However, the question of such prejudice must always be weighed against the wider interests of justice so that an applicant in a matter of this nature is not locked out of the judicial system and denied an opportunity to exercise the constitutional right of appeal in appropriate circumstances.
13. In view of the foregoing, I am inclined to exercise my discretion in favour of the applicant, which I hereby do, and extend the time for filing the record of appeal for a period of 30 days from the date of delivery of this ruling. The applicant shall bear the costs of this application.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 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**

