



REPUBLIC OF KENYA



KENYA LAW
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**ombacho v Miruka (Civil Application 136 of 2020)
[2022] KECA 913 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 913 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 136 OF 2020
PO KIAGE, JA
JULY 22, 2022**

BETWEEN

GEORGE MAUTI OMBACHO APPLICANT

AND

JAMES TONGI MIRUKA RESPONDENT

(An application for extension of time to file the Notice of Appeal and Record of Appeal against the Judgment of the Environment and Land Court at Kisii (Mutungi, J.) dated 7th November, 2019 in ELC No. 412 of 2013)

RULING

1. The applicant, George Mauti Ombacho, has filed a Notice of Motion dated November 6, 2020 seeking the following order in the main;
 - b) That the honourable court be pleased to grant the applicant leave and time be extended within which to file and serve records (sic) of appeal out of time.
2. The application is based on 7 grounds on the face of it. In his supporting affidavit the applicant deposed that the impugned judgment was delivered on November 7, 2019 in the absence of his advocate as he was not served with the notice of its delivery. On February 18, 2020, when his advocate became aware of the said judgment, even though time for filing the notice and record of appeal had lapsed, he immediately applied for the proceedings by a letter of even date. The certified copies of the proceedings were duly received on July 9, 2020. The applicant explained that the delay in filing this appeal was occasioned by the failure of the Registry at the Kisii Environment and Land Court to serve his advocate with the notice of delivery of judgment. He affirmed that he is keen to prosecute the appeal and in the interest of justice, he urged the Court to allow this application.
3. In opposition, the respondent urged the Court to dismiss this application. He contended that the applicant exhibited inordinate delay in filing this application and the same is inexcusable. He explained



that; the proceedings were ready for collection on March 5, 2020 but the applicant paid for them on July 9, 2020; and this application was filed on November 6, 2020, approximately 120 days after the applicant's receipt of the proceedings. As such, the applicant has failed to explain this inordinate delay and therefore is not deserving of the relief sought.

4. In the exercise of my free and unfettered discretion in this Rule 4 application, my mind shall be guided by settled principles expressed in many decisions. In *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 for instance the factors to consider were stated as;

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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.”

5. From the record, it is evident that the applicant was not represented and was notified of the delivery of the impugned judgment on November 7, 2019. I therefore cannot fault the applicant or his advocate for failing to meet the timelines for filing a notice and record of appeal as regulated by the Court of Appeal Rules which had lapsed by the time they discovered the existence of the judgment. I have also noted the swiftness with which Counsel acted on the letter bespeaking the proceedings. That being said, however, the applicant has failed to satisfactorily explain, in fact, has proffered no explanation as to why the payment for the proceedings, which were ready by March 5, 2020, was made on July 9, 2020. Further, why this application was filed on November 6, 2020, almost four months after receipt of the said proceedings.
6. This relief is a creature of discretionary and, even though there is not set minimum or maximum time period of delay, the Court must be satisfied that the delay has been reasonably explained. A plausible and satisfactory explanation is the key that unlocks the flow of the Court's discretionary favour. See *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR.
7. I have come to the conclusion that the applicant and his advocate exhibited indolence as soon the letter bespeaking the proceedings was filed. It took four months for the proceedings to be paid for and to make matters worse, a similar time lapsed before this application was filed. The delay was inordinate and, without any explanation proffered, inexcusable.
8. In the result, I decline to grant the prayer to extend time and accordingly dismiss the application in its entirety with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

