



REPUBLIC OF KENYA



KENYA LAW
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**Mohamed v Machiri (Civil Application E040 of 2022)
[2022] KECA 621 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 621 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E040 OF 2022**

M NGUGI, J

JULY 8, 2022

BETWEEN

MACHIRI Y.S.M. MOHAMED APPLICANT

AND

ABUBAKAR SALIM MACHIRI RESPONDENT

(Being an application for leave to file and serve the record of appeal out of time against the judgment of the Environment and Land Court at Bungoma, (Olaog, J.) dated 4th February 2021 in ELC NO. 335 OF 2013)

RULING

1. In his application dated 7th March, 2022, the applicant seeks leave to file the record of appeal against the judgment of Olaog, J in Bungoma ELC No. 335 of 2013 – Abubakar Salim Machiri v Machiri Y.S.M. Mohamed dated 4th February 2021 out of time.
2. The application is based on the grounds set out on the face of the application and in the affidavit sworn by the applicant on 8th March, 2022. The applicant states in these grounds that he intends to file an appeal against the judgment, but the time within which to file the record of appeal has expired. He attributes the failure to file it on time to the failure by the High Court (sic) to give him the certificate of delay in typing the proceedings. He avers in his affidavit that he filed a notice of appeal against the judgment on 4th March, 2021. A copy of the said Notice of Appeal is annexed to the application. His Advocates also applied for the proceedings and judgment on 17th February 2021 and paid for them on 12th April, 2021 upon notification by the High Court on the charges payable. The proceedings and judgment were given to his Advocates on 4th August, 2021.
3. The applicant further avers that since the proceedings and judgment were given after the time allowed for lodging his appeal, his Advocates sought a certificate of delay from the court on 11th August, 2021 as evidenced in annexure MYSSM4. His Advocates sent reminders regarding the certificate to the court,



the last such reminder being the one dated 24th January, 2022 (annexure MYSSM5). According to the applicant, the certificate of delay (annexure MYSSM6), though signed in August, 2021, was released to his Advocates on 31st January, 2022 via WhatsApp. He asserts that he is still keen to file an appeal and has an arguable appeal as evidenced in the draft memorandum of appeal annexed to his affidavit.

4. The principles on the basis of which this Court will exercise its discretion under Rule 4 of the *Court of Appeal Rules, 2010*, were enunciated in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* 1999(2) EA 231. The Court is required to consider the length of the delay, the reasons for the delay, (possibly the chances of success of the intended appeal, and the prejudice to be suffered by the respondent if the application is allowed.
5. The applicant filed his notice of appeal against the judgment dated 4th February, 2021 on 4th March, 2021. Under Rule 75 of the Court of Appeal Rules, the notice was required to be filed within 7 days. It was filed 30 days later. No explanation has been offered for the delay.
6. The applicant was required to file his record of appeal within 60 days of filing his notice of appeal. There is no letter placed before this Court to show when, and if, he applied for the proceedings. This is essential for purposes of Rule 82 if the applicant is to benefit from the proviso to Rule 82(1). Whatever the case, it appears that the proceedings were ready by 12th April, 2021, which is the date when, according to the applicant, the proceedings were paid for, having been applied for on 18th February, 2021.
7. The applicant avers that his Advocates applied for the certificate of delay on 11th August, 2021 but received it via WhatsApp on 31st January, 2022.
8. I have examined the documents annexed to the applicant's affidavit and I am unable to comprehend the explanation that he attempts to offer for the delay. First, no explanation is offered for the delay in filing and serving the notice of appeal. None of the annexures corresponds to what is required of a letter bespeaking the proceedings, duly served on the respondent, to entitle the applicant to rely on Rule 82(1) of this Court's 2010 Rules which were then in force.
9. The explanation that a certificate of delay was signed in August, 2021 but released via WhatsApp on 31st January 2022 is not credible. It would, perhaps, have helped if the applicant's Advocate, who was serving the notice and letters and following up with the Registry, had sworn an affidavit in support of the present application. That he did not, leaving the applicant to depose to matters on the basis of very questionable information, is of no avail to the applicant. I find that no plausible reasons have been placed before the Court to explain the delay in filing and serving the notice of appeal for a period of 30 days. None has been advanced to explain the delay of 10 months in seeking extension of time to file the record of appeal, even had there been a valid notice of appeal.
10. In the circumstances, I find the application dated 7th March, 2022 to be without merit, and it is hereby dismissed.
11. As there was no response from the respondent, there shall be no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true



copy of the original

Signed

DEPUTY REGISTRAR

