



**Nduati & 2 others v Malenya & another (Civil Application  
E233 of 2022) [2022] KECA 1179 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1179 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E233 OF 2022  
JM MATIVO, JA  
OCTOBER 21, 2022**

**BETWEEN**

**JOSEPH NGUGI NDUATI ..... 1<sup>ST</sup> APPLICANT  
NANCY GATHONI ..... 2<sup>ND</sup> APPLICANT  
STEPHEN G. KIARIE ..... 3<sup>RD</sup> APPLICANT**

**AND**

**CHARLES ADAVACHI MALENYA ..... 1<sup>ST</sup> RESPONDENT  
NAIROBI CITY COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file and serve the Memorandum of Appeal and Record of Appeal against the judgment and decree of the Environment and Land Court at Nairobi (Hon. Justice S. Okong'o) delivered on 10th November 2021 in Milimani ELC Suit No. 1453 of 2002 in Thika ELC Case No. 739 of 2017 dated/delivered on 3rd February 2022)*

**RULING**

1. By an application dated June 23, 2022, the applicants pray for extension of time to file and serve upon the respondents the memorandum of appeal and the record of appeal. The applicant also prays for costs of the application to be provided for.
2. The grounds in support of the application are that the 1<sup>st</sup> respondent sued the applicants in Milimani ELC No 1453 of 2002 seeking orders that:
  - a. A declaration that the purported registration of LR No Nairobi block 63/316 was unlawful, null and void;
  - b. An order directing that the said registration of LR No Nairobi block 63/316 effected on September 24, 2001 be cancelled by the registrar of land;



- c. An injunction restraining the defendant from transferring, alienating, constructing or in any manner dealing with the property until the final determination of the suit;
  - d. Alternatively, and without prejudice the defendants do compensate the plaintiff for the full market value of the undeveloped property known as LR No Nairobi block 63/316;
  - e. Costs of this suit;
  - f. Such other relief as may be deemed fit.
3. On November 10, 2021, the trial court entered judgment in favour of the 1<sup>st</sup> respondent. Dissatisfied with the judgment, on November 26, 2021, the applicants lodged their notice of appeal at the trial courts registry and on November 29, 2021, their advocates issued a letter bespeaking proceedings and the judgment of the trial court. The applicants state that subsequently, their advocate severally visited the trial courts registry to follow up on the judgment and proceedings but it was not until May 27, 2022 when the deputy registrar informed their advocates that the proceedings were ready for collection upon payment of the requisite court fees. Their advocate collected the judgment and proceedings on May 31, 2022, and a certificate of delay was issued on June 14, 2022, after 172 days after the expiry of the statutory period of 60 days within which an appeal ought to be filed. They state that the delay was not intentional; that this court has unfettered discretion to grant the orders sought, and it is in the interests of justice that the orders sought be granted.
4. The application is opposed. On record a replying affidavit sworn by a one Francis Wasuna, an advocate having the conduct of this matter on behalf of the respondents dated September 14, 2022. The substance of his averments is:-
- (i) that the notice of appeal was filed on December 8, 2022, 20 days out of time and without courts leave;
  - (ii) that without leave the notice of appeal is invalid and no appeal can be founded on it;
  - (iii) that the leave sought to file the appeal 60 days outside the statutory period cannot cure the invalidity of the notice of appeal;
  - (iv) the application is in competent and it ought to be struck out.
5. The applicant's counsel submitted that the reason for the delay must be plausible and argued that the delay in obtaining the certificate of delay was not intentional. He cited *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] e KLR which set out the factors to be considered in applications seeking extension of time stating there is no limit to the factors to be considered provided they are relevant, and that the period of the delay, 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 administration of justice, the importance of the compliance with time limits, the resources of the parties, whether the matter raises issues of public importance, all are relevant but not exhaustive factor. He cited *Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet* [2018] e KLR in support of the proposition that the law does not set a minimum or maximum period of the delay, but the delay must be satisfactorily explained, and that plausible and satisfactory explanation for the delay is the key which unlocks the courts discretion. (Also cited *Silas Kanyolu Mwachha v Joseph Kavive James* civill App No 19 of 2021).
6. The respondent did not file submissions. On September 19, 2022 I directed the court registry to notify the respondents to file their submissions within 14 days from the said date. Despite being served as directed as at the time I wrote this ruling, long after the expiry of the 14 days, the respondents had not complied, so I wrote this ruling the failure notwithstanding.



7. First, I will address the respondent's averment that the notice of appeal was not served upon them within 7 days from date of filing. I note that the notice of appeal was lodged on June 11, 2021. The respondent states that the notice of appeal was served upon them on December 8, 2021, outside the prescribed 7 days. It is a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out a pleading is discretionary and is exercised based on the peculiar circumstance of each case.
8. The proviso to rule 86 of the [Court of Appeal Rules, 2022](#) is instructive on the circumstances when a notice of appeal may not be struck out. It provides: -

“...provided that an application to strike out notice of appeal or an appeal shall not be brought after expiry of 30 days from the date of service of the notice or record of appeal.”
9. The respondents never acted in accordance with the above provision.
10. I now address the issue whether the applicant has established grounds for this court to grant the orders sought. An applicant for extension of time must show good and substantial reasons for the delay, and, *prima facie* good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.
11. The decision to grant an application for extension of time is a discretionary power. This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice. It is also required that all relevant factors are considered. The Supreme Court in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) {2014} e KLR set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -
  - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
12. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in *M/S Portreitz Maternity v James Karanga Kabia* civil appeal No 63 of 1997 thus: - “That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”
13. Rule 4 of the [Court of Appeal Rules, 2022](#) provides: -



The court may, on such terms as may be just, by order, extend the time limited by these rules, or by any decision of the court or of a superior court, for the doing of any act authorized or required by these rules, whether before or after the doing of the act, and a reference in these rules to any such time shall be construed as reference to that that time as extended.

14. Coming now to the merits of the application, as a matter of general principle, it is entirely in the discretion of the court whether to grant or refuse an application for extension of time. That discretion is, however, judicial and so, it must be exercised according to the rules of reason and justice, the deciding factor being the showing of "good cause" by the applicant. As to what constitutes "good cause" is dependent upon a variety of factors which may include the length of the delay, the reasons for the delay, the chances of the appeal succeeding if the application is granted and; the degree of prejudice to the respondent if the application is granted.
15. The main reason offered by the applicant is there was a delay in obtaining certified copies of the proceedings and the judgment and it was only on May 27, 2022 that their advocates received a notice from the deputy registrar informing them that the proceedings were ready for collection. They collected the judgement and proceedings on May 31, 2022. Further, the certificate of delay was issued on June 14, 2022, 172 days after the expiry of the statutory period of 60 days required to lodge a memorandum and record of appeal.
16. The question here narrows to whether the delay is excusable. Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party's control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.
17. In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion. In this regard, in *National Union of Mineworkers v Council for Mineral Technology*[1998] ZALAC 22 at para 10, the court held as follows: -

“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

18. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.



19. Significant with a determination of such applications is that condonation cannot be had for the mere asking, and a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
20. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.
21. I have evaluated the reason offered for the delay. I find and hold that the delay in obtaining certified proceedings and judgment cannot be faulted on the applicant. The delay is excusable. I find no difficulty in unleashing my discretion in favour of the applicant. Accordingly, I allow the applicant's application dated June 22, 2022 and order that the intended appeal be filed and served within 14 days from the date of this ruling.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

