



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Karuru v Housing Finance CO. of Kenya Ltd & 2 others (Civil Application  
E289 of 2021) [2022] KECA 1169 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1169 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E289 OF 2021  
JM MATIVO, JA  
OCTOBER 28, 2022**

**BETWEEN**

**RAPHAEL JOSEPH KARURU ..... APPLICANT**

**AND**

**HOUSING FINANCE CO. OF KENYA LTD & 2 OTHERS ..... RESPONDENT**

*(Being an application for leave to file a supplementary Record of Appeal out of time  
and for the supplementary Record of Appeal filed on 24th June 2021 to be deemed as  
properly filed and the supplementary Record of Appeal to be admitted out of time)*

**RULING**

1. By an application dated August 12, 2021, Raphael Joseph Karuru (the applicant) seeks leave to file his supplementary record of appeal out of time against the judgment and decree issued by Kariuki J dated December 2, 2015 in Nairobi HCC No 1565 of 2001. He also prays for his supplementary record of appeal filed on June 24, 2021 to be deemed as properly filed and admitted on record. Lastly, the applicant prays for costs of this application to be provided for.
2. The key grounds cited as I glean them from the application and the supporting affidavit are:
  - (a) Judgment was delivered on December 2, 2015;
  - (b) On December 8, 2015 he filed a notice of appeal;
  - (c) On May 6, 2016, a notice of appeal was erroneously prepared and placed in the appellant's file at the firm of Kirundi & Co Advocates;
  - (d) That both records of appeal erroneously included appeal dated May 6, 2016 instead of December 7, 2015;



- (e) Upon noticing the error, a supplementary record of appeal was prepared to include the correct notice of appeal and it was filed on June 24, 2021 outside the time lines set out under the rules, hence, the request for leave;
- (f) That the respondent will not suffer any prejudice.
3. In summation, the applicant's counsel underscored the mandate of the court under rule 4 and relied on *Edith Gichugu Koine v Stephen Njagi Thoitthi*.
4. The respondents did not file any response to the application nor did they participate in the proceedings. I also note that service was effected by the court pursuant to my directions.
5. For starters, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others {2014} eKLR* set out 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."
6. The right of appeal is a statutory right, and the contours of this right, including the circumstances in which such right can be exercised, by whom it can be exercised, the period within which it should be exercised and on the grounds on which an appeal may be favourably considered are determined by the provisions of the statute creating such right and judicial precedents. Because the right to prefer an appeal is a right created by statute, no party can file an appeal against any judgement, decree or order as a matter of course in the absence of a suitable provision of some law conferring on the party concerned the right to file an appeal against any judgement, decree or order. In appropriate cases a party may be held to have become disentitled from enforcing the right of appeal which he may otherwise have.
7. 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.
8. An applicant for extension of time to file a notice of appeal out 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.

9. The word “may” is deployed in the above provision is merely permissive and intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the court should tolerate a delay. Equally there would be cases where the court must exercise its discretion against an applicant for want of any of the required ingredients or where it does not reflect “good cause” as understood in law. The expression “for good cause” implies the presence of legal and adequate reasons. The phrase means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men.
10. The “good cause” should be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay as an excusable one. The above provision gives the court enough power and discretion to apply the law in a meaningful manner, while assuring that the purpose of enacting such a law is not frustrated. The person applying for leave to appeal out of time should show that besides acting bona fide, he had taken all possible steps within his/ her power and control and had approached the court without any unnecessary delay. The test is whether or not a cause is good enough that it could not have been avoided by the person by the exercise of due care and attention.
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. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent. (See *M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No 63 OF 1997*).
12. Filing an appeal within a period of limitation is the rule and condonation of delay is an exception. While condoning the delay, the courts must be cautious and only on genuine reasons, the courts are empowered to condone the delay. The power of discretion to condone the delay is to be exercised judiciously and by recording reasons. The reasons furnished for condonation of delay must be candid and convincing. Therefore, the condonation of delay cannot be claimed as a matter of right and only on genuine reasons, the delay is to be condoned and not otherwise. In the event of condoning long delays in a routine manner, the courts are not only diluting the law of limitation but unnecessarily encouraging this kind of lapses. Therefore, reasons which are all acceptable alone must be a ground for condonation of delay, and flimsy, false and casual reasons cannot be taken for the purpose of condoning the huge delay.
13. Granted, 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.
14. For delay to be condoned, the reasons adduced must be properly pleaded, convincing and acceptable and explanation should be offered for condonation of the delay. Unless a proper explanation is offered, the courts will not exercise its discretion in the proper perspective to advance substantial justice.
15. The question here narrows to whether the delay in this case 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. The distinction between these two is significant in that it determines whether a party is liable for the delay.

16. 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.
17. 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.
18. 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. Also vital 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.
19. The main reason offered by the applicant is alleged mix-up or errors in preparing the notices of appeal. However, from 2015 to 2021, there is an un-explained period of about 6 years. It's not clear why it took so long for the applicants to detect the mistake. This suggests some degree of indolence.
20. Statutes of limitation are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, witnesses have disappeared or parties holding decrees assume that no appeals have been preferred. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them. The fundamental purpose of the statute of limitations is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims.
21. I have considered the reason offered for the delay. I am not satisfied that the applicant has demonstrated good grounds to merit the orders sought. In conclusion, I dismiss the applicant's application dated August 12, 2021. I make no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2022.**

**J MATIVO**

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

**Signed**

.....

**JUDGE OF APPEAL**

**DEPUTY REGISTRAR**

