



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Kimani (Civil Application Nai E049 of 2022)
[2022] KECA 1188 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1188 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION NAI E049 OF 2022
JM MATIVO, JA
OCTOBER 28, 2022**

BETWEEN

ANDREW KARIUKI NJOROGE APPLICANT

AND

PAUL JOHN KIMANI RESPONDENT

(An application for extension of time to file and serve the Memorandum of Appeal and Record of Appeal out of time in an intended appeal against the judgment and decree issued on 26th July 2018 in Environment and Land Court, Nairobi (Obanga J), against the judgment and decree of the Environment and Land Court at Nairobi in (Environment and Land Court Case No. 2020 of 2021.)

RULING

1. By an application dated February 22, 2022, the applicant prays for extension of time to file and serve the memorandum of appeal and the record of appeal against the judgment and decree rendered by the Environment and Land Court in ELC Case No 2020 of 2021, Nairobi delivered on July 26, 2018 (Eboso J). He also prays for such other orders as the court deems fit and for costs of the application to be provided for.
2. The grounds in support of the application are that:- (a) judgment was entered on July 26, 2018 and the applicant's then advocates applied for certified copies of proceedings and judgment vide a letter dated July 31, 2018; (b) even though the court registry states that the applicant's previous advocates were informed that the proceedings were ready for collection vide letters dated December 10, 2019 and October 22, 2020, the said advocates denied receiving the said communication; (c) the applicant's present advocates collected the proceedings on December 14, 2021; (d) a certificate of delay dated January 16, 2022 indicates that the previous advocates were informed via a phone on December 10, 2019 that the proceedings were ready for collection but it erroneously computed time from July 31, 2018 to December 10, 2019; (e) that the instant application was filed without delay.



3. The application is opposed. The respondent filed a replying affidavit dated April 22, 2022. The salient points are:- (a) that he filed an application to strike out the notice of appeal on 22nd Marcy 2019 on grounds that 7 months later the appeal had not been filed but his application was dismissed on grounds that the proceedings were not ready; (b) the proceedings were ready but the applicant's advocate refused to collect them; (c) if leave is granted, the applicant be ordered to deposit Kshs 3,000,000/= in court plus interests plus income and the matter be fixed for hearing on a priority basis; (d) and if the application is dismissed, the applicant be penalized.
4. The applicants counsel cited *Del Monte Kenya Limited v Patrick Njuguna Kariuki* [2015e KLR in support of the holding that the decision whether or not to grant leave is discretionary and that the delay in filing the appeal was occasioned by the inability to get the certified proceedings.
5. The respondent's submissions did not focus on whether or not the application meets the tests for granting leave. Instead, he essentially adduced evidence.
6. 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.
7. This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice. 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."
8. 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."



9. 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."

10. The main reason offered by the applicant is that the delay in obtaining certified copies of the proceedings and the judgment. 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.

11. In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefore, and the prospects of success. This list is not exhaustive and each case will depend on its peculiar facts and circumstances. In *National Union of Mineworkers v Council for Mineral Technology*[1998] ZALAC 22 at para 10, the court held: -

"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."

12. 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. Condonation cannot be had for the mereasking. An applicant is required to make out a case entitling him 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.

13. 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.

14. 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. I find and hold that the delay is excusable and that it has been satisfactorily explained. I also find that the application meets the tests for the court to exercise its discretion in the applicant's favour. Accordingly, I allow the applicant's application dated



February 22, 2022 and order that the intended appeal be filed and served within 30 days from the date of this ruling.

DATED AND DELIVERED AT NAIROBI THIS 28TH 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

