



Kaloki v Independent Electoral and Boundaries Commission & 2 others (Civil Application E080 of 2021) [2022] KECA 1185 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1185 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E080 OF 2021
F SICHALE, JA
OCTOBER 21, 2022**

BETWEEN

PHILIP KALOKI APPLICANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

JESSICA NDUKU MBALU 3RD RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal out of time against the judgment of Nyamweya, J (as she then was), dated 17th August 2020) IN (Nairobi High Court JR Misc Appl No. 592 of 2017)

RULING

1. Professor Philip Kaloki (the applicant herein), has vide a motion dated March 8, 2020, brought pursuant to the provisions of rule 4 of the Court of Appeal Rules sought the following orders;
 1. “That the appellant be given leave to file his notice of appeal out of time and the same together with the request for certified proceedings, judgment and resultant order in the Superior Court be deemed as duly filled within time.
 2. That costs of this application be in the cause.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant, who deposed inter alia that the matter was set for judgment on July 30, 2020, but the same was not delivered with the judgment being postponed a couple of times until August 17, 2020, when it was delivered by dispatching emails to the parties which was received by his advocates on August 21, 2020.



3. That on August 24, 2020, his advocates upon receipt of the email promptly applied in writing and copied to all the parties via email in tandem with the directives given by the superior court for certified copies of proceedings, judgment and resultant order, undertaking to pay the requisite charges and again on August 31, 2020, his advocates wrote to the court seeking a response, as no response was forthcoming from the court 14 days after delivery of the judgment and the very material deadline for filing the notice of appeal.
4. He further deposed that on August 31, 2020, his advocates received an email response, that they were now required to apply for the same through the rolled out e-filing system and not via email as per the earlier directives and that from the foregoing, it was clearly impossible to file the notice of appeal and request for certified proceedings, judgment and resultant order therein within the material time *i.e.* August 31, 2020, using the newly introduced mode.
5. There was no reply on part of the respondents and neither did they file submissions.
6. I have carefully considered the motion, the grounds thereof, the supporting affidavit and the law. The principles upon which this court exercises its discretion under rule 4 are firmly settled. The court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion, the court should do so judiciously.
7. In *Fakir Mohamed v Joseph Mugambi & 2 others* CA No NAI 332 of 2004, the court laid out some of the considerations to be taken into account by court in deciding applications of these nature as follows; the length of the delay, the causes of the delay, the possibility of the appeal succeeding and prejudice to be occasioned to the parties.
8. In the instant case, the impugned judgment was delivered on August 17, 2020. The applicant however contends that his advocates did not receive the same until August 21, 2020 whereas the instant application is said to be dated March 8, 2020, which is certainly erroneous as the application could not have been drafted before the impugned judgment was delivered on August 17, 2020.
9. Be that as it may and as regards reasons for the delay, I have looked at the annexures annexed to the motion and the email exchanges between the applicant and the court and indeed note that that the applicant had made attempts to file the notice of appeal within the prescribed period which was not possible owing to varying directives issued by the court from time to time which is certainly way beyond the applicant's control. Consequently, I am satisfied that the reasons given for the delay are plausible and the same have been explained to the satisfaction of this court.
10. As to whether the intended appeal has possible chances of succeeding, I am mindful of the fact that I cannot make a definitive finding on this issue sitting as a single judge lest I embarrass the bench that will be eventually seized of this matter and I will therefore make no further comments regarding the same.
11. Regarding prejudice, I am satisfied that the applicant will be prejudiced if the instant motion is not allowed as his right of appeal will be completely shut out. On the other hand, the respondents have not even opposed the motion.
12. Accordingly, the applicant's motion dated March 8, 2020, is merited and I accordingly allow the same in in terms of prayer 1 thereof. The applicant will further file and serve the record of appeal within 60 days from the date of this ruling failure to which these orders shall stand vacated.
13. The costs of the motion shall abide the outcome of the intended appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

F. SICHALE



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

