



REPUBLIC OF KENYA



**Kiarie v Mwaura (Civil Application E341 of 2020)
[2022] KECA 1147 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1147 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E341 OF 2020
JM MATIVO, JA
OCTOBER 21, 2022**

BETWEEN

DOMINIC NJUGUNA KIARIE APPLICANT

AND

DAMARIS MWIHAKI MWAURA RESPONDENT

(An application for extension of time to file a Notice of Appeal against the Ruling and Order of the Environment and Land Court at Nairobi (Hon. Justice K. Bor) in Milimani ELC No. 116 of 2007 (O.S.) dated/delivered on 2nd July 2020)

RULING

1. By a Notice of Motion dated 30th October 2022, the applicant prays for leave to file a Notice of Appeal out of time against the Ruling of Hon. Justice K. Bor delivered on 2nd February 200 in Milimani ELC case number 116 of 2007. He also prays for an order that he be at liberty to apply for further orders and or directions as this court may deem fit and just to grant. Lastly, he prays for the costs of the application to be provided for.
2. The application is premised on the grounds that the delay in filing the Notice of Appeal was occasioned by unavoidable circumstances including shut down of the Courts Registry during the Covid-19 pandemic and unavailability of the court file at the Court Registry. He states that upon tracing the file, there was a mix-up in the rulings delivered on the said date and it took a while for the Registry to sort out the files and after getting the ruling, he took a while to study and understand it because the learned judge only read the last part. He states that the reasons for delay were beyond his control, so the delay is excusable, that it was not deliberate nor was it meant to delay the Respondent from realizing the fruits of his judgment.



3. He states that he has an arguable appeal with high chances of success and if the orders sought are refused, the appeal will be defeated, and that he will suffer irreparable loss. Lastly, that states that he filed the application timeously.
4. The Respondent did not file any response despite being served.
5. 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. The right to appeal could be restricted, or lost by the provisions of such statute. The right of appeal could also be lost to a person either because of his/ her conduct.
6. The Supreme Court *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 as follows:-
 - 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."
7. In granting leave, the court has to balance the competing interests of the parties. (See *M/S Portreitz Maternity v James Karanga Kabia* Civil Appeal No. 63 of 1997). The applicant blames the delay to the challenges caused by the COVID- 19 pandemic and inability to access the court file. However, there is no single letter addressed to the court registry complaining about the alleged inability to access the court file. The ruling was delivered virtually on 2nd July 2020. Its common knowledge that by July 2020, virtual hearings and e-filing had already taken root. The applicant claims that when he ultimately got the court ruling, he needed time to study it. Nothing has been produced to show when he ultimately received the ruling. In short, the delay has not been successfully explained.
8. 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. 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. If courts are to condone delays not sufficiently explained, they will not only be diluting the law of limitation but unnecessarily encouraging



unacceptable lapses. Only acceptable reasons must be grounds for condonation of delay. Flimsy, false and casual reasons cannot be taken for the purpose of condoning a delay, no matter how short.

9. The foregoing being the factum, this court is of the opinion that the applicant has not set out any acceptable grounds for the purpose of condoning the delay. It will suffice to state that for condonation of delay, the reasons adduced must be properly pleaded, convincing and acceptable.
10. The other reason urged by the applicant is that he has an arguable appeal. The applicant did not annex the draft appeal. I am alive to the fact that an arguable appeal is not necessarily one that will succeed. I am also alive to the fact that I'm not required to delve into the merits at this stage. However, having perused the ruling, it is my view that the applicant has failed to satisfy the tests to merit the leave sought. Accordingly, I dismiss the application dated 30th October 2020 with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST 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

