



**Ahmed & another v Sketty & another (Civil Application
E086 of 2021) [2022] KECA 1086 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1086 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E086 OF 2021**

JW LESSIT, JA

OCTOBER 7, 2022

BETWEEN

OMAR SHARRIF AHMED 1ST APPLICANT

MOMBASA HOUSEWARES LIMITED 2ND APPLICANT

AND

MUNIR MOHMED SKETTY 1ST RESPONDENT

EQUITY BANK (K) LIMITED 2ND RESPONDENT

*(An application for extension of time to file and serve a notice and record of
appeal against the ruling of the High Court at Mombasa (J.N. Onyiego, J)
delivered on 31st August 2021 in High Court Succession Cause No. 24 of 1966)*

RULING

1. Before the Court is an application for extension of time dated 10th November 2021 brought under Article 159 (2) (d) of the Constitution of Kenya, 2010, Section 3, 3A & 3B of the Appellate Jurisdiction Act and Rule 4, 42[now Rule 44 of the Court of Appeal Rules] and 75 [now 77] of the Court of Appeal Rules seeking orders as follows:
 - i. Moot
 - ii. That this honourable Court be pleased to grant an order for extension of time to file a Notice of Appeal against the ruling of Hon. J.N. Onyiego, J delivered on August 31, 2021 in Mombasa High Court Succession Cause Number 24 of 1966.
 - iii. That the Notice of Appeal dated November 8, 2021 be deemed as properly filed.
2. The application is founded on grounds on the face of the Motion and in the affidavit sworn by the 1st applicant dated November 10, 2021 and summarised in the applicant's written submissions by counsel



for the applicants. Principally the applicants ground their application on the fact the impugned ruling was issued without notice to the applicants; the delay in filing the notice of appeal was inadvertent and excusable; that the applicants are desirous of appealing against the impugned ruling; and, that the application has been made without unreasonable delay.

3. The application was called out for virtual hearing on the 13th June 2022. Learned counsel Mr. Origi for the applicants was the only advocate who appeared for the hearing. Learned counsel Mr. Miller for the respondents did not appear though served with the hearing notice on the May 16, 2022 by way of the firms email address. The 1st respondents did however file a replying affidavit sworn by him dated December 3, 2021 and written submissions dated December 30, 2021.
4. In an application for extension of time, the principles which apply were enunciated in various cases including in the cases of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2E A 231; *Fakir Mohamed vs. Joseph Mugambi & 2 Others*; [2005] eKLR; *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR; *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR and *Athuman Nusura Juma vs. Afwa Mohamed Ramathan* CA No. 227 of 2015. The guiding principles were restated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (M.K. Ibrahim & S.C. Wanjala SCJJ) as follows:
 - “(1) 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.
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the respondent of the extension is granted.
 6. Whether the application has been brought without undue delay; and
 7. Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
5. The applicants have the burden to explain the reason for the delay in filing the Notice of Appeal to the satisfaction of the Court. The applicants’ case is that the 1st applicant filed an application for revocation of grant of administration which was heard and scheduled for ruling on the March 1, 2021. The ruling was not delivered as scheduled but was delivered on August 31, 2021 without notice to the applicants. Further the applicants lament that the impugned ruling was delivered during the court’s vacation. The grounds further stated that the lack of notice notwithstanding, the record reflects that the ruling was delivered in the presence of counsel for the 1st respondent. That by the time the applicants discovered the ruling and its contents, the time for filing the notice of appeal had long lapsed. Hence, it was argued that the delay in filing the notice of appeal was inadvertent and excusable since the applicants were never notified of the date of the delivery of the ruling and only became aware of the ruling and its import when the 1st respondent visited Plot No. 1004/MN/III, the suit property, to claim ownership thereof.



6. It was further argued that the applicant's intended appeal as per the draft memorandum of appeal is arguable and raises grave legal issues that ought to be given a chance to be ventilated in the intended appeal, in that the learned judge erred in law when he went beyond the scope of the application before him by pronouncing himself on the validity of the title to the suit property. The applicants have argued that they will be greatly prejudiced if this application were not allowed as they stand to be evicted from the seat of justice through no fault of their own and without being heard, thereby infringing upon their right to be heard and to access justice.
7. The applicants relied on the decision in *Imperial Bank Limited (In receivership) & another v. Alnasir Popat & 18 Others* (2018) eKLR where this Court held that;

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal.
8. The application for extension of time was opposed. In the 1st respondent's replying affidavit and written submissions it is contended that the delay of three months is inordinate since the 1st respondent has already applied and executed the ruling sought to be appealed from. Having examined the grounds of appeal, the 1st respondent further contended that the applicants have no chance of success in their intended appeal since the salient question determined in the High Court was on whether a person can deal with deceased's property without first obtaining grant of letters of administration.
9. The 1st respondent's contention is that the impugned ruling has already been executed as the suit property has already been registered at the lands registry. Therefore, the applicants shall suffer no prejudice because the ruling sought to be overturned as already been executed and the 1st respondent shall suffer prejudice if the application is allowed since he has already enjoyed the fruits of his litigation.
10. The position of this Court is that it has unfettered discretion under Rule 4 of the Rules so long as the applicant has given sufficient cause to satisfy it. There is no limit to the number of factors the Court could consider so long as they are relevant. The court has to consider the period of delay, the reasons for the delay, the degree of prejudice to the respondent, and the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties are all relevant but not exhaustive factors.
11. That said, this Court is also cautious of the parameters of considering the arguability of an intended appeal by a single judge set out in *Imperial Bank Limited (In Receivership) & another v Alnasir Popat & 18 others* [2018] eKLR which further reiterated *Athuman Nusura Juma v. Afwa Mohamed Ramadhan*, CA No 227 of 2015, which stated thus;

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its



decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

12. If this Court is to exercise its discretion in favour of a party, the party is obligated to place before it some material to justify exercise of discretion. Indeed the exercise of the court's discretion which is generally unfettered must be grounded on reason and cannot be exercised on a whim, caprice, or sympathy. What commends to this Court for consideration is whether the grounds urged by the applicants that the impugned ruling was delivered six months after the day initially scheduled for delivery, and without notice to the applicants within the legal timeframes is a valid reason for extending time to lodge the intended appeal.
13. The respondents have not contested the applicants' contention that they had no notice that the impugned ruling was coming up for ruling on the date of its delivery. It did not escape my attention that the 1st respondent's counsel was recorded as being present in court at the date the ruling was delivered. However, he did not notify his opponent's counsel of the date of ruling, either before or after the said date. In the circumstances, I agree with the applicants that the delay in filing the Notice of Appeal was excusable and reason advanced by them was reasonable and acceptable. I find that the applicants were not to blame for the delay.
14. In the result, I find merit in the applicants' application. Consequently,
 - a. I do allow the application dated 10th November 2021 in terms of order 2 thereof.
 - b. I order further that the applicants should file the Notice of Appeal within 21 days of the date of this ruling and serve it within 7 days of filing.
 - c. The applicants will have the costs of this application.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER, 2022.

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

