



REPUBLIC OF KENYA



KENYA LAW
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**Gacheca v Ndung'u & another (Civil Appeal (Application)
E395 of 2022) [2022] KECA 1232 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1232 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E395 OF 2022
PM GACHOKA, JA
NOVEMBER 4, 2022**

BETWEEN

JOSEPH KIMANI GACHECA APPELLANT

AND

CHARLES NGIGI NDUNG'U 1ST RESPONDENT

FRANCIS MAINA NJONJO 2ND RESPONDENT

(Being an application for extension of time to file record of appeal out of time from the judgment and decree of the Environment and Land Court at Thika (B. M. Eboso, J.) delivered on 25th March 2022 in Environment and Land Court Case No. 21 OF 2020)

RULING

1. This dispute relates to parcel of land LR No Ruiru Kiu Block 2 Githunguri/4970 (though in the plaint it was described as Ruiru Kiu Block 2/4970. The dispute started in the Magistrate's Court in SPMCC MCLE 118/2019. The judgment of the magistrate was overturned in the High Court (B M Eboso, J) on March 25, 2022 triggering this application.
2. The applicant aggrieved by the judgment of the Environment and Land Court, filed a notice of appeal dated March 30, 2022 on March 31, 2022 which was within the time prescribed by rules 75 of the [Court of appeal Rules](#). The applicant admits that it did not serve the notice of appeal within time as it served the notice of appeal on the respondents on April 14, 2022.
3. The applicant filed the record of appeal on June 29, 2022 which was outside the statutory timelines. The applicant seeks the following orders:
 - (i)



- (ii) That the honourable court do extend time for filing record of appeal against judgment and decree of Honourable Justice B M Eboso in Thika Environment and Land Court, appeal Case No 21 of 2020 dated March 25, 2022 and consequently the record of appeal filed on the June 29, 2022 be deemed to have been properly filed.
4. Rule 4 of the [Court Of Appeal Rules](#) which gives the court discretion to extend time has been subject of many legal battles and the principles applicable are now well settled. In this application, the parties are walking on a well-trodden path, so to speak.
 5. The discretion to extend time is given to a single Judge in the first instance and is wide and unfettered. However, one has to keep in mind always, that when discretion is given to a Judge, it has to be exercised judiciously and upon reasons rather than arbitrarily or capriciously.
 6. The principles that guide the exercise of jurisdiction under the rule 4 of the [Court of Appeal Rules](#) are now well settled by numerous enunciations in case law both binding and persuasive, some of which are [Leo Sila Mutiso v Rose Hellen Wangari Mwangi \[1999\] 2E A 231](#), [Fakir Mohamed v Joseph Mugambi & 2 Others; \[2005\] eKLR](#); [Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees \[2020\] eKLR](#); [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet \[2018\] eKLR](#) and [Athuman Nusura Juma v Afwa Mohamed Ramathan CA No 227 of 2015](#).
 7. The principles distilled from the above case law may be enumerated *inter alia* as follows:
 - i. The mandate under rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
 - ii. Orders under rule 4 of the [Court of appeal Rules](#) should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the courts indulgence or that the court is otherwise satisfied beyond para-adventure, that the intended appeal is not an arguable one.
 - iii. The discretion under rule 4 of the [Court of Appeal Rules](#) must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see [Githere v Ndiriri](#).
 - iv. As the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant to the issues falling for consideration before the court.
 - v. The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.
 - vi. 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 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;



- vii. Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word “possibly”;
 - viii. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.
 - (xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.
8. It is instructive to note that the rules do not set the number of days that would be considered as inordinate, and each case will be determined on its own facts as held in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR* in which this court stated thus:
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
9. Turning to the application and applying the above principles, the following facts as deponed by the applicant are as follows:
- i. The judgment of the court was delivered on March 25, 2022.
 - ii. The applicant lodged the notice of appeal on March 31, 2022 and served it on the respondent on April 14, 2022.
 - iii. The applicant applied for typed proceedings on March 28, 2022 and they were availed to him on June 22, 2022.
 - iv. The certificate of delay was availed to him on June 29, 2022 and on the same date, they lodged the record of appeal.
- They state that the letter requesting for proceedings was served on the respondent and it is duly stamped by their advocate.
10. In opposing to the application, the respondent has filed written submissions dated September 7, 2022. The 1st respondent submits that; the letter requesting for proceedings was not served on them and therefore the provisions of rules 82 (2) is not available to the applicant; a letter bespeaking the typed proceedings was served on the July 14, 2022, 13 days after the same was filed in court; no prejudice will be caused to the applicant if the application is dismissed and the appeal has little chances of success; the order of the court was that the suit be heard afresh and therefore, the appeal will not resolve all the issues.
11. I have carefully considered the application, the rival affidavits, and the written submissions by the parties. The question that I need to answer is has the applicant established good grounds or reasons for exercise of discretion to extend time? As already stated, rule 4 does not set out the principles that a judge should consider when exercising the discretion to extend or refuse to extend time. The courts have over the years developed the guiding principles to enable a judge to exercise the discretion in a judicious manner. No case is on all fours with another, and each will be determined on its own circumstances.



12. I note that the applicant lodged the notice of appeal on March 31, 2022, just five days after the delivery of the judgment. There was a delay of seven days before service of the notice of appeal on the respondents. Though I do not agree with or condone the delay, the applicant has been diligent in its desire to pursue the appeal.
13. As regards the chances of the intended appeal, it is not my role to pronounce on the merits of the appeal and I leave that to the bench that will hear and determine the appeal. As this court held in *Athuman Nusura Juma v Afwa Mohamed Ramadhan CA No 227 of 2015*:

“This court has been careful to ensure that whether the intended appeal has merits or not it 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”

I have looked at the memorandum of appeal and I can only say that possibly, it may succeed and no more.
14. On the issue of prejudice, that will be caused if I extend time, I am called upon to balance the comforting interests of the parties. In this case the applicant is praying for the record of appeal that is already filed to be admitted out of time and the cause of the delay is well explained I think it will be wrong to lock out the applicant since is a plausible explanation for the delay.
15. On the question whether the applicant could rely on rule 82(2) on computation of time, I note that the respondents allege that the letter requesting the proceedings was not served on them. The respondents have not filed a replying affidavit and have only raised this issue in their submissions. As already noted, the applicant wrote several letters to the deputy registrar of the court, requesting for proceedings. Those letters are copied to the respondents and therefore the applicant is well entitled to rely on rule 82(1) of the *Court of Appeal Rules*. The letter bespeaking the typed proceedings was served on the July 14, 2022, 13 days after the same was filed in court. I do not consider that delay inordinate as it is evidenced from the letters to the deputy registrar.
16. The applicant is seeking for a chance to argue the appeal whereas the respondent is desirous of the case being heard afresh in the Magistrate’s Court as ordered by the High Court. Whereas I agree with the respondent that there will be a lot of time wasted in the event the appeal fails, the parties will have the chance to go for the hearing in the magistrate’s court.
17. So in the delicate act of balancing the interests of the parties, I hold that no prejudice will be suffered by the respondents. If the applicants were to fail in the appeal, it will learn that, whereas the mill of justice grinds slowly, when it does, it grinds finely as losing the appeal may have consequences in terms of costs.
18. In view of the foregoing, I am satisfied that the applicant has met the parameters for exercise of my discretion. Accordingly, I allow the notice of motion dated June 30, 2022 with no orders as to costs.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.

M GACHOKA, CIArb, FCIArb

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Judge of appeal

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

Signed



DEPUTY REGISTRAR

