



**Mutegi (Suing on behalf of the estate of the late Julliet Kangai Mutegi) v Warshow & 2 others
(Civil Appeal (Application) E488 of 2021) [2022] KECA 1227 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1227 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E488 OF 2021
PM GACHOKA, JA
NOVEMBER 4, 2022**

BETWEEN

**PRISCILLA CIAMWARI MUTEGI (SUING ON BEHALF OF THE ESTATE OF
THE LATE JULLIET KANGAI MUTEGI) APPELLANT**

AND

M. M. WARSHOW 1ST RESPONDENT

EDWIN MOGERA 2ND RESPONDENT

AGA KHAN UNIVERSITY HOSPITAL 3RD RESPONDENT

*(Being an application for extension of time to file a record of appeal out of time
against the ruling of the High Court of Kenya at Nairobi (Msagha Mboghli,
J.) delivered on 27th May 2021 in Misc. Civil Application No. E565 of 2020)*

RULING

1. Before me is a notice of motion dated March 30, 2022 which is expressed to be brought under Rules 4, 42, and 47 of the [Court of Appeal Rules, 2010](#), sections 3A and 3B of the [Appellate Jurisdiction Act](#), articles 48, 50(1) of the [Constitution](#) of Kenya and all enabling provisions. The applicant seeks the following orders:
 - a)
 - b) That this honorable court be pleased to enlarge time of filing the Record of Appeal out of time.
 - c) That this honourable court be pleased to find that the Record of Appeal filed on August 27, 2021, be deemed to be properly filed and on record.



- b) That this honourable court be pleased to issue any other orders, writs, and directions the honourable court considers appropriate and just to grant in the interest of justice.
2. In support of the application, the applicant has filed a supporting affidavit sworn on 30th March 2022. In the affidavit, she depones that: application for certified copies of proceedings, ruling and order were made on May 28, 2021; the court supplied certified copies on 10th August 2021; the record of appeal was filed on August 27, 2021; that there was a delay of 30 days before the filing of the record of appeal; the 30 days delay is not inordinate and it is explained by the time it took to process the certificate of delay; and it is in the interest of justice that the extension of time be granted.
 3. In opposition to the application, the 1st respondent has filed an affidavit sworn on April 8, 2022, where she depones that: the applicant has deliberately failed to disclose that there is a pending application to strike out the record of appeal dated August 21, 2021; the application to strike out the record of appeal was served on September 22, 2021; the proceedings in the Magistrate's Court have been at a standstill since September 13, 2021 and the supplementary record of appeal was served on March 22, 2022.
 4. In regard to the certificate of delay, the 1st respondent states that; the application for proceedings was made on May 28, 2021 but paragraph 1 of the certificate of delay states that, the application for delay was not lodged in the high court until June 30, 2021; the allegation that this was within 30 days of the ruling is incorrect as the ruling was delivered on May 27, 2021; the certificates of delay state that the applicant's advocate was informed that the proceedings were ready for collection on July 7, 2021 but fees was paid on August 4, 2021 and; the proceedings collected on August 12, 2021.
 5. The 1st respondent further states that the applicant has been aware that the appeal had been filed out of time since September 1, 2021 when the 1st respondent's advocate served the applicant's advocate with the application to strike out the record of appeal; that the applicant's advocate dismissed the warning that the appeal had been filed out of time by an email dated September 17, 2021 and the present application for extension of time has been filed after delay of 7 months.
 6. The 2nd and 3rd respondents filed grounds of opposition and written submissions both dated June 27, 2022. They state that, this application is meant: to divert the court's attention from the application for striking out, dated September 20, 2021; no proper explanation for the delay has been given; the delay is inordinate and not excusable; the intended appeal has no merit; the letter requesting for proceedings was not served on them until July 27, 2021 and the application for extension of time was filed 7 months late.
 7. With that background, I now consider whether the applicant has met the conditions for exercise of the discretion to extend time or not. The parties are walking a well-trodden path as this court has laid out the principles that are applicable in an application for extension of time. These principles act like a compass for guiding the parties and a party can only blame itself if it gets lost when walking in this well-trodden path. Many legal battles have been fought in the arena of Rule 4 and well settled principles that guide the court in exercise of the discretion to extend time have emerged over the years.
 8. The court has pronounced itself on this issue as follows: the discretion to extend time is given to a single judge in the first instance; The discretion is wide and unfettered; the discretion has to be exercised judiciously; and upon reasons rather than arbitrarily, capriciously or on sentimental grounds. ([Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others](#) [2013] eKLR (C.A No. 14 of 2013).
 9. Bearing these principles in mind, I have considered the notice of motion, the rival affidavits, the documents, and the written submissions by the parties.



10. At this point, it is necessary to set out the principles that this court has developed over the years. In the celebrated case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997, this court said as follows on the question of discretion:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

11. The issues that a court should consider in the exercise of discretion to extend time are both discretionary and not exhaustive as this court held in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR where the court pronounced itself as follows:

“The exercise of this court’s discretion under Rule 4 has followed a well-beaten... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors.”

12. The same was reiterated in the case of *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* – Civil Application No. 190 of 2019 in the following terms:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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.”

13. 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.”

14. I have considered the application, supporting affidavit, the documents, the 1st respondent’s replying affidavit, the 2nd and 3rd respondents’ ground of opposition and the written submissions as well as the law.



15. On the issue of the delay, one glaring issue that the applicant has failed to address is why it took them over 6 months to file this application for extension of time. I note that a warning shot was fired by the 1st respondent's advocate on September 1, 2021 through an email that states as follows:

“We acknowledge receipt of your email of the August 27, 2021 serving on us the record of appeal that you have filed in the Court of Appeal.

The Ruling appealed from was delivered on the May 27, 2021. Under the provisions to rule 82(1) of the *Court of Appeal Rules*, an application for the proceedings was to be filed and served on the other parties within 30 days of the ruling if you are to take advantage of the time taken to prepare the proceedings. Therefore, any application for the proceedings should have been served on us by the June 27, 2021. While your application for proceedings is dated the May 28, 2021. This was not sent to us until the July 7, 2021 and therefore you cannot rely on the provisions to Rule 82(1) to extend the time for filing the appeal. In any event you have not included a certificate of delay in your record.

You filed your notice of appeal on the May 28, 2021. The record of appeal should have been filed within 60 days i.e by the July 27, 2021. It appears that you filed the appeal on the August 27, 2021 which is the same day on which you served us. It would therefore appear that your appeal is one month out of time. We should be grateful for your comments.”

16. Rather than take heed and take corrective initiatives, the applicant's advocate through an email dated September 17, 2017 responded as follows:

“Hi.

I don't need this kind of emails. Kindly act for your client.

Kind regards.

Kiama Wangai.”

17. I note that a much louder warning shot was fired in the air on September 21, 2021, when the 1st respondent filed an application to strike out the record of appeal. The applicant took another 7 months before filing the application for extension of time. The least one would expect is an explanation for such a delay. I note that no such an explanation has been given.
18. Turning to the delay in filing the record of appeal, it is striking that the dates given by the applicant contradict the dates in the certificate of delay. The applicant has deliberately or unknowingly created confusion on the issue of the delay in the filing of the records of appeal. The certificate of delay, which is a record of the court, has different dates than those given by the applicant. I agree with the advocate for the 1st respondent that, certificate of delay only explains the delay from the lodgment of the request for proceedings on June 30, 2021 until July 7, 2021 when the proceedings were ready for collection, that is 8 days. The notice of appeal was filed on 25th May 2021 and 68 days takes us to August 4, 2021. The record of appeal was not filed until August 27, 2021, a delay of 23 days which is not explained.
19. It is now clear that, I have before me an applicant who has not explained the delay in filing of the record of appeal and the delay of 7 months before filing the application for extension of time. An applicant approaching a court for exercise of discretion must explain the delay irrespective of the number of days. The applicant's only statement is that she verily believes on the advice of her advocates that the delay is not inordinate. It is not her belief that counts, but the explanation for the delay. The discretion to extend time is not an act of mercy or sympathy. An applicant must explain the reason for the delay to



trigger the exercise of the discretion in their favour. In this case the applicant has not given any plausible reason for the delay. Further, the applicant has not rebutted the statement by 2nd and 3rd respondents that they were not served with the letter requesting for proceedings. I need not say any more on the delay.

20. On the issue of the chances of the intended appeal, I need not say much as this is an issue that is best left to the bench that will hear the appeal. [See [Athuman Nusura Juma v Afwa Mohamed Ramadhan](#) CA No. 227 of 2015]
21. As regards the question of prejudice to the respondents, I note that the dispute in this matter is still pending in the magistrate's court and is an issue that was considered in the high court. It is my considered view that the delay by the applicant is detrimental to the respondents' right to a quick and expeditious disposal of the hearing.
22. By now, it is clear that this application is heading in only one direction: that the applicant has failed to meet the parameters set out in the various decisions of this court that would enable me to exercise the discretion to extend time in her favour. In view of the foregoing, I decline to exercise my discretion in favour of the applicant to extend time. The application is dismissed with costs to the respondents.

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

