



REPUBLIC OF KENYA



KENYA LAW
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**Muli v Kanyi (Civil Application 394 of 2019)
[2022] KECA 1407 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1407 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 394 OF 2019
PM GACHOKA, JA
DECEMBER 16, 2022**

BETWEEN

REUBEN MUSYOKI MULI APPLICANT

AND

PETER MUTUA KANYI RESPONDENT

(Being an application for extension of time to file and serve a notice and record of appeal out of time against the ruling of the High Court of Kenya at Nairobi (O.A. Angote J.) delivered on 5th April 2019 in Environment and Land Court Case No.350 of 2017)

RULING

1. Before me is a notice of motion dated December 17, 2019, which is expressed to be brought under rules 4, 5(1), (2) (b) of the [Court of Appeal Rules](#) and all enabling provisions. The applicant seeks the following orders:
 - a)
 - b) That leave be granted to the applicant to file and serve the notice and record of appeal out of time.
 - c)
2. In support of the application, the applicant has filed a supporting affidavit sworn on December 17, 2019. In the affidavit, he depones: that the judgment was delivered on April 5, 2019; that the notice of appeal was filed on April 12, 2019 and it was served on the respondent on April 16, 2019; that he applied for certified proceedings on April 25, 2019 and served the letter on the advocates for the respondent on the same day.
3. Further grounds relied on were that the certified proceedings and judgment were supplied after the period for filing the appeal had lapsed; that since the delivery of the judgment, he had faced financial



difficulties in paying the advocates, for them to prepare the record of appeal; that the failure of the proceedings and judgment to be certified within time ought not to be visited upon him; and that it is in the interest of justice that the extension of time be granted.

4. From the record, there is no replying affidavit or submissions by the respondent, in opposition to the application. The application was fixed for hearing on December 5, 2022, and the parties were served through email on November 29, 2022. The parties were advised that, the application would be heard by way of written submissions and no appearance by counsel in court or through video link was required. The parties were directed to file their written submissions within three days of service.
5. I note that the applicant filed his submissions on December 1, 2022. On its part, the respondent sent an email on November 29, 2022, indicating that they had not been served with the application to enable them seek instructions and file a response. The said email was not copied to the applicant. If the respondent's advocate was not served, the least he would have done is to copy the email to the applicant's advocate. The application is thus not opposed. That position notwithstanding, I am obligated in law to give a merit determination.
6. With that background, I now move to consider whether the applicant has met the conditions for exercise of the discretion to extend time or not. The parties are walking on a well-trodden path as this court has laid out the principles that are applicable in an application for extension of time.
7. These principles act like a compass for guiding the parties, and they can only blame themselves if they got 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: that the discretion to extend time is given to a single judge in the first instance; the discretion is wide and unfettered; and that the discretion has to be exercised judiciously and upon reasons rather than arbitrarily, capriciously or on sentimental grounds. (*Julius Kamau Kithaka vs Waruguru Kithaka Nyaga & 2 others* [2013] eKLR (CA No 14 of 2013).
9. At this point, it is necessary to set out the principles that this court has developed over the years. In the oft quoted case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* - Civil Application No {{abbr{title Nairobi}} 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.”
10. The issues that a court should consider in the exercise of discretion to extend time are equitable reliefs. They are both discretionary and not exhaustive as this court held in *Fakir Mohamed vs 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.”

11. The same was reiterated in the case of *Muringa Company Limited vs 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.”

12. The rules do not set the number of days that would be considered as inordinate, and each case will be determined on its facts as held in the case of *Andrew Kiplagat Chemaringo vs 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.”

13. Bearing these principles in mind, it is old hat that the court must engage in a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. I have considered the application, supporting affidavit, the documents and the written submissions as well as the law and the question I have to answer is whether the application for extension of time is merited.

14. The line of authorities that I have cited, clearly illustrate that an applicant who prays for the discretion of the court to be exercised in its favour must give reasons for the delay. But what the applicant placed before me in the affidavit in support of the application falls short of information as it only explains the filing of the notice of appeal and writing a letter applying for proceedings. There is no statement at all as to whether the applicant has received the proceedings. There is a statement that the applicant is facing financial difficulties and thus, could not instruct his lawyers on time but that bare statement ends there.

15. In the written submissions, the applicant states as follows; the notice of motion for extension of time was filed on December 18, 2019. The applicant ought to have filed his record of appeal by June 12, 2019 thus the delay in filing the application for extension of time was 6 months which is explained by the failure to be supplied with certified copies of proceedings and financial constraints as deponed to in paragraph 7 of the supporting affidavit of the applicant.

16. It is noteworthy that, the applicant has not stated when it received the proceedings. This is important as it would enable one to compute time as provided in rule 84 of the *Rules* of this court. In the absence of a certificate of delay, and a cogent explanation as to why there is a delay of six months, I am not in a position to know whether the delay of 6 months is reasonable or not in the circumstances of this application. The applicant has therefore failed to bring himself, within the ambit of rule 4 which inaction, renders his application fatal.



17. I have before me, an applicant who is approaching the court in a casual manner and who has failed to explain why I should exercise the discretion to extend time in his favour. The rules of the court are meant to achieve timely and orderly commencement, progress and proper determination of litigation of proceedings and the lackluster manner in which the instant application has been brought, does not assist the applicant's case.
18. 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 guide me in exercising the discretion to extend time in his favour, hence undeserving of the court's discretion. In the result, I decline to exercise my discretion in favour of the applicant to extend time. The application is dismissed with no orders on costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 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

