



**Chief of the Kenya Defence Forces & another v Taiti & 9 others (Civil Application  
Nai E193 of 2022) [2022] KECA 1357 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1357 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION NAI E193 OF 2022  
HM OKWENGU, JA  
DECEMBER 2, 2022**

**BETWEEN**

**CHIEF OF THE KENYA DEFENCE FORCES ..... 1<sup>ST</sup> APPLICANT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PRESTON KARIUKI TAITI ..... 1<sup>ST</sup> RESPONDENT  
CHARLES KAGO KIBIKU ..... 2<sup>ND</sup> RESPONDENT  
AGEYO MUTHENGI GITURANTHI ..... 3<sup>RD</sup> RESPONDENT  
FRANCIS MURIIRA WALUKENYA ..... 4<sup>TH</sup> RESPONDENT  
PAUL MWANGI KURU ..... 5<sup>TH</sup> RESPONDENT  
WILFRED WAITIKI GAKURE ..... 6<sup>TH</sup> RESPONDENT  
STEPHEN CHARO KOI ..... 7<sup>TH</sup> RESPONDENT  
FRANCIS GAKONGO NTWIKI ..... 8<sup>TH</sup> RESPONDENT  
STEVE BIRGEN ..... 9<sup>TH</sup> RESPONDENT  
MATHEW NTHIGA NYAGA ..... 10<sup>TH</sup> RESPONDENT**

*(Being an application for extension of time to file a notice of appeal in  
the intended appeal from the judgment of the High Court (W. Korir,  
J) delivered on 22nd September 2021 in Petition No. 240 of 2014)*



## RULING

1. By a notice of motion dated June 6, 2022 said to be brought under rules 4 and 5 of the *Court of Appeal Rules* of procedure, and section 2 and 3A of the *Civil Procedure Act*, order 51 of the *Civil Procedure Rules*, the applicants seek orders that leave be granted for them to file a notice of appeal and the intended appeal out of time, and that the annexed notice of appeal be deemed to have been properly filed.
2. The application is supported by an affidavit sworn by LA Goro (Goro), a legal officer at the Kenya Defence Forces, in which she depones that the applicants are dissatisfied with the judgment of the High Court issued in favour of the respondents who are former serving officers of the Kenya Airforce, who had filed a petition claiming that their constitutional rights had been violated during the course of their employment.
3. The applicants intend to appeal the judgment and have annexed a memorandum of appeal in which they fault the judgment on five grounds. Goro deposes that the applicants were never informed of the date for delivery of judgement, and that it was only after unsuccessfully following up the issue of judgment, that their advocates discovered that the judgment had in fact been delivered virtually on September 22, 2021. Consequently, they requested for copies of typed proceedings and followed up with the current application. Goro explains that the delay in filing the appeal is not due to any fault on the part of the applicant, but is attributable to the superior court's failure to serve them with the judgment notice.
4. The applicants have also filed written submissions in which they urge the court to exercise its discretion in their favour as the delay was inadvertent. They urge that they have an arguable appeal as the learned judge erred, in finding without the benefit of any medical evidence, that the respondents were tortured. The applicants further urge that the respondents will not be prejudiced by the granting of their application.
5. The application is opposed through a replying affidavit sworn by Mr Mbogo Mureithi (Mureithi), who is the advocate for the respondents. Mureithi dismissed as untrue and misleading, the applicants' contention that they were not aware of the delivery of the judgment. He maintained that the court served judgment notices through a short text message (SMS), notifying parties of the date of the delivery of the judgment as September 22, 2021. Mr Mureithi further deposed that his assistant, one Leah Gikonyo who held his brief during the delivery of the judgment, informed him that at the virtual delivery of the judgment on September 22, 2021, the applicants were duly represented by counsel, one Ms Muindi who appeared for the Attorney General. Mr Mureithi relied on a certified copy of the proceedings indicating the representation of the applicants on the date of delivery of the judgment. He maintained that the applicants brought their application for extension of time after an undue delay of 9 months, which delay has not been explained, and that it is unfair for the applicants to purport to blame the court for their own indolence, inaction, and dereliction of professional duty.
6. The respondents also filed written submissions in which they contest the factual basis of the application and assert that the court had served the parties with a notice of delivery of judgment. They submit that the denial of notice of delivery of judgment is a hollow and deliberate sharp practice by the applicants. They cite this court's decision in *Principal Secretary Ministry of Defence & anor vs Dorothy Kanyua Mbaka & anor* [2016] eKLR for the proposition that extension of time is an equitable remedy and the general conduct of parties, including lack of candour or any inequitable conduct, is more likely to disentitle an applicant.



7. The respondents pointed out that even if it was to be accepted that the applicants were not aware of the date of delivery of the judgment, the applicants have not explained why it took four (4) months from the date they became aware of the judgment to the date they filed the application for extension of time. The court was urged to dismiss the application and allow the respondents to access the fruits of their judgment.
8. I have carefully considered this application, the submissions, and the authorities cited. Under rule 4 of the *Court of Appeal Rules*, this court has discretion to extend time for the doing of any act under the Rules. However, such discretion must be exercised judicially and not capriciously or out of sympathy. This has been laid out in many decisions of this court including *Leo Sila Mutiso vs Hellen Wangari Mwangi* [1999] 2EA 231, and *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR.
9. It is not disputed that the judgment, subject of the intended appeal, was delivered on September 22, 2021, and that the notice of appeal prepared by the applicant on June 6, 2022, was way out of time. The applicants have explained that they were not aware of the delivery of the judgment date. However, the certified copy of proceedings of the High Court produced by the respondents indicate clearly that on the September 22, 2021, when the judgment was delivered, whereas Ms Gikonyo was holding brief for Mr Mbugua Mureithi for the petitioners (respondents herein), Ms Muindi appeared for the Attorney General. The applicants did not file any response to the replying affidavit, denying this fact. Therefore, the explanation that they were not aware of the delivery of the judgment is not plausible.
10. Secondly, the applicants have not given any explanation as to why it took them several months to seek extension of time from the time they admit knowledge of the judgment. At paragraph 7 of her affidavit, Goro depones as follows in this regards:
 

“That the judgment was not forthcoming an issue that prompted counsel for the applicants to do an inquiry and when she searched the Kenya Law Reports on February 7, 2021, she discovered that the judgment had been delivered virtually on September 22, 2021”.
11. As judgment was delivered on September 22, 2021, we take it that February 7, 2021 is a typographical error, and that the discovery was made on February 7, 2022. However, the applicants’ motion was not brought until June 6, 2022. The applicants have not offered any explanation for the delay in filing the application. As stated by J Mohammed, JA in George *Kagima Kariuki & 2 Others vs George M Gichimu & 2 others* [2014] eKLR (cited by the applicants):
 

“The principles guiding the court on an application for extension of time premised upon rule 4 of the Rules, are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour.”
12. As was stated in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others* (supra), 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, and the party who seeks for extension of time has the burden of laying a basis to the satisfaction of the of the court.
13. In this case, the applicants have not laid any basis to justify the exercise of this court’s discretion in their favour. In the circumstances, the application is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2022.**



HANNAH OKWENGU

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

