



REPUBLIC OF KENYA



KENYA LAW
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**Kigotho v Chege (Civil Application 11 of 2020)
[2021] KECA 4 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 4 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 11 OF 2020
KI LAIBUTA, JA
SEPTEMBER 23, 2021**

BETWEEN

SAMUEL CHEGE KIGOTHO APPLICANT

AND

HORTENSIA WANJIKU CHEGE RESPONDENT

(Being an application for extension of time to file an appeal out of time, from the Judgment of Justice S. Munyao, dated 31st July, 2019 in Nakuru Environment and Land Court Case No. 329 of 2012)

RULING

Background

1. Before me is a Notice of Motion dated 3rd February 2020 made under Rule 4 of the [Court of Appeal Rules](#) in which the Applicant, Samwel Chege Kigotho, seeks –
 - (a) extension of time pursuant to Rule 4 to file an appeal out of time; and
 - (b) orders that the Notice of Appeal dated 3rd February 2020 together with the letter dated 3rd February 2020 requesting for typed proceedings filed and served upon the respondent be deemed as properly filed and served.
2. The application is made on 20 grounds set out on the face of the Motion, which seek to explain the reason for the delay in filing his appeal, but which I need not recite. A summary thereof would suffice to guide the exercise of my discretion in determination of the application. Briefly stated, the grounds are that –
 - (a) the Applicant was incapacitated by mental illness that rendered him incapable of instructing his counsel;



- (b) counsel for the Applicant did not take appropriate action to apply for the proceedings, institute and file the intended appeal within the statutory period;
 - (c) the Notice of Appeal previously filed on 6th August 2019 was withdrawn by order of this Court on 30th January 2020 for want of compliance with Rule 82(1) and (2) of the Court of Appeal Rules;
 - (d) the Respondent would not suffer any prejudice if this application is allowed;
 - (e) the Applicant has an arguable appeal and he would be unfairly prejudiced if he is shut out of court and denied the right of appeal; and
 - (f) if the Applicant is not granted the orders sought, he stands to suffer substantial loss and damage.
3. The Applicant's Notice of Motion is supported by the annexed affidavit of Raydon Peter Mwangi, counsel for the Applicant, sworn on 3rd February 2020. In it, counsel explains the delay in filing the requisite Notice of Appeal and Record of Appeal. He blames his unnamed associate for the inaction that constituted the delay.
4. In her replying affidavit sworn on 15th October 2020, the Respondent states that –
- (a) counsel for the Applicant, Mr. Raydon Peter Mwangi, has constituted himself party to the proceedings in the superior court and to this Court in pursuit of his personal interests in the suit property;
 - (b) the Applicant is mentally ill and incapable of conducting the proceedings herein, which led to the appointment of one Harun Maina Kigotho as his duly constituted Attorney under and by virtue of an unregistered Power of Attorney given on 10th April 2019;
 - (c) the Court rejected the Applicant's application for extension of time and ordered his Notice of Appeal dated 6th August 2019 and lodged in the superior court on 13th August 2019 be deemed as withdrawn for non-compliance with Rule 82(1) and (2) of the Court's Rules for reasons, among others, that the Applicant has never served the Respondent with any Notice of Appeal or any written request for proceedings in the superior court;
 - (d) the decree of the superior court was fully executed soon after judgment whereupon she took possession of the suit property thereby rendering the intended appeal an academic exercise;
 - (e) the application herein has been brought after inordinate delay, which is unexplained, and the Applicant is guilty of laches; and
 - (f) the application herein is frivolous, an abuse of the court process, and ought to be dismissed with costs to be personally borne by Raydon Peter Mwangi, Advocate for the Applicant.

Submissions by Counsel

5. In their written submissions dated 5th July 2021 and made in support of the Applicant's application, counsel for the Applicant, M/s. Raydon Mwangi and Associates, address themselves to two issues: (a) the Applicant's alleged mental illness in respect of which no medical report has been presented; and (b) the reasons for delay in instituting the intended appeal, which is attributed to an "associate" whose identity remains undisclosed.
6. Counsel rely on the authority of *Charles Gitonga Gakuu and 2 others v Lee Eun Hee*, *Stanley Kaboro Mwangi and 2 others v Kanyamui Trading Company Limited* [2015 eKLR and *Thuita Mwangi v*



Kenya Airways Ltd, all of which hinge on the principles that guide the Court in exercise of its discretion to extend time to lodge an appeal, and to which I will shortly return.

7. Counsel for the Respondent, M/s. S. M. Omae & Co. Advocates, filed their written submissions dated 15th October 2020 to which there are attached a list of 6 authorities of the same date. They rely on the cases of *AMAA v FSS*, *MGG v Gateway Insurance Co. Ltd and 2 others*, *Gerphas Alphonse Odhiambo v Felix Adiego*, *Hezekia Michoki v Elizaphan Onyancha Ombongi*, *Bandari Enterprises (K) Ltd v D. K. Musinga T/A Musinga and Co. Advocates* and *Ephantus Stanley Njagi Moko v Monica Ruguru Njiru*. He invites me to consider three issues:
 - (a) whether the applicant has given instructions for the filing of the application;
 - (b) whether the application meets the threshold for extension of time; and
 - (c) who bears the cost of this application.

Determination

8. In the absence of evidence to the contrary as respects the first issue, I am inclined to confine myself to the second and third issues. I agree with both counsel that Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to “... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ...,” on such terms as it thinks just. However, this discretion must be exercised judiciously.
9. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that “the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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 case of *Fakir Mohammed v Joseph Mugambi and two others [2005] eKLR* lends clarity to the issue of the Court’s jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

“The exercise of this Court’s discretion under Rule 4 has followed a well- beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. 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, 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. In addition to the foregoing, I have considered the decision in *Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* where the Court, at p.733, called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* where this Court stated:

“As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

 - (a) that there is merit in his appeal;



- (b) that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and
- (c) that the delay has not been inordinate.”

- 12. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. In the absence of a draft Memorandum of Appeal, the Applicant has failed to demonstrate that he has an arguable appeal with the likelihood of success. It is not enough for the Applicant to make a blanketing statement to that effect and leave it to the Court to figure out what the grounds of the intended appeal would be. None is disclosed. Neither is the judgment from which the intended appeal is preferred annexed to his application.
- 13. In *Hezekia Michoki v Elizaphan Onyancha Ombongi* , the Court perused the judgment but could not state either way whether the intended appeal was arguable as there was no draft Memorandum of Appeal annexed to the application.
- 14. As the Court could not make an informed view as to the argueability of the intended appeal, the Court declined to exercise discretion in favour of the Applicant.
- 15. In the absence of any material to aid the Court in making an informed decision on the matter, I find that the Applicant has failed to satisfy the pivotal conditions on which the Court may exercise its unfettered discretion to extend time to enable the Applicant to lodge an appeal out of time. Moreover, no such appeal has been instituted as required by Rule 75(1) and (2) of the Court of Appeal Rules in light of the presumed withdrawal of the previous Notice on account of non-compliance with Rule 82(1) and (2). In the circumstances, nothing would be gained by an inquiry into the veracity of the reasons given for the delay in instituting the intended appeal in accordance with the Rules of this Court and, in any event, no plausible reasons have been advanced. As to whether the Applicant has the capacity to instruct counsel in this or other matters is not for me to judge. Finally, I am of the considered view that, in the circumstances of this case, it would be unfairly prejudicial to the Respondent to grant the orders sought. Accordingly, I order and direct that the Applicant’s Notice of Motion dated 3rd February 2020 be and is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

