



**Kenya Tea Development Agency & another v Kiambati (Civil Application
86 of 2019) [2021] KECA 82 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 82 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 86 OF 2019
RN NAMBUYE, JA
OCTOBER 22, 2021**

BETWEEN

KENYA TEA DEVELOPMENT AGENCY 1ST APPLICANT

GITHONGO TEA FACTORY 2ND APPLICANT

AND

HENRY G. KIAMBATI RESPONDENT

(An application for enlargement of time to appeal from the Judgment of the High Court of Kenya (A. C. A. Ong'injo, J.) dated 27th September, 2018 in Meru HCCA No. 5 of 2013)

RULING

1. Before me is a notice of motion dated 3rd June, 2019 substantively brought under Rule 4 and 82 of the *Court of Appeal Rules*, and all other enabling provisions of the law.
2. It is supported by grounds on its body, a supporting affidavit of Charles Benedict Mwangela together with annexures thereto, written submissions dated 8th October, 2021 together with legal authorities relied upon by the applicant in support thereof.
3. It has not been opposed as borne out by the content of an electronic communication under the hand of Kariuki instructed by the firm of Mithega & Kariuki Advocates on record for the respondent. Apparently, it was originated on Monday, October 18, 2021 at 4.18pm. It is addressed to the Deputy Registrar in response to the electronic hearing notice served on learned counsel for the respective parties herein on Friday, October 15, 2021 at 9.11am notifying them of the hearing date of the matter namely, Tuesday 19th October 2021 at 9.00am by a single Judge and also inviting the respective parties to file written submissions according to the specification given therein. The contents of the same and which I find prudent to reproduce for purposes of the record are as follows:

“Good afternoon,



Please note that the respondent does not intend to oppose the application for extension of time.”

4. In summary, applicants’ position is that they were the appellants in Meru High Court Civil Appeal No. 5 of 2013 wherein a ruling was delivered by Anne C. A. Ong’ino, J. on 27th September, 2018, in favour of the respondent dismissing the applicants’ application dated 14th May, 2018, seeking to reinstate their appeal. The applicants were aggrieved with the order dismissing their application and instructed their advocate on record to initiate appellate process pursuant to which the advocate wrote a letter to the Registrar of the Court dated 27th September, 2018 asking to be supplied with a certified copy of the ruling. The notice of appeal was timeously filed on 16th October, 2018 and also served within the timelines stipulated in the Rules of the Court.
5. They also timeously filed a letter bespeaking proceedings for purposes of progressing their timeously initiated appellate process. It was however not until 10th May, 2019 when they were informed that typed copies of proceedings were ready for collection by which time, time for filing the record of appeal as of right pursuant to the prerequisite in Rule 82(1) of the Court of Appeal Rules had long lapsed, hence the application under consideration seeking validation of the timeously initiated appellate process.
6. In light of the above uncontested position, the applicants contend that the explanation proffered above satisfies the threshold for granting relief under the provision of the Rules of the Court of Appeal cited for accessing the relief sought. Further that the intended appeal is not only arguable but it also has high chances of success. If the relief sought is not granted the applicants will suffer substantially irreparable loss and prejudice. They are willing to abide by any condition that the court may deem fit to set as condition for granting them the relief sought to meet ends of justice herein.
7. To buttress the above position, the applicant relies on the Supreme Court decision in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR, and the Court of Appeal Ruling in the case of *John Amalemba Kirui & 2 Others vs. Joseph Chibeiya Makamu* [2021] eKLR both on the threshold for granting relief of extension of time within which to comply with the prerequisites in the Court of Appeal Rules and to which I shall revert to shortly.
8. My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the Court of Appeal Rules, which provides as follows:

“ 4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
9. The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations of this court and as crystallized by the Supreme Court.
10. I take it from the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ.) decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [supra] in which these were restated as follows:-

“(1) 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.



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the respondent of the extension is granted.
 6. Whether the application has been brought without undue delay; and
 7. Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
11. Rule 82 of the Court of Appeal Rules is the substantive Rule that provides for the mandatory requirement that a certified copy of the proceedings be applied for within thirty (30) days of the delivery of the decision appealed against, while the record of appeal is required to be filed within sixty (60) days from the date of the filing of the notice of appeal, unless there is demonstration that the circumstances under consideration in an application of this nature fall within the proviso to the said Rule 82 which provides for exclusion from computation of the sixty days for filing of the record of appeal, time taken by the registry for preparation and supply of a certified copy of the proceedings.
 12. The applicant’s counsel has submitted that the delay in filing the record of appeal within the timeline stipulated in Rule 82(1) of the Court of Appeal Rules was occasioned by the delay in getting the typed proceedings which though timeously applied for in September, 2018 were not supplied until 10th May, 2019 despite applicants advocates due diligence of frequent visits and inquiries from the Court’s registry with regard thereto.
 13. *In George Mwendu Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014* (UR), extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months, while in [Aviation Cargo Support Limited vs. St. Marks Freight Services Limited \[2014\]eKLR](#), the relief for extension of time was declined for the applicant’s failure to explain why the appeal was not filed within sixty (60) days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six (6) months to seek extension of time within which to comply.
 14. In the uncontested circumstances of this application, the applicants were capacitated to pursue their timeously initiated appellate process on 10th May, 2019. From the date of capacitation with a copy of the proceedings of 10th May, 2019, to the date of the filing of the application under consideration dated 3rd June, 2021 is a period of approximately twenty-four (24) days which in my view is far much below the period of time in the George Mwendu case [*supra*] which necessitated the court therein to decline the exercise of its discretion in favour of the applicant therein. I therefore find the same excusable especially when it is on record that it is not contested by the respondent.
 15. In light of the assessment and reasoning set out above, the application dated 3rd June 2019 is allowed on the following terms:
 1. The applicant has sixty (60) days from the date of this ruling to file and serve the record of appeal.



2. There will be no order as to costs as the application was not contested.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

