



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Busienei & 3 others v Chepkwony & 2 others; Karira & 3 others (Interested Party)
(Civil Application E097 of 2021) [2021] KECA 56 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 56 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E097 OF 2021
RN NAMBUYE, JA
OCTOBER 8, 2021**

BETWEEN

**ELISHA KARE BUSIENEI 1ST APPELLANT
AGNES ROP 2ND APPELLANT
STEPHEN KEMBOI 3RD APPELLANT
JACKSON KIBOR 4TH APPELLANT**

AND

**JAPHET KIPYEGO CHEPKWONY (SUING AS THE ADMINISTRATORS OF
THE ESTATE OF ELIZABETH SIRMA) 1ST RESPONDENT
REBECCA SOY 2ND RESPONDENT
GIRO COMMERCIAL BANK 3RD RESPONDENT**

AND

**NICHOLAS GITUHU KARIRA INTERESTED PARTY
ALLAN GEORGE NJOGU KAMAU INTERESTED PARTY
FESTUS MITEI KIPTOO INTERESTED PARTY
JEPKORIR KIPLAGAT INTERESTED PARTY**

*(An Application for extension of time to file and serve a Record of Appeal
out of time against the Judgment of the Environment and Land Court (M.
Njoroge, J.) dated 12th February, 2020 in Kitale ELC No. 131 of 2013)*



RULING

1. Before me is a Notice of Motion dated 3rd June, 2021, brought under Rule 4 of the Court of Appeal Rules, substantively seeking an order granting leave to the Applicant to file and serve a record of appeal against the ruling and order of M. Karanja, J. of 12th February, 2020 in ELC No. 131 of 2013, out of time.
2. It has been supported by grounds on its body and a supporting affidavit of Ian Makotsi. It has not been opposed. At least no replying affidavit has been traced on the record nor written submissions filed by the respondent in response to the hearing notice served electronically by the Deputy Registrar of the Court to parties on 27th September, 2021 at 1.37p.m notifying parties of the hearing date of the application which is today 29th September, 2021 and also inviting them to file written submissions according to the specification given therein and time line given. Only applicant complied with that prerequisite by filing written submissions a position also confirmed by the Deputy Registrar vide the Deputy Registrar's letter to the court dated 6th October, 2021 following an inquiry by the court with regard thereto.
3. In summary, the appellants' advocates averments and submissions are inter alia that the appellants were aggrieved with the judgment of the trial Court, and instructed his advocate to lodge an appeal against the said judgment pursuant to which instructions counsel simultaneously filed and served a notice of appeal and a letter bespeaking proceedings on 12th February, 2020. Proceedings were subsequently supplied with a certificate of delay on 17th February, 2021 covering the period of delay between 13th February, 2020 to 18th November, 2020 on the basis of which counsel compiled the record of appeal and sent the same to the courts email for assessment but the same was not assessed until much later, that the intended appeal is not frivolous. The delay in meeting the timeline for lodging the record was occasioned by the numerous Covid-19 restrictions on controlled movements in and out of various counties which in effect occasioned a breakdown in communication between the applicant and their advocates. Another factor also fronted by the applicant as a ground relevant for consideration is that the record of appeal is voluminous. It was therefore necessary to subject it to numerous corrections which also took abit of time to be perfected. The procedure in the registry also contributed to the delay as they declined to accept hard copies of documents. There was also delayed email responses by the registry on the progress for the filing of the voluminous record of appeal. It is therefore their position that the default in timeously filing the record of appeal is sufficiently explained. The application is therefore well founded and should be allowed as prayed.
4. Counsel relies on the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* , *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* , *Fakir Mohamed vs. Joseph Mugambi & 2 Others* ; *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* ; *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* and *Athuman Nusura Juma vs. Afwa Mohamed Ramathan* all for principles that guide the court in the exercise of its mandate under Rule 4 of the *Court of Appeal Rules*; Article 159 of the *Kenya Constitution of Kenya, 2010* 2010, which unfetters the Court from the clutches of technical subservience.
5. 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.”

6. 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.
7. 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.”
8. 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.
9. The applicant’s counsel has submitted that the delay in getting the typed proceedings as well as filing the record of appeal in time was largely occasioned by the delay at the registry as explained in the certificate of delay.
10. 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*, 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.
11. In the circumstances of this application, applicant was capacitated to pursue his appellate process on 1st March, 2021. From the date of capacitation with a certificate of delay on 1st March, 2021 the applicant had sixty days within which to file the record of appeal which lapsed on or about 1st May, 2021. The application for capacitation is dated 3rd June, 2021 a period of one (1) month and approximately two (2) days which in my view is far much below the period of time in the George



Mwende 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.

12. It is appreciated no draft memorandum of appeal is annexed. That default notwithstanding the principle of law set out above on this issue indicates clearly that in the absence of a draft memorandum of appeal the court can gauge the arguability of an intended appeal from other supportive facts. Herein, none have been proffered. I cannot however, ignore the fact that the record of appeal has already been compiled and it is ready for filing, which in my view is sufficient demonstration of the applicants' intention to progress their intended appellate process as soon as capacitated.
13. In light of the assessment and reasoning set out above, the application dated 3rd June 2021 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.

DATED AND DELIVERED AT NAIROBI THIS 8TH OF OCTOBER, 2021.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a

True copy of the original

Signed

DEPUTY REGISTRAR

