



REPUBLIC OF KENYA



KENYA LAW
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**Matafali v Luteshi (Civil Application E099 of 2021)
[2021] KECA 70 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 70 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E099 OF 2021
RN NAMBUYE, JA
OCTOBER 8, 2021**

BETWEEN

JOHN WEKESA MATAFALI APPLICANT

AND

REBA KHABERE LUTESHI RESPONDENT

(An Application for leave for extension of time to file Notice of Appeal and Record of Appeal out of time against the Judgment of the Environment and Land Court (M. Njoroge, J.) dated 23rd October, 2019 in Kitale ELC No. 168 of 2016)

RULING

- 1 Before me, is a notice of motion substantively brought under Rule 4 of the Court of Appeal Rules and numerous other provisions of law cited in the heading of the application together with an attendant, all other enabling provisions of the law. It seeks leave of the court to file both a notice of Appeal and record of appeal out of time against the decision made in the Environment and Land Court at Kitale, ELC No. 168 of 2016 delivered on 23rd October, 2019 erroneously indicated in the application as 23rd October, 2021 together with an attendant order that costs incidental to the application to abide the outcome of the appeal.
- 2 It is supported by a supporting affidavit sworn by John Wekesa Matafali together with annexures thereto. It is not 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 1.38p.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 specifications given therein and time line given. None of the parties complied with that prerequisite by filing written submissions, a position confirmed by the Deputy Registrar Kisumu vide the Deputy Registrar's communication to the court dated 6th October, 2021 following inquiry by the court with regard thereto.



- 3 The application was canvassed through applicant's sole pleadings. It is applicant's averments that he is a farmer living on the suit property. He was aggrieved by the outcome of the decision in the said matter and expressed his desire to appeal against that decision. He was at the time represented by an Advocate who was absent on the date of the delivery of the judgment and so was he. He was also suffering from a stroke. It was only until recently that he learnt of the judgement which he is dissatisfied with and wishes to appeal against. He states that he has applied for certified copies of the proceedings.
- 4 It is on the totality of the above uncontested position that the applicant contends that the delay in timeously initiating the appellate process was occasioned by his defunct advocate who ceased acting for him without informing him and hence his wish to act in person henceforth. Second, that since this is a land matter and emotive he should be accorded an opportunity to be heard on his intended appellate process.
- 5 My invitation to intervene on behalf of the applicant has been invoked substantively under Rule 4 of this Court's Rules. It provides:
- “(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 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, 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 Court in the exercise of its mandate under the said Rule have not only been restated numerously by this court but also crystallized by the Supreme Court of Kenya. 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* [2013] eKLR in which these were crystallized as follows:- “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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
- 7 From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
- 8 Starting with the delay, it is not in dispute that the intended impugned judgment was delivered on 23rd October, 2019, while the application under consideration is dated 29th June, 2021 a period of one year, eight months and about five (5) days.
- 9 In *George Mwende 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 days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.



- 10 Applying the above threshold to the uncontroverted position herein, it is my finding that the length of delay under interrogation herein is not so long as that which was the subject in the *Mama Day Nursery School* case [supra] that led to the Court declining relief therein. It is however longer than the length involved in the *Aviation Cargo* case (supra) which also resulted in the Court declining to exercise its discretion in favour of the applicant therein. The above being the position, issue as to whether the applicant's request is sustainable or not will depend on my take on the reasons given for the delay.
- 11 As highlighted above, the uncontroverted position is that, the applicant's advocate did not attend court on the date of the judgment and the applicant has explained that he suffered a stroke. There is no reason for me to doubt him. I am therefore satisfied that they are genuine. The reason for the delay is plausible, and, therefore, excusable.
- 12 As for arguability of the intended appeal, there is a draft memorandum of appeal. In law an arguable ground of appeal is not one that must necessarily succeed but one that is bona fide and would not only call for a response from the opposite party but also warrant the court's interrogation. The grounds annexed by the applicant in my view, satisfy the threshold for arguability of the intended appeal notwithstanding its ultimate outcome.
- 13 As for prejudice to be suffered by the opposite party, I find none.
14. In the result, I find that on the totality of the above assessment and reasoning, the applicant has satisfied the threshold for granting relief under the above rule. The application is allowed and I therefore proceed to make orders thereon as follows:
1. The applicant has fourteen days from the date of the delivery of this Ruling to file and serve a notice of appeal.
 2. Thereafter to proceed according to law since the applicant has not yet been supplied with certified copies of the proceedings.
 3. There will be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH 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

