



**Kithu v Musyoka & another (Civil Application E010 of 2020)
[2021] KECA 174 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 174 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E010 OF 2020
J MOHAMMED, JA
NOVEMBER 5, 2021**

BETWEEN

MAKASA KITHU APPLICANT

AND

SEDRICK MUSYOKA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

((Being an application for extension of time to lodge and serve a memorandum of appeal and record of appeal from the judgment and decree of the High Court of Kenya at Kitui (Kariuki, J.) dated 17th January, 2020 in H. C. C. No. 27 of 2018))

RULING

Background

1. This Notice of Motion dated 7th July, 2020 is brought under Rule 4 of the Court of Appeal Rules by Makasa Kithu (the applicant) seeking the following orders: that the applicant be and is hereby granted leave to file and serve his memorandum of appeal and record of appeal from the judgment and decree delivered by (C. Kariuki, J.) on 17th January, 2020 in Civil Appeal No. 27 of 2018 at the High Court of Kenya at Kitui out of time; and that the costs of this application abide the appeal.
2. The application is premised inter alia on the grounds that; the judgment intended to be appealed from was delivered on 17th January, 2020; the applicant being dissatisfied with the judgment lodged his notice of appeal timely on 27th January, 2020; the applicant had compiled his record of appeal and it was ready for filing on 29th March, 2020 which was within the sixty days' time limit prescribed for instituting appeals under Rule 82 of the *Court of Appeal Rules*; the applicant was however prevented from lodging the record of appeal by the outbreak of Covid-19 disease and the containment measures that were put in place to prevent the spread of the disease; that the time for instituting the appeal has since lapsed out of no fault on the part of the applicant who had strived to abide by the rules; that the



Court has jurisdiction under Article 159 of the Constitution and Sections 3A and 3B of the *Appellate Jurisdiction Act* to extend the time for filing of the intended appeal in the circumstances of this case in order to ensure that the applicant does not lose his chance of appeal out of no fault of his own.

3. From the record, the respondent has not filed any replying affidavit.

Submissions

4. The application was disposed of by way of written submissions. The applicant's counsel submitted: that the notice of appeal was filed timeously on 27th January, 2020; that the delay in filing the record of appeal is not inordinate or deliberate but is excusable and was occasioned by the Corona Virus Pandemic; that the and the Court Registry turned away the applicants counsel's representative on 19th March, 2020 when he attempted to lodge the record of appeal; that the applicants should not be denied access to justice for circumstances beyond their control. Counsel urged the Court to allow the application.
5. The 1st respondent filed written submissions opposing the application. Counsel submitted that the applicant has not demonstrated due diligence in the observance of time lines set in law and should therefore be disentitled to the relief held. Counsel further submitted that it would be prejudicial to the 1st respondent for the instant application to be allowed as it is frivolous and lacks merit.

Counsel urged the court to dismiss the application with costs.

Determination

6. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. Rule 82 of the Court of Appeal Rules provides that a record and memorandum of appeal should be filed within 60 days of the lodging of the notice of appeal.
7. The discretion that I am called to exercise in the determination of this application is provided under Rule 4 of the Court of Appeal Rules which provides as follows:

“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.”

8. Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the *locus classicus*, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, 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.” [Emphasis supplied].



9. The issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR where the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... 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, (possible) 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 factor.”

10. This was reiterated further in the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 where it was explained that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

11. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible.

12. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR as was cited by the applicant, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

13. Rule 82 of the Court of Appeal Rules provides:-

- “(1) Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
- i. a memorandum of appeal, in quadruplicate
 - ii. the record of appeal, in quadruplicate
 - iii. the prescribed fee, and
 - iv. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded



such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

14. Accordingly, a record of appeal should be filed within 60 days of the lodging of the notice of appeal. The applicant filed the notice of appeal timeously on 27th January, 2020. It was his counsel’s contention that his representative unsuccessfully attempted to lodge the record of appeal and was turned away by the Court registry staff owing to the Covid 19 pandemic. Counsel urged us to take judicial notice of the prevailing circumstances being the Covid 19 pandemic and the containment measures put in place which resulted in the scaling down of Court activities on 16th March, 2020; and that the introduction of electronic filing had not been rolled out.
15. The applicants contended that they have an arguable appeal. Without going into the merits of the appeal as this will be determined by the full bench which will be seized of this appeal, I am satisfied that the intended appeal is arguable. In *Muchugi Kiragu v James Muchugi Kiragu & another* Civil Application No. NAI. 356 of 1996, this Court had the following to say as regards this Court’s discretion under Rule 4:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.” (Emphasis supplied).
16. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the High Court and is desirous of appealing against the said judgment out of time.
16. From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in *Leo Sila Mutiso* (supra). The upshot is that the notice of motion dated 7th July, 2020 is allowed.
18. Accordingly, I make the following orders:
 - a. That leave is hereby granted to the applicant to file and serve a record of appeal out of time against the judgment and decree of the High Court of Kenya at Kitui (Kariuki, J.) dated 17th January, 2020 in HCCC No. 27 of 2018.
 - b. That the record of appeal be filed and served within thirty (30) days from the date hereof;
 - c. Costs of this application to abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

