



REPUBLIC OF KENYA



KENYA LAW
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**Wao v Mutugi & another (Civil Application E7 of 2020)
[2021] KECA 131 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 131 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E7 OF 2020
SG KAIRU, JA
NOVEMBER 5, 2021**

BETWEEN

ELISHA OTIENO WAO APPLICANT

AND

B.G. MUTUGI 1ST RESPONDENT

ROBERT NKAIRI MWINJA 2ND RESPONDENT

(An application for leave to file and serve notice of appeal out of time against the ruling of the High Court of Kenya at Mombasa (Chepkwony, J.) delivered on 5th December, 2019 in High Court Misc. Application No. 125 of 2019))

RULING

- 1 The application before me is dated 1st October 2020 and is made under Rule 4 of the Court of Appeal Rules. The applicant, Elisha Otieno Wao, who is in person, seeks leave to file and serve notice of appeal out of time.
- 2 The background in brief is this: The applicant's application dated 27th February 2019 before the High Court for leave to file an appeal from the judgment of the Chief Magistrate's Court at Mombasa given on 16th September 2011 was dismissed by the High Court on 8th July 2019 for non-attendance by the applicant.
- 3 On 6th August 2019, the applicant presented an application before the High Court to reinstate that application of 27th February 2019 on grounds that the applicant had mixed up the date he was to attend court.

Instead of 8th July 2019, he was under the mistaken impression it was to be heard on 18th July 2019.



- 4 In a ruling given on 5th December 2019, the High Court (D.O. Chepkwony, J.) refused to set aside the order of 8th July 2019 and dismissed the applicant’s application dated 6th August 2019.
- 5 The applicant is aggrieved by the ruling given on 5th December 2019 and intends to challenge it on appeal to this Court. In that regard, he prays, in the application now before me dated 1st October 2020, for leave to file and serve notice of appeal out of time.
- 6 The legal principles applicable when considering applications of this nature were stated in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR* where the Supreme Court of Kenya said that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay.
- 7 Before that, Waki JA in the case of *Fakir Mobamed vs. Joseph Mugambi & 2 others [2005] eKLR* stated that:
- “The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
- 8 Considering those principles, it is critical in an application of this nature for the applicant to give reasons, to the satisfaction of the court, why he did not file the notice of appeal when he should have done so. In this case, the ruling he intends to appeal from was delivered on 5th December 2019. He should have filed his notice of appeal by 19th December 2019 at the latest. He has exhibited with his application, a notice of appeal of appeal dated 7th September 2020. He waited until 1st October 2020 to present this application for extension of time. In the grounds in support of the application and in his supporting affidavit, the applicant has set out reasons why he considers that the decision of the High Court is wrong. However, he does not say anything at all why he did not file the notice of appeal in time or why it took him until October 2020 to bring this application.
- 9 In his submissions before this Court dated 16th September 2021, he again sets out his grievances with the decision of the lower court. Beyond stating that the threshold required in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi...has been met*”, he again offers no explanation for the inordinate delay involved.
- 10 For the 1st respondent, H.N. Njiru & Company Advocates have submitted that the intended appeal is devoid of any merit; that the application if allowed would prejudice the 1st respondent; and that there has been a delay of 10 years with no explanation.



11 Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Empathetic as I might be to the applicant who appears in person, there is no material based on which I may exercise the courts discretion in his favour.

12 Consequently, the application dated 1st October 2020 fails and is hereby dismissed. I make no orders as to cost not having seen any steps taken by the respondents in opposition to the application.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

