



**Katampoi v Nyambura & another (Civil Appeal (Application)
E374 of 2021) [2021] KECA 332 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 332 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E374 OF 2021
J MOHAMMED, JA
DECEMBER 17, 2021**

BETWEEN

PAULINE KATAMPOI APPLICANT

AND

PETER MAKARIO NYAMBURA 1ST RESPONDENT

JACKLINE WANJIRU NGECHU 2ND RESPONDENT

(Being an application for extension of time to file and serve a record of appeal out of time from the judgment of the High Court of Kenya at Nairobi (A. Ongeru, J.), dated 18th October, 2019 in Succession Cause No. 881 of 2016)

RULING

Background

1. Before me is an application dated 13th July, 2021 filed by Pauline Katampoi (the applicant), seeking extension of time within which to file and serve the Record of Appeal out of time from the judgment of the High Court at Nairobi (A. Ongeru, J.) in Succession Cause No. 881 of 2016 delivered on 18th October, 2019. Peter Makario Nyambura & Jackline Wanjiru Ngechu are the 1st & 2nd respondents respectively.
2. The application is premised inter alia on the grounds: that there was a delay on the part of the trial court in supplying certified court proceedings to the applicant; that the certificate of delay was issued by the Deputy Registrar on 24th June, 2021; that by the time the applicant obtained the certificate of delay, the time stipulated in the rules for filing the record of appeal had lapsed; that the delay in filing the record of appeal was not deliberate but was occasioned by the unavailability of the typed proceedings and certificate of delay which constrained the applicant to file the intended appeal within time. The application is supported by the affidavit of Steven Nzaku, the applicant's counsel, sworn on 13th July, 2021 in which he reiterated the grounds on the face of the application.



3. There was no replying affidavit or written submissions filed by the respondents when I considered the application.

Submissions

4. The application was canvassed by way of written submissions. The applicant's counsel, Ms. Nzaku & Nzaku Advocates filed written submissions and submitted that the applicant has been diligent in pursuing the filing of the record of appeal and the delay in filing the record of appeal was not deliberate; that the reason for the delay has been satisfactorily explained; and that a Court should not shut out a litigant who acts with diligence. The applicant relied on the case of *Leo Sila Mutiso -versus-Rose Hellen Wangari Mwangi* -Civil Application No. Nai 255 of 1997(unreported).
5. Counsel further submitted that they have an arguable appeal as demonstrated by the applicant's draft memorandum of appeal; and that no prejudice or undue delay shall be visited upon the respondents if the orders sought are granted. Counsel urged the Court to allow the application.

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 an objective 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. 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.”

12. 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.”

13. Accordingly, a record of appeal should be filed within 60 days of the lodging of the notice of appeal. However, where a party files and serves an application for typed proceedings, the time taken to assemble the proceedings is exempted in the computation of the 60 days. Thereafter, the Deputy Registrar of the relevant court issues a Certificate of Delay for verification of the period to be excluded by the Court and the parties.



14. In the instant application, the notice of appeal was lodged on 23rd October, 2019 together with a letter bespeaking proceedings pursuant to the Court’s direction on 12th February, 2020. The Certificate of Delay was signed, sealed and released to the applicant’s advocates together with the proceedings on 24th June, 2021. The instant application was filed on 13th July, 2021. I therefore find that the period of delay in filing the record of appeal is not inordinate and is well explained.
15. The applicants contend that they have an arguable appeal on the ground inter alia: who the rightful beneficiaries and dependents of the Estate of Ephantus Mirie Mbagu (Deceased) are pursuant to the *Law of Succession Act*. 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.
17. In the case of *Richard Nchapi Leiyagu vs IEBC & 2 Others*, Civil Appeal No. 18 of 2013, this Court expressed itself as follows:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
18. 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 13th July, 2021 is allowed.
19. Accordingly, I make the following orders:
 - a. That leave is hereby granted to the applicant to file and serve the record of appeal and memorandum of appeal out of time within thirty (30) days from the date hereof;
 - b. Costs of this application to abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

J. MOHAMMED



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

