



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Kamau (Civil Application 103 of 2019)
[2021] KECA 333 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 333 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 103 OF 2019
RN NAMBUYE, JA
DECEMBER 17, 2021**

BETWEEN

ROBERT MACHARIA MWANGI APPLICANT

AND

SAMUEL KARICHU KAMAU RESPONDENT

(An application for extension of time to file and serve a notice of appeal and record of appeal out of time from judgment and decree of (J. G. Kemei, J.) dated 29th November, 2018 in Murang'a ELC Case No. 102 of 2017)

RULING

1. Before me is a Notice of Motion dated 3rd July, 2019 brought under Rule 4, of the [Court of Appeal Rules](#) and all other enabling provisions of the law. It seeks orders as follows:
 - “1. THAT the applicant be granted leave to appeal out of time against the whole judgment and decree of the Honourable Justice J. G. Kemei delivered on 29th day of November, 2018 in the Environment and Land Court at Murang'a in ELC No. 102 of 2017.
 2. THAT upon grant of leave to appeal out of time, the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served.
 3. THAT the Honourable Court be pleased to stay execution of the said judgment pending the hearing and determination of the application inter partes.
 3. Such further or other orders be made as are just and expedient for purposes of facilitating justice to the applicant.



6. THAT the costs of the application be provided for.
2. It is supported by grounds on its face, a supporting affidavit sworn by Robert Macharia Mwangi, the applicant together with annexures thereto and written submissions dated 27th October, 2021. It is opposed by a replying affidavit of Samwel Karichu Kamau, the respondent herein sworn on 3rd November, 2021 and written submissions dated 28th October, 2021.
3. Cumulatively, the applicant submits that judgment was delivered against him in favour of the respondent on 29th November, 2018 in the Environment and Land Court at Murang'a in ELC No. 102 of 2017. Being aggrieved and dissatisfied with the said judgment, he decided to appeal against the whole of the said decision. He accordingly drew and filed a notice of appeal dated 5th December, 2018, endorsed by the Deputy Registrar of the court on 6th December, 2018 and filed within the fourteen (14) days stipulated in Rule 75 of the Court of Appeal Rules.
4. On 7th December, 2018 he wrote a letter bespeaking certified copies of the judgment and proceedings to the Deputy Registrar which was also within the thirty (30) days stipulated in Rule 82 of the Court of Appeal Rules. He instructed the firm of Githiga Kimani Advocates to take over the conduct of his appellate process from the firm of J. M. Njoroge Advocates previously on record for him at the trial. The said firm of advocates sought leave of the trial court to come on record for him, granted.
5. By the time the incoming advocate obtained leave to come on record for him on 26th June, 2019 by which time, the timeline for the filing of the record of appeal as of right had long lapsed.
6. The the application under consideration was filed on 3rd July, 2019, a period of only five to six (5 – 6) days from 26th June, 2019 when change of advocate was sanctioned by the trial court.
7. It is also the applicant's assertion that the intended appeal is arguable. He relies on the annexed memorandum of appeal raising seven grounds of appeal. In summary, on appeal, the applicant intends to fault the Judge for the failure to sustain his assertion that the respondent's claim against him was res judicata.
8. To buttress the above submission, the applicant relies on the Supreme Court of Kenya decision in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR on principles that guide the court in the exercise of its mandate in an application of this nature; the case of *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR for the holding, inter alia, that "a" plausible satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. Second, there has to be valid and clear reasons upon which discretion can be said to be favourably exercisable; and lastly, the case of *Njeri Njoroge vs. Joseph Maina Gichuhi & Another* [2018] eKLR for the holding, inter alia, that it is not only a constitutional imperative but also a rule of natural justice that each person has a right to legal representation by counsel of his/her choice. Second, that where there is demonstration that the delay was occasioned by administrative lapses in the process of change of advocates, it amounts to sufficient explanation for the delay, all in support of his assertion that the application meets the threshold for granting relief of this nature.
9. In rebuttal, the respondent cumulatively submits that the delay herein ranging from 29th November, 2018 the date of the judgment to 3rd July, 2019 when the application under consideration was filed renders the application unmeritorious due to the inordinate delay in seeking the court's intervention which according to him has not been explained. Second, the intended appeal has no chances of success, granting the relief sought will therefore be an exercise in futility. The court is therefore urged not to engage itself in a vain exercise.



10. On the law, the respondent relies on the decision in the case of *Patel vs. Waweru & 2 Others* [2003] KLR 261 at page 363, on the threshold for granting relief in an application of this nature.

11. My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the Court of Appeal 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.”

12. The factors for consideration by the court in the exercise of its discretionary mandate under the above Rule are as were restated by the court in *Patel vs. Waweru & 2 Others* case [supra]. These have now been crystallized by the Supreme Court of Kenya, in a number of its decision. I take it from *County Executive of Kisumu vs. County Government of Kisumu & 8 Others* [2017] eKLR wherein the Supreme Court of Kenya expressed itself therein as follows:

“It is trite law that in an application for extension, the whole period of delay should be declared and explained satisfactory to the court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time. The court delineated the following as:

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.”

13. Starting with the length of the delay, it is common ground that the intended impugned judgment was delivered on 29th November, 2018. The applicant being aggrieved with the said judgment timeously filed a notice of appeal within fourteen (14) days of that date pursuant to Rule 75 of the Rules of this Court, dated 5th December and endorsed by the Deputy Registrar of the Court on 6th December, 2018.

13. Upon complying with Rule 75 of this Court's Rules, the applicant failed to comply with Rule 82 of the Court's Rules which required him to file the record of appeal within sixty (60) days hence the filing



- of the application under consideration filed a period of about seven (7) months and about 4 – 5 days from the date of the delivery of the intended impugned decision, and about five (5) months and 4 – 5 days from the date when the record of appeal ought to have been lodged as of right.
15. 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* [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.
 16. The period involved in the above case law was much longer than the period under consideration herein. This finding alone is not however sufficient to warrant the applicant the sought relief. It has to be considered in conjunction with the other factors falling for consideration in an application of this nature before deciding either way. Among these falls the reasons for delay. The applicant has cited the length of time taken for him to change advocates as the reason. He has annexed the application for change of advocates, and the consent for change of advocates. The application for change of advocates was heard on 8th May, 2019 pursuant to which orders were issued on 26th June, 2019. From the date of the ruling on the change of advocates' application to the date of seeking the court's intervention is a period of 6 – 7 days, which in my view is not inordinate especially when it is undisputed that the applicant had no control over the pace at which the said application was to be processed.
 17. On the totality of the above assessment and reasoning, I am satisfied that the applicant has given not only a reasonable but also a plausible explanation for the delay, which I find therefore excusable.
 18. On the possibility of the arguability of the intended appeal, the position in law is that an arguable appeal is not necessarily one that must succeed but one that warrants interrogation by a court of law and invitation of a response from the opposite party. See *Sammy Mwangi Kiriethi & 2 Others vs. Kenya Commercial Bank* [2020] eKLR.
 19. My take on the proposed grounds of appeal is that issue as to whether the suit whose judgment was rendered in favour of the respondent was res judicata irrespective of its ultimate outcome is definitely arguable. It is also trite that one arguable ground of appeal is sufficient demonstration. Herein, I have identified several. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 20. On the prejudice to be suffered by the respondent if the relief sought were granted, the respondent cites being kept out of the enjoyment of the fruits of the judgment rendered in his favour to which the applicant says and correctly so in my view that this has to be weighed and balanced against the applicant's right to ventilate his now timeously initiated appellate rights, subject to validation of the process by granting the relief sought herein.
 21. The position in law on the need for a deserving party to be accorded a right to pursue either intended or already initiated appellate right is as has been stated in the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others* [2013] eKLR; *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; in which it was variously held, inter alia, that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.



22. My take on the above is that the applicant having raised the issue of res judicata on account of previous litigation over the substratum of the intended appeal, a position not controverted in the respondent's replying affidavit is sufficient basis for me to hold that this is a proper case for me to exercise my discretionary mandate in favour of the applicant to accord him an opportunity to ventilate his intended appellate rights to crystalize more importantly issue as to whether the litigation resulting in the judgment rendered in favour of the respondent was res judicata or otherwise.
23. The totality of the above assessment and reasoning now leads me to determine the appropriate relief to issue herein. Out of the totality of the reliefs highlighted above, I find prayer 4 misplaced, as it does not fall for consideration in an application of this nature. It is, therefore, discounted.
24. The upshot of the totality of the above assessment and reasoning, is that I am satisfied the applicant's application dated 3rd July, 2019 has merit. It is allowed on the following terms:
1. The applicant has leave to appeal out of time against the whole judgment and decree of the J. G. Kemei, J. delivered on 29th November, 2018 in the Environment and Land court at Murang'a in ELC No. 102 of 2017.
 2. The notice of appeal and memorandum of appeal are deemed properly filed and served.
 3. The applicant has sixty (60) days from the date of the delivery of the ruling to file and serve a record of appeal.
 4. In default of item 3 above, the leave granted herein to stand lapsed.
 5. Costs of the application to abide the outcome of the appeal.

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

