



Joseph Gichuhi Kariuki Njuguna Mugo (Officials of AIC Kamangu) Benson Mwangi Mugo and Daniel Thuo Wanjohi (as officials of the AIC Kikuyu District Church Council v Kimani (Civil Application E013 of 2020) [2021] KECA 287 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 287 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E013 OF 2020
J MOHAMMED, JA
DECEMBER 3, 2021**

BETWEEN

**JOSEPH GICHUHI KARIUKI NJUGUNA MUGO (OFFICIALS OF
AIC KAMANGU) BENSON MWANGI MUGO AND DANIEL THUO
WANJOHI (AS OFFICIALS OF THE AIC KIKUYU DISTRICT CHURCH
COUNCIL APPLICANT**

AND

ROBERT KIMANI RESPONDENT

(Being an application for leave to file and serve a notice of appeal out of time and lodge a record of appeal out of time from the Judgment of the Environment & Land Court of Kenya at Nairobi (Okong'o, J.) dated 9th April, 2019 in E. L. C. No. 38 of 2014)

RULING

Background

- 1) This is an application dated 14th July, 2020 by Joseph Gichuhi Kariuki, Njuguna Mugo (Officials of AIC Kamangu), Benson Mwangi Mugo and Daniel Thuo Wanjohi (as officials of the AIC Kikuyu District Church Council (the applicants) seeking orders in the main: That this Court be pleased to enlarge time within which to file and serve a Notice of Appeal filed on 2nd June, 2020 and lodged in this Court on 5th June, 2020 be deemed as duly filed and served; that the Notice of Appeal filed on 2nd June, 2020 and lodged in this Court on 5th June, 2020 be deemed as duly filed and served; that this Court be pleased to extend time for filing a Record of Appeal from the Judgement of the Hon. Justice S. Okong'o delivered on 5th May, 2020 and in Nairobi ELC Appeal No. 38 of 2014; and that the costs of this application be in the cause.



- 2) The application is brought under Rules 4, 41 & 42 of the Court of Appeal Rules and is premised on the grounds that: the judgment of the ELC was delivered on 5th May, 2020; that this was during the period of the COVID-19 pandemic and the Country was on partial lockdown; that the Advocates then acting for the applicants did not inform them about the judgment and they came to learn about it only when they received information that the respondent going around saying he would demolish the Church which stands on KARAI/KARAI/2149 (the suit property) and that by the time the applicants got in touch with their erstwhile advocates, secured the file and applied for preservation of the status quo, the time within which to lodge and serve notice of appeal had long since lapsed. Robert Kimani is the respondent herein.

Determination

- 3) 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.
- 4) 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.”

- 5) 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].

- 6) 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.”



- 7) 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.”

- 8) 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.

- 9) 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.”

- 10) 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.”

- 11) 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.

- 12) In the instant application, the impugned judgment was delivered on 5th May, 2020, the notice of appeal was lodged on 2nd June, 2019. The applicants submitted that they were unaware that the



impugned judgment had been delivered and on 27th May, 2020 but learnt that the respondent was planning to demolish their church, whereupon they filed the notice of appeal.

- 13) The applicants contended that they have an arguable appeal on the ground inter alia, whether a constructive trust had been created in respect of the suit property. 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).

- 14) 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 ELC and is desirous of appealing against the said judgment out of time.
- 15) 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 14th July, 2020 is allowed.
- 16) Accordingly, I make the following orders:
- a) That the notice of appeal filed on 2nd June, 2020 be deemed as properly filed.
 - b) 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 ELC at Nairobi (Okong'o, J.) in ELC Appeal No. 38 of 2014;
 - c) That the record of appeal be filed and served within thirty (30) days from the date hereof;
 - d) Costs of this application to abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD 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

