



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbatha v Joseph (Civil Appeal (Application) E014 of 2021)  
[2021] KECA 262 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 262 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E014 OF 2021  
F SICHALE, JA  
DECEMBER 3, 2021**

**BETWEEN**

**JOSPHINE MUENI MBATHA ..... APPELLANT**

**AND**

**GABRIEL NJUE JOSEPH ..... RESPONDENT**

*(Being an Application for Extension of Time to file an appeal against the judgment of the High Court of Kenya at Kajiado (Nyakundi J) dated 11th December 2019.) in (Kajiado High Court Civil Case No. 16 (OS) of 2018)*

**RULING**

1. Josephine Mueni Mbatha (the applicant herein) has vide a motion dated 24<sup>th</sup> May 2021 and brought pursuant to Rule 4 of the Court of Appeal Rules and all other enabling provisions of the law sought the following orders;
  - “ 1. THAT an order be and is hereby issued allowing the appellant to file an appeal out of time.
  2. THAT an order be and is hereby issued validating the Memorandum and Record of Appeal dated 7<sup>th</sup> July 2021 as fit for hearing in appeal.
  3. THAT costs be in the cause.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed that she was aggrieved by the judgment of Nyakundi, J delivered on 11<sup>th</sup> December 2019 , whereupon she subsequently filed a Notice of Appeal on 19<sup>th</sup> December 2019 and requested for typed proceedings on time but they delayed for the reason that there was no enough staff



- to handle most of the work due to the Covid-19 situation and that further she had tried filing the appeal through the e-filing portal but the same was unresponsive.
3. She further deposed that given the circumstances, the appeal was brought in reasonable time and without inordinate delay and that the appeal had very high chances of success.
  4. The application was opposed vide a replying affidavit sworn by the respondent Gabrile Njue Joseph on 29<sup>th</sup> June 2021, who deposed *inter alia* that the application was bad in law and could not withstand legal scrutiny to be applied in granting of leave to file the appeal out of time. He further deposed that the applicant had only filed the instant application upon realizing that the blanket stay of execution orders stood set aside once she failed for the umpteenth time to comply with the orders of the court issued on 5<sup>th</sup> May 2021.
  5. It was submitted for the applicant that the delay in filing the Memorandum and Record of Appeal was not inordinate given the circumstances in the year 2020 and that the reliefs being sought were discretionary and that the Court should exercise its discretionary power and allow the application so as the applicant can prosecute the appeal and that further the appeal raises triable issues with very high chances of success.
  6. On the other hand, it was submitted for the respondent that the applicant's application was frivolous, unmeritorious and misguided and did not meet the principles developed under Rule 4 of the [Court of Appeal Rules](#) and was therefore ripe for dismissal with costs. It was further submitted that the letter bespeaking of the proceedings was written to the Deputy Registrar on 13<sup>th</sup> December 2019 and the same was not copied to the respondent and that further certified copies of the proceedings were ready on 19<sup>th</sup> May 2020 and that even though the applicant claimed the delay in filing the appeal was caused by insufficient judicial staff due to Covid-19, no certificate of delay had been produced before the Court to excuse the delay and that there was no evidence suggesting that she followed up on the proceedings, save for email communications between the applicant and her advocate demonstrating that the applicant's first attempt to file her appeal was on 2<sup>nd</sup> November 2021.
  7. It was further submitted that the appeal and the instant application was served on the respondent on 24<sup>th</sup> May 2021, leaving no doubt that the Record of Appeal was filed on 24<sup>th</sup> May 2021, approximately 15 months after the appeal was due for filing which delay had not been explained. Consequently, the respondent urged the Court to strike out the Record of Appeal with costs as the request for extension of time was unmerited.
  8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
  9. The applicant's motion is brought, under Rule 4 of this Court's Rules.

The said Rule provides:

“ 4

Extension of time

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.”



10. The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 where the court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

11. In the instant case, the impugned judgment was delivered 11<sup>th</sup> December 2019\*, whereas the appeal and the instant application was filed on 24<sup>th</sup> May 2021, approximately 15 months after the appeal was due for filing. The delay herein therefore is certainly inordinate. The applicant contends that the delay in filing the appeal was due to technological challenges posed by Covid-19 directions on filing of appeals and other suits and delay in receiving the typed proceedings. It is imperative to note that the applicant has not disclosed when the proceedings became ready and neither has she annexed a certificate of delay to the application.

12. Be that as it may, save for a letter dated 13<sup>th</sup> December 2019, requesting for proceedings, there is no other evidence on record to show the steps taken up by the applicant to follow up on the proceedings. The contention by the applicant that she had requested for typed proceedings but they delayed for the reason that there was no enough staff to handle most of the work due to Covid-19 is not supported by any evidence, as indeed this Court is aware that notwithstanding the challenges posed by Covid-19, court operations were still ongoing albeit on a limited scale.

13. Similarly, the contention by the applicant that the e filing portal was non responsive is not supported by any evidence since the applicant only complained on 2<sup>nd</sup> November 2020, 11 months after the impugned judgment had been delivered and there is no evidence on record to show that she had tried to file the appeal at any other time and failed.

14. On the other hand, the respondent contended that certified copies of the proceedings were ready on 19<sup>th</sup> May 2020, a fact that has not been controverted by the applicant and it has not been shown to the satisfaction of this Court, the steps that the applicant took from 19<sup>th</sup> May 2020 when the proceedings were said to be ready up to 7<sup>th</sup> July 2021 when Memorandum of Appeal and Record of Appeal were prepared.

15. From the circumstances of this case and in my considered opinion, the delay herein is inordinate and unreasonable and the same has not been explained to the satisfaction of this court.

16. Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in *Leo Sila Mutiso case* (supra), to extend time and therefore decline to extend time within which to file the appeal.

17. Accordingly, the applicant’s application dated 24<sup>th</sup> May 2021, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021.**



**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

