



Moses Kiplangat Saikwa [Suing as the Personal Representative of the Estate of Andrew Kisa Saikwa (Deceased) v Vomorono Limited & 2 others; Saikwa (Interested Party) (Civil Appeal (Application) E303 of 2021) [2021] KECA 260 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 260 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E303 OF 2021
KI LAIBUTA, JA
DECEMBER 3, 2021**

BETWEEN

MOSES KIPLANGAT SAIKWA [SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREW KISA SAIKWA (DECEASED)] APPLICANT

AND

VOMORONO LIMITED 1ST RESPONDENT

AFRICAN MERCHANT ASSURANCE COMPANY LIMITED 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

AND

JOHN MTAY SAIKWA INTERESTED PARTY

(Being an application for extension of time to file the Notice and Record of Appeal out of time, against the Ruling and Order of the Environment and Land Court of Kenya at Nairobi (Loice Chepkemoi Komingoi, J) delivered on 5th March 2020) in Environment and Land Court Case No. 251 of 2019)

RULING

1. By a Notice of Motion dated 8th June 2021 made under Rules 4 and 81(1) (2) [sic] of the Court of Appeal Rules, the Applicant, Moses Kiplangat Saikwa, seeks extension of time pursuant to Rule 4 to file the Notice of Appeal and the intended appeal out of time. He also seeks costs of the application. The intended appeal arises from the Ruling and Order of the Environment and Land Court at Nairobi



Case No. 251 of 2019 (L. C. Komingoi, J.) delivered on 5th March 2020. The application and today's Hearing Notice have been duly served on the respective counsel for the three Respondents.

2. The Motion is supported by the annexed affidavit of Burton Isindu (learned counsel for the applicant) sworn on 8th June 2021, and is made on 7 grounds set out on the face of the Motion, which I need not recite here, save to observe that they contain the Applicant's explanation for the delay in lodging his intended appeal. A summary of those grounds, which are also deposed in the learned counsel's supporting affidavit, suffice to guide the exercise of my discretion in determination of the applicant's Motion. Briefly stated, the grounds are that –
 - a. following delivery of the impugned Ruling and order on 5th March 2020, the applicant filed his Notice of Appeal on 19th March 2020 in compliance with Rule 75(2) of the Court of Appeal Rules;
 - b. counsel for the Applicant applied for certified copies of the proceedings and the impugned Ruling and Order on 19th March 2020, which he obtained on 9th April 2021;
 - c. the delay in filing the Record of Appeal was occasioned by delay in obtaining the certified copies of the proceedings, Ruling and Order as shown on the Certificate of Delay issued on 4th June 2021; and
 - d. according to the Certificate of delay, the time required for the preparation and delivery of certified copies of the proceedings was from 19th March 2020 to 6th April 2021, a period of 383 days, which should be excluded from computation of the time allowed to file the Record of Appeal.
3. The 2nd respondent, African Merchant Assurance Company Limited, filed a replying affidavit sworn by Elizabeth Kosgei (the 2nd respondent's Chief Executive Officer) on 19th August 2021. She opposes the applicant's Motion and states that –
 - a. the 14 days' delay in filing the Record of Appeal was unjustified; and
 - b. the issues purportedly raised in the intended appeal are merely preemptive and in furtherance of the multiplicity of proceedings, which are still pending in Civil Appeal No. 411 of 2019 involving the same parties, and on the same issues.
4. Except for the 2nd respondent's replying affidavit, no submissions have been made on behalf of the respondents. In their written submissions dated 18th November 2021 and made in support of the Applicant's application, learned counsel for the Applicant, M/s. Burton Isindu & Co. Advocates, rely on the authority of *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others [2018] eKLR* where this Court stated that –

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

5. Rule 4 of the Rules of this Court gives the Court unfettered discretion to “... 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 ...,” on such terms as it thinks just.

6. In its decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that;

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

7. In addition to the foregoing, I have considered the decision in *Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court, at p.733, called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

“As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

- a. that there is merit in his appeal;
- b. that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and
- c. that the delay has not been inordinate.”

8. Rule 75(1) and (2) of the *Court of Appeal Rules* requires “any person who desires to appeal to the Court” to “... give notice in writing within 14 days of the date of the decision against which it is desired to appeal.” Rule 77(1) requires that the Notice be served on the Respondent within 7 days next following. The applicant has complied with Rule 75 as regards the lodging and service of the requisite Notice of Appeal, he delayed in filing the Record of Appeal for about 14 days, which I do not consider inordinate.

9. That leaves me with the decisive issue as to whether the intended appeal is arguable with the possibility of success. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. From the annexed Order given on 5th March 2020 and the draft Memorandum of Appeal, I am satisfied that the grounds set out on the face of the Applicant’s draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable. In particular, it is arguable whether the learned Judge erred in –

- a. failing to appreciate and find that the cause of action as stated in the plaint only arose for the first time on or about 9th-11th July 2018, one month after delivery of judgment in P & A 599 of 1986 following which the respondents secured change of user and transfer of the suit property to the 2nd respondent;



- b. finding that the suit was res judicata and an abuse of the court process, yet the cause of action had not arisen by 5th June 2018; and
 - c. finding that the suit was res judicata while the transactions undertaken by the respondents subsequent to the judgment in the Probate and Administration Cause No. 599 of 1986 aforesaid could not have been challenged in that case, which had already been determined.
10. While I have no jurisdiction to scrutinise the possible merits or demerits of the intended appeal, suffice it to observe that the grounds therein advanced raise arguable points of law. Whether or not the intended appeal will succeed is not for me to judge.
11. By so determining, I am guided by this Court’s decision in *Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015* (Unreported), where the Court observed:
- “This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.
12. On the authority of *Muchungi Kiragu v James Muchungi Kiragu and another [1998] eKLR*, I am of the considered view that allowing time for the Applicant to pursue his desire to pursue the intended appeal would not unduly prejudice the 2nd Respondent. In Muchungi’s case, the Court had this to say:
- “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.”
13. Having carefully considered the contents of the Applicant’s Notice of Motion, the supporting affidavit, his draft Memorandum of Appeal, the 2nd Respondent’s affidavit in reply, and the written submissions of learned counsel for the Applicant, I find that the Applicant’s Notice of Motion dated 8th June 2021 succeeds. Accordingly, I hereby order and direct that:
- a. the applicant’s Record of Appeal filed on 8th June 2021 be deemed as duly filed; and
 - b. costs of this application be costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

