



REPUBLIC OF KENYA



**Obiero (suing on behalf of self and members of Lake Basin Development Authority Provident/  
Pension Scheme v Lake Basin Development Authority Board of Trustees & 9 others  
(Civil Application E077 of 2021) [2021] KECA 252 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 252 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E077 OF 2021  
RN NAMBUYE, JA  
DECEMBER 3, 2021**

**BETWEEN**

**CLIFFORD OTIENO OBIERO (SUING ON BEHALF OF SELF AND MEMBERS  
OF LAKE BASIN DEVELOPMENT AUTHORITY PROVIDENT/PENSION  
SCHEME ..... APPLICANT**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY BOARD OF TRUSTEES & 9  
OTHERS ..... RESPONDENT**

*((An application for extension of time to lodging of appeal and record  
of appeal against the ruling of the High Court of Kenya (F. Ochieng,  
J.) dated 26th March, 2021 in Kisumu Const. Petition No. 26 of 2019)*

**RULING**

1. Before me is a Notice of Motion dated 5th May, 2021 brought under Rule 4 of the [Court of Appeal Rules, 2010](#). It substantively seeks leave of the Court to extend time within which to file and serve both the Notice, Memorandum and a record of appeal out of time together with an attendant order for provision for costs of the application.
2. It is supported by grounds on its body, a supporting affidavit of Clifford Otiemo Obiero together with annexures hereto and written submissions dated 7th June, 2021. It is not opposed. At least I have not traced on the record either a replying affidavit in response to the application or both a replying affidavit and written submissions in response to the Deputy Registrar's notice for the hearing of the application served electronically both on the applicant and the advocates on record for the respondents on Wednesday, October 27, 2021 at 12.47pm.



3. Supporting the application, the applicant submits cumulatively that the intended impugned ruling was delivered on 24th March, 2021 in his absence. He concedes that the advocate for the respondents got through to him and inquired from him about his attendance before the Judge for the delivery of the intended impugned ruling. It is his position that his response to the advocates inquiry was that he was incapacitated through ill health and requested to be supplied timeously with a copy of the ruling through an email he provided. He contends that instead of the advocate for the respondents conveying to the court the correct information about his physical condition which had prevented him from attending the Judge for the delivery of the ruling, the advocate allegedly misrepresented to the Judge that the applicant was just idling in the village and never relayed to the Judge the request that he be supplied with a copy of the ruling through email.
4. The applicant further asserts that he was incapacitated on account of ill health for quite some time. In support of his assertion of incapacity, the applicant has exhibited a doctor's medical report indicating that he was attended by the said doctor on 22nd March, 2021 and granted forty-five (45) days sick leave. He has also exhibited a photograph showing his right arm in bandages. It is his position that the failure to timeously initiate his intended appellate process was not therefore deliberate in the circumstances explained above which in his opinion are also not only reasonable but also excusable and therefore sufficient to warrant the court to exercise its discretionary mandate in his favour and grant the reliefs sought.
5. To buttress the above submission, the applicant relies on Rule 4 of the Court of Appeal Rules, 2010 which donates the mandate for the court to exercise its discretionary mandate in his favour. Article 159 of the *Constitution of Kenya, 2010* which in his opinion is the oxygen principle that enjoins courts to administer justice without undue regard to procedural technicalities. He also relies on the case of *Karny Zabrya & Another vs. Shalom Levi* [2018] eKLR and *Abdul Azizi Ngama vs. Mungai Mathayo* [1976] KLR 61 on the threshold for granting a relief under Rule 4 of the Court of Appeal Rules.
6. As already mentioned above, the application is unopposed. Lack of opposition to the application notwithstanding, I am in law obligated to render a merit determination of the application.
7. My mandate to intervene 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.”
8. The principles that guide the court in the exercise of its mandate under the said rule are set out in the very case law that the applicant has relied upon in support of his application already highlighted above. The principles in the above cited case law among numerous others have now been crystallized by the Supreme Court of Kenya. I take it from (M.K. Ibrahim & S.C. Wanjala SCJJ.) decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR in which these were crystallized as follows:- “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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the



extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

9. From the above, the factors I am supposed to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
10. Starting with the period of delay, it is evident from the record that the ruling intended to be impugned is dated 24th March, 2021. The application under consideration which seeks the court’s intervention was filed on 5th May, 2021 a period of about one month and eleven (11) days.
11. 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.
12. In the instant application, the period of delay is much less than what was under consideration in the *George Mwendu case* (supra). It is therefore not inordinate. This finding alone cannot, however, per se entitle the applicant to the relief sought. It is imperative for me to consider the other factors as well before finally deciding either way. The next factor falling for consideration is the explanation that the applicant has proffered for the failure to initiate his intended appellate process timeously. He cites indisposition. He has annexed a doctor’s report giving him 45 days off duty and a photograph showing his right hand in bandages. There is nothing to suggest this was a feigned condition.
13. The forty-five days fell within the period the applicant ought to have taken steps to file the notice of appeal and the letter bespeaking proceedings and cause these to be served on the opposite parties. I therefore find the reason for the delay well explained and therefore excusable.
14. On the arguability of the intended appeal, the applicant has not annexed a draft memorandum of appeal indicating the issues he intends to take up on appeal. The position in law however is that where there is no memorandum of appeal annexed to the application, the court can discern the grievances intended to be taken up on appeal from any other supportive facts proffered by the applicant in support of the application.
15. In his written submissions, the applicant asserts that his withdrawal of the petition giving rise to the order of costs granted against him was involuntary. He withdrew upon losing locus standi as a result of constructive dismissal meted out against him by the respondent. He says a competent court of law has vindicated him by turning his resignation into constructive dismissal and awarded him damages. He therefore has a genuine grievance to take up on appeal.
16. The position in law on arguability of an appeal/intended appeal is that it need not be one that must succeed but one that warrants the court’s interrogation on the one hand and also invites the opposite party to respond thereto.
17. In my view, appellant’s allegation that he was forced to withdraw the petition due to circumstances beyond his control namely, lack of locus standi and that since he has been subsequently vindicated he should not be penalized with an order for payment of costs is definitely arguable. I also entertain no doubt that it will invite a response from the respondent. I am in the circumstances satisfied that the



intended appeal is arguable notwithstanding its ultimate outcome. See [Sammy Mwangi Kirietho & 2 Others vs. Kenya Commercial Bank](#) [2020] eKLR.

18. On the prejudice to be suffered by the opposite party should the relief be granted, none has been demonstrated to exist for lack of a response from the respondent.

19. The applicant has also relied on the non-technicality principle enshrined in Article 159(2)(d) of the Constitution, 2010. It provides:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles -

d. Justice shall be administered without undue regard to procedural technicalities;

20. The principles that guide the court in the discharge of the court’s mandate donated by the above provision have also been crystallized by case law. I take it from the cases of [Jaldesa Tuke Dabelo vs. IEBC & Another](#) [2015] eKLR; [Raila Odinga and 5 Others vs. IEBC & 3 Others](#) [2013] eKLR; [Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others](#) [2014] eKLR; [Patricia Cherotich Sawe vs. IEBC & 4 Others](#) [2015] eKLR for principles/propositions, inter alia, that: the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2)(d) of the Constitution is not a panacea for all procedural ills.

21. In light of the above crystallized position, shutting out the applicant and sending him from the seat of justice empty handed in the wake of existence of provision of law donating power to the court to extend time within which to initiate an appellate process in the absence of any valid reason for withholding the relief sought, would in my view be tantamount to rendering justice on technicalities. Interest of justice herein, therefore, would demand that the applicant be accorded an opportunity to pursue his intended appellate right.

22. Also falling for consideration is the right to be heard on the intended appellate right which is now constitutionally entrenched. The parameters for according this right to a deserving party have also been crystallized by case law. See I take it from 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.

23. On the totality of the above assessment and reasoning, I am satisfied that the applicant has satisfied the prerequisite for granting of a relief under Rule 4 of this Court’s Rules. I therefore proceed to make orders as follows:



1. The applicant's application dated 5th May, 2021 be and is hereby allowed on the following terms:
  - a. The applicant has fourteen (14) days from the date of the delivery of this ruling to file both a notice of appeal and a letter bespeaking proceedings.
  - b. The applicant has seven (7) days from the date of the lodging of the notice of appeal to serve the notice of appeal on the opposite party.
2. In default of compliance with the terms in item 1 above, the leave granted herein to stand lapsed.
3. There will be no order as to costs as the application was undefended.

**DATED AND DELIVERED AT NAIROBI THIS 3RD 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**

