



**Raffaela Pochintesta & another v Shemaka (Civil Application
23 of 2021) [2021] KECA 269 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 269 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 23 OF 2021
SG KAIRU, JA
DECEMBER 3, 2021**

BETWEEN

RAFFAELA POCHINTESTA 1ST APPLICANT

SARAF VENTURES LIMITED 2ND APPLICANT

AND

ISMAEL SHEMAKA RESPONDENT

*(An application for extension of time to file a notice of appeal out of time
against the judgment of the Environment and Land Court at Malindi
(Olola, J.) delivered on 17th June, 2020 in ELC Case No. 115 of 2010)*

RULING

1. In a ruling delivered on 17th June 2020, the Environment and Land Court (ELC) at Malindi allowed an application by Ismael Shemaka, the respondent herein, to review a consent order that had been recorded by the parties in the suit on 30th September 2015 and ordered that a property known as Kilifi/Jimba/1334 be sold and proceeds thereof be used to offset the unpaid balance of the decretal amount.
2. Intending to challenge that ruling, the applicants, Raffaela Pochintesta and Saraf Ventures Limited, have by application dated 13th August 2020 applied, presumably under Rule 4 of the Court of Appeal rules, for an order for extension of time to file a notice of appeal out of time. In his affidavit in support of the application, Gicharu Kimani, the advocate for the applicants, deposes that he was instructed on 30th July 2020 to file the appeal; that his firm applied for certified copies of proceedings on the same date; that he is aware that the time for filing the notice of appeal has since lapsed; that the present application has been made without unreasonable delay; that the intended appeal has chances of success; and that the respondent will not suffer prejudice if the application is allowed.
3. In submissions in support of the application, the advocate for the applicants has cited numerous decisions of this Court, including *Vishva Stone Suppliers Company Limited vs. RSR Stone (2006)*



Limited [2020] eKLR and *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR* regarding the legal principles applicable in applications for extension of time. In the same submissions counsel for the applicants Mr. Kimani urges matters that should have been deposed to in an affidavit, namely, that when the ruling was delivered on 17th June 2020, his client the 1st applicant had traveled outside the country and his efforts to contact him to obtain instructions were in vain; that it was not until 30th July 2020 when he received instructions to appeal whereupon he applied for certified copies of proceedings in the ruling.

4. It is submitted that the delay in preparation and filing and instituting their appeal was caused by “the incomparable communication breakdown between the advocate and client attributed to the outbreak of the global COVID-19 virus, leading to scaling down of operations, suspension of flights in and out of the country and the unscheduled closing and re-opening of the advocates office”. Counsel urged the Court to take judicial notice of the unforeseen disruption of public service operations and subsequent scaling down of court operations with respect to the government effort to combat the spread of the COVID-19 virus.
5. In his replying affidavit in opposition to the application, the respondent deposes that the ruling the subject of intended appeal was delivered on 20th June 2020 in the presence of counsel for both parties; that no explanation is given why the applicants did not instruct their advocate soon thereafter; that the request to the court below for proceedings on 30th July, 2020 was made more than 30 days after delivery of the ruling and no explanation is offered for that delay; that although the present application is dated 13th August 2020, it was not filed until 8th February 2021 and thereafter served on counsel for the respondent on 27th April 2021; and that the applicant stands to suffer prejudice if the application is allowed as the dispute has been in court for 11 years.
6. Citing numerous authorities including *Abdul Aziz Ngoma vs. Mungai Mathayo & Another (1976) eKLR* and *Abdulkadir Athman Salim ElKindy vs. Director of Public Prosecutions (2018) eKLR* counsel for the respondent, Kilonzo & Aziz Co Advocates, have submitted that this is not a proper case for the exercise of discretion in favour of the applicants as there is no satisfactory explanation for the delay involved.
7. As the Supreme Court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR* extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration. See also *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997 [1999] 2 EA 23*.
8. As already indicated, the ruling of the ELC the subject of the intended appeal was delivered on 17th June 2020. By dint of Rule 75 of the Court of Appeal Rules, the notice of appeal should have been filed on or before 1st July 2020. Although the notice of appeal attached to the application bears the date of 30th July 2020, it is not evident that it was ever filed. Furthermore, notwithstanding that the present application seeking extension of time bears the date of 13th August 2020, it was not presented to court until 8th February 2021. There is an unexplained delay of about 6 months from 1st July 2020, by when the notice of appeal should have been filed, to 8th February 2021 when this application was filed.



9. Beyond the invitation to the Court to take judicial notice of the Covid 19 pandemic and its effects on public service delivery generally, no concrete explanation is offered for the long delay in presenting the instant application.
10. The applicants have not equipped the Court with sufficient material or basis upon which to exercise its discretion in favour of the applicants. Consequently, the application dated 13th August 2020 filed in the registry on 8th February 2021 fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

