



**Diffin v Muhdhar (Miscellaneous Application E027 of 2023)
[2024] KEELC 3270 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION E027 OF 2023**

**EK MAKORI, J
APRIL 12, 2024**

BETWEEN

HAFSWA ABDALLA SAID DIFFIN APPLICANT

AND

AMINA MUHDHAR RESPONDENT

RULING

1. Application dated 9th June 2023, supported by the annexed affidavit of one HAFSWA ABDALLA SAID DIFFIN sworn on the even date, seeks among other prayers:
 - a. That this Court be pleased to grant the applicant leave to file an appeal out of time against the judgment delivered by Hon. Wachira SRM on 17th March 2023, in Lamu PM-ELC Case No.10 of 2020 – Abdalla Said Diffin v Amina Muhdhar, or in the alternative leave to appeal out of time.
 - b. That the costs of this application be in the intended appeal or in the cause.
 1. The respondent Amina Muhudhar filed her replying affidavit sworn on 14th July 2023 opposing the Notice of Motion application.
 2. The parties canvassed the application by way of written submissions.
 3. The issue for the determination of this Court is whether it will be germane to grant leave within which to file an appeal out of time or deem the filed Memorandum of Appeal as filed within time with the attendant costs.
 4. The main reason the applicant proffers for being late in the filing of the intended appeal as disclosed in the body of the application and the supporting affidavit is that the applicant while dissatisfied with the judgment of the Court, decided to look for a lawyer, other than the one representing her in the Lower Court. When she could not



find one she resorted to engaging her former lawyer who then immediately filed the current application.

5. Mr. Aboubakar for the applicant is of the view that 3 three-month delay in filing the current application is not inordinate and invites this Court to consider several Articles of *the Constitution* vide - Articles 50 (2), on the right of appeal as a fundamental right, 25(2) on the right to a fair trial as an inalienable right,⁴⁸ on access to justice,^{159(2)(d)} on the determination of disputes without undue regard to procedural technicalities but rather substantive justice, which goes in tandem with the decision in *Apollo Mboya v Attorney General and 2 Others* [2018]eKLR, on ouster clause. That the Court can overlook an ouster clause when committed to doing substantial justice
6. Mr. Aboubakar further cites the provisions of Sections 1A and 1B of the *Civil Procedure Rules* on the overriding objectives and determination of disputes based on proportionality where no substantial prejudice shall be suffered by either party in the justice chain, including the right of appeal.
7. Mr. Aboubakar argues the Court to adhere to the laid down judicial precedents and place consideration on the period of delay, the reasons for the delay, whether the appeal is arguable, the degree of prejudice to be suffered by the respondent if any, the importance of compliance with the time limits to particular litigation in issue and the effect if any on the administration of justice or public interest involved. See *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR.
8. When all those factors are considered, Mr. Aboubakar believes the scale tilts towards allowing the application and the orders sought. Significant in the appeal will be that no prejudice will be suffered by any party since the land in issue remains undeveloped and whoever wins the appeal will still use the land. Besides, the Magistrate erred in not finding that the appellants were first in time to be allocated the land in dispute.
9. The respondent on the other hand is of the view that the current application is bad in law and brought late in the day after the 45-day window period had lapsed. The 90 days delay from 17th March to 27th June 2023 has not been explained, running afoul of the exercise of discretion and the novel principles to consider before granting an extension of time within which to appeal as enunciated in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR and *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR.
10. The principles for the grant of leave to appeal out of time are as enunciated in the cases cited by the parties and as emphasized by the Supreme Court in the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR:

“25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... 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.



“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;
 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]
12. The single reason provided by the applicant for the 90-day delay is that the applicant was grappling with the advocate to appoint to represent her for the appeal purposes, but ended up wasting time and settling on her earlier one. This reason does not sound useful enough for the delay. And that the authorities cited emphasize that a party has to be vigilant enough and bring up an appeal in good time. It is not a party's right to just wait and decide what time to appeal.
13. I have noted that the parties are wrangling over who was allocated the suit property earlier in time and which land it is. That the land in question has not been developed and that nobody is to be prejudiced if the appeal were to be allowed to proceed. Had I found that the respondent was to be prejudiced, I would not have allowed the current application.
14. Exercising my discretion, therefore, I will allow the application and order that leave be and is hereby granted for the applicant to appeal out of time. In any event, the lodged Memorandum of Appeal be deemed regular and directions be taken on the hearing and disposal of the main appeal itself.
15. No order as to costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 12TH DAY OF APRIL 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Soita for the Respondent.

Court Assistant: Happy.

In the Absence of:

Mr. Aboubakar for the Applicant

