



**Mwavula v Mohamed (Environment & Land Miscellaneous Case  
E059 of 2023) [2024] KEELC 4639 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4639 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E059 OF 2023**

**NA MATHEKA, J**

**JUNE 13, 2024**

**BETWEEN**

**MNYASA MWAVULA ..... APPLICANT**

**AND**

**FATUMA MOHAMED ..... RESPONDENT**

**RULING**

1. The application is dated 6<sup>th</sup> November 2023 and is brought under sections 79G and 95 of the [Civil Procedure Act](#), Order 50 Rule 1 of the Civil Procedure Rules seeking the following orders:
  1. That this honourable Court be pleased to grant leave to the Applicant to file appeal out of time against the whole judgment and decree of Hon. J. B Kalo Chief Magistrate, given on 7<sup>th</sup> September, 2023 in Mombasa RMCC No. 1808 of *Fatuma Mohamed vs Mnyasa Mwavula*.
  2. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.
  3. That the costs of this application be provided for.
2. It is based on the following grounds that judgement to be appealed against was delivered on 7<sup>th</sup> September, 2023 and a copy of the judgement sent via the Advocates email on the same date. That on several occasions the Applicant's Advocates tried to get in touch with the Applicant with a view of obtaining instructions on whether to prefer an appeal. That by the time the instructions were obtained from the Applicant, the time allowed to file an Appeal had lapsed. That the Respondent will not suffer any prejudice if the Applicant is allowed to appeal out of time. The slight delay occasioned herein is not inordinate and is excusable in the circumstances. That the Applicant has a reasonable Appeal with high chance of succeeding. Any party served does not appear at the time and place above mentioned such order will be made proceedings taken as the court may think just and expedient.



3. The Respondent in her replaying affidavit dated 1<sup>st</sup> March 2024 stated that the instant application before court is brought with undue delay which explanation offered by the applicant is not satisfactory or at all. No material has been placed before the court to demonstrate the alleged delay and or receipt of instructions by the Applicant herein. That from the foregoing and explanation offered by the Applicant it is clear that the Applicant slept on his rights to which this court ought not aid at all. That the Applicant has not ably demonstrated the merits of his Appeal and the chances of success to be warranted the chance to pursue his Appeal.
4. This court has considered the application and submissions therein. Section 79G of the [Civil Procedure Act](#) is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the [Civil Procedure Act](#) provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
5. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of town. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* (1970) EA 482 the court stated as follows;

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”
6. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in [Edith Gichungu Koine vs Stephen Njagi Thoithi](#) (2014) eKLR thus;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
7. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.
8. In [Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others](#) (2013) eKLR the court held as follows;
  - (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 for 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) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  - (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
  - (6) Whether the application has been brought without undue delay; and
  - (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
9. I have given due consideration of the record in light of the rival pleading, submissions by the applicant and principles that guide the court I find that the reason given for the delay in filing the appeal is that judgement to be appealed against was delivered on 7<sup>th</sup> September, 2023 and a copy of the judgement sent via the Advocates email on the same date. That on several occasions the Applicant's Advocates tried to get in touch with the Applicant with a view of obtaining instructions on whether to prefer an appeal. That by the time the
10. instructions were obtained from the Applicant, the time allowed to file an Appeal had lapsed. The Applicant submitted that the judgement erroneously stated that the Respondent/Plaintiff had produced during the trial the certificate of title, deed plan and transfer, rate payment, certificate of postal search, property ownership transfer receipt and rates receipt. These facts did not relate to the case. The Applicant applied for a variation and /or rectification of the judgement and an amended judgement was delivered on the 7<sup>th</sup> September 2023 with the same erroneous facts. I have perused the annexed amended judgement and indeed this is reflected on page 4 of the said judgement. The draft memorandum of appeal states that the trial magistrate erred in fact and law by relying on facts and documents which did not form part of the pleadings and the evidence in court. I find that the applicant does have an arguable appeal. I also find that the applicant is not guilty of inordinate delay. I find this application is merited and I grant it as prayed with no orders as to costs.
11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

**N.A. MATHEKA**

**JUDGE**

