



Mulatya v Ochieng & another (Environment and Land Miscellaneous Application E023 of 2024) [2024] KEELC 5621 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5621 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E023 OF 2024
NA MATHEKA, J
JULY 24, 2024

BETWEEN

JOSEPHINE MULATYA APPLICANT

AND

BETTY AKINYI OCHIENG 1ST RESPONDENT

IRENE AKOTH OCHIENG 2ND RESPONDENT

RULING

1. The application is dated 25th April 2024 and is brought under Section 1A, 1B, 3A, 63(e), 79G & 95 of the *Civil Procedure Act* and Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders;
 1. That this Honourable Court be pleased to enlarge the time within which the Applicant herein is to file Appeal and that the Appeal herein be admitted out of time;
 2. That the Memorandum of Appeal filed herein be deemed to have been file within time;
 3. That the costs of this Application be costs in the cause.
2. It is premised on the supporting Affidavit of Apollo Muinde and on the following grounds that the Judgment with regard to which the leave to appeal is sought was delivered on 1st December 2023. That out of an innocent mistake on the part of Counsel for the Applicant filed the relevant Appeal within time against the whole decision of the judgment in the High Court Registry on 17th January 2024 as opposed to in the Environment & Land Court Registry as the matter in question involved land. That the Applicant's Counsel has learnt of the said error as he was intending to file the Record of Appeal since he has already obtained certified copies of proceedings and judgment and the only document remaining and ought to be obtained from the court is the decree which has already been extracted but the same has not been signed owing to the non-traceability of the court file. That the Applicant has



wholly withdrawn the entire Appeal in HCCA/EOI 1/2024 and intends to file it afresh to this Court, which is the Court clothed with the requisite competent jurisdiction. That leave to Appeal is necessary, for the prescribed time within which to Appeal has already lapsed. That the Applicant's Counsel on 18th April 2023 wrote to the Chief Magistrate to hasten on the retrieval of the Court file in order for the decree to be signed for them to take necessary steps in regard to the preparation of the final record. That it is only fair and in the interest of Justice that the Orders sought herein be granted.

3. 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.”

4. 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.”

5. 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 Thoitbi](#) (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.”

6. 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.

7. 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.”
8. I have given due consideration of the record in light of the application 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 1st December, 2023. The reason for the delay in filing the appeal on time was out of an innocent mistake on the part of Counsel for the Applicant filed the relevant Appeal within time against the whole decision of the judgment in the High Court Registry on 17th January 2024 as opposed to in the Environment and Land Court Registry as the matter in question involved land. This application was filed immediately after the realisation of the said mistake. I find that this was an honest mistake on the part of the Counsel. In the circumstances I 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 as it was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

