



**Njiru v Wakai (Miscellaneous Application E008 of 2024)
[2024] KEELC 6298 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
MISCELLANEOUS APPLICATION E008 OF 2024
JM MUTUNGI, J
SEPTEMBER 30, 2024**

BETWEEN

MOSES WAWERU NJIRU APPLICANT

AND

ELIZABETH WAKAI RESPONDENT

RULING

1. The Applicant/Intended Appellant through a Notice of Motion application dated 22.3.2024 filed in Court on 7.4.2024 prays that he be granted leave to file an appeal against the Judgment delivered by the Principal Magistrate, Gichugu in Gichugu PM ELC No E008 of 2023 on 1st December 2023 out of time. The grounds upon which the application is based are set out on the body of the application and on the Affidavit sworn in support by Moses Waweru Njiru, the Applicant on 22nd March 2024. The Applicant avers he desires to lodge an appeal but the period allowed to file an appeal has expired. He avers his appeal has high chances of succeeding and that the Respondent stands to suffer no prejudice if the application is allowed. He avers the delay in filing the appeal was not deliberate and that it would be in the interest of justice to allow the application.
2. The Respondent filed a Notice of Preliminary Objection and a Replying Affidavit dated 30th April 2024 sworn by the Respondent in opposition to the application. The Preliminary Objection was predicated on two grounds namely, that the Affidavit sworn in support offended Rule 9 of the [Oaths and Statutory Declarations Act](#) as exhibits were not marked as required; and secondly that the Supporting Affidavit offended Rule 5 of the [Oaths and Statutory Declarations Act](#) as the attesting commissioner of oaths was shown to have been at Nairobi while the Affidavit indicated it was sworn at Chuka. The Respondent in the premises contended the Affidavit in support was defective and should be expunged from the record.
3. In the Replying Affidavit the Respondent averred that the Judgment was delivered on 1st December, 2023 and that the Applicant brought the instant application after over 3 months from the date of



delivery of the Judgment and the Respondent has not offered any reasonable and/or viable explanation for the delay in filing the appeal or bringing the instant application. The Respondent argued the Applicant's objective was merely to delay the execution of the Judgment/decre to the prejudice of the Respondent and was not deserving of the Court's discretion.

4. The Court on 6th May 2024 gave directions that the Preliminary Objection and the application be canvassed together by way of written submissions. Both the Applicant and the Respondent filed their submissions. The Applicants submissions are dated 26th May 2024 and those of the Respondent are dated 24th May 2024.
5. As regards the Preliminary Objection, the Applicant submitted that the Preliminary Objection was misconceived and constituted a fishing expedition by the Respondent in the hope that she would somehow stumble on some good luck. The Applicant submitted that the Preliminary Objection did not satisfy the threshold of what would constitute a valid Preliminary Objection as established in the Case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. The Applicant argued that the Respondent was resulting to invoking technicalities in an endeavour to shut out the Applicant from the seat of justice against the spirit and letter of the [Constitution](#) that Advocates fair Justice for all. The Applicant argued that adherence to technicalities ought not to be applied to deny a deserving litigant access to Justice.
6. The Applicant on the merits of Preliminary Objection submitted that the same raised issues of verification of the facts. The Applicant stated that Rule 9 of the Oaths and Statutory Declarations Act did not define the nature or form of the seal and neither did it spell out the manner the sealing was to be done and that left it open for the Practioners to devise how to comply with the provision.
7. As regards the format and content of the jurat, or attestation of the Affidavit the Applicant submitted that it was not an unusual for one to have a physical address that was different from the postal address. In the instant case the Applicant argued the Commissioner for Oaths had a physical presence at Chuka while his postal address was in Nairobi and hence the attestation was proper.
8. In regard to the application for leave to appeal out of time, the Applicant submitted that the Court's discretion to extend time was unfettered and urged the Court to exercise the discretion in his favour. The Applicant argued the delay was not inordinate. He stated the Judgment intended to be appealed against was delivered on 1st December, 2023 and that the instant application was filed on 22nd March, 2024 (though the thread or sent through e-filing shows the filing was effected on 6th April, 2024). The Applicant in support of his submissions relied on the Court of Appeal Case of [Gachugu v Karaine & 3 others](#) (2022) KECA 1411 (KLR) (16th December 2022) where Gachoka, JA cited various decisions and set out the considerations the Court of Appeal under Rule 4 of the [Court of Appeal Rules](#) takes into account. Inter alia the Judge observed:-
 - i. As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.
 - ii. The degree of prejudice entails, balancing the competing interests of the parties, that is the injustice to the Applicant in denying him/her an extension, against the prejudice to the Respondent in granting an extension.
 - iii. The Law does not set out any minimum or maximum period of delay. All it states, is that any delay should be, satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power, with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.



9. The Applicant also relied on the Case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* (2018) eKLR where the Court held:-

“The Law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favor. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

10. The Respondent in her submissions asserted that the Applicant’s Affidavit was defective for failure to comply with Section 9 and Section 5 of the *Oaths and Statutory Declaration Act* Cap 15 Laws of Kenya as the annexure was not marked as provided and that the attestation was improper as the Affidavit was indicated as having been sworn at, Chuka while the attesting Commissioner of Oaths, affixed a stamp indicating a Nairobi address.

11. The Respondent placed reliance on the Case of *Jeremiah Nyanwara Matoke v IEBC & 2 others* (2017) eKLR where Okwany J held that exhibits that were not marked and attested by a Commissioner of Oaths were inadmissible and expunged them from the record. Okwany J in her ruling cited a decision of this Court in the Case of *Solomon Omwega Omache & another v Zachary O. Ayieko & 2 others* (2016) eKLR with approval where the Court stated:-

“Although the point was not taken up by the Plaintiffs the Court has a duty to uphold the sanctity of the record noting that this is a Court of record. Before the Court is a Replying Affidavit with annexures which are neither marked nor sealed with the Commissioner’s stamp.”

“Are, they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the Replying Affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wake up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to Counsels or their assistant’s lack of attention and due diligence.”

12. In regard to the application for leave to appeal out of time the Respondent submitted that the Applicant had not offered any explanation for the delay and for that reason could not be entitled to the exercise of discretion by the Court, in his favour. The Applicant placed reliance on the Case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* (2014) eKLR where the Supreme Court laid down the principles that guide the Court in exercise of discretion in applications for extension of time which the Court stated 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 by case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.



5. Whether here will be any prejudice suffered by the Respondents if the 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.
13. The Respondent like the Applicant also cited the Case of *Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet* (2018) eKLR in support of his submissions.
14. I have considered the pleadings and the submissions made by the parties in regard to the Preliminary Objection and the application for extension. As concerns the Preliminary Objection, I am not satisfied the threshold upon which the objection could be sustained has been met. The objection was on two grounds; that the Jurat and attestation of the Affidavit sworn in support was improper; and that the annexure was not appropriately marked and sealed by the attesting Commissioner of Oaths. On the issue of the Jurat and the attestation, the complaint was that the Affidavit was indicated as having been sworn at Chuka while the attesting Commissioner's stamp carried a Nairobi postal address. I do not consider this would be sufficient to invalidate the Affidavit. It is quite possible in my view for a Commissioner of Oaths to practice at a given physical address and to have a postal address at another place. I did not understand the complaint to be that the Affidavit was not Commissioned and/or that the deponent never appeared before a Commissioner for oaths.
15. In regard to the second limb of the objection that the annexure was not sealed and marked as required under Rule 9 of the *Oaths and Statutory Declarations Act*, the affidavit referred to, only had one annexure, a Draft Memorandum of Appeal. It is correct that the "Draft Memorandum of Appeal" was not sealed and marked as provided under Rule 9 which provides thus:-
9. All exhibits to Affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.
15. The intent for the Applicant annexing a draft Memorandum of Appeal was so as to demonstrate that he had a viable appeal. The Applicant could as well demonstrate the grounds of his appeal in the sworn affidavit. Besides the Draft Memorandum was the only annexure to the Affidavit and there could be question of identification of the annexure. In this instance, I would not consider the failure to mark the annexure would render the Supporting Affidavit fatally defective as there was no possibility the annexure could be mistaken for want of identification. It was the only annexure.
16. As concerns the application for extension of time to file an appeal out of time, I agree the Applicant is seeking to have the Court exercise its discretion to enlarge time and allow him to file an appeal out of time. As expressed by the Supreme Court in the *Nicholas Salat v IEBC & 7 others Case* (*supra*) and the Court of Appeal Case *Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet* (2017) eKLR, the Applicant in an application for leave to appeal out of time (extension of time) has the burden to give a reasonable explanation for the delay to the satisfaction of the Court.
18. In the present case, the Judgment having been delivered on 1st December 2023 and the instant application being filed in early April, 2024, there is a delay of about 3 months since the period allowed for appeal lapsed. What was the reason for the delay? The Applicant does not give any viable reason either on the grounds supporting the application or in the Supporting Affidavit. The Applicant merely depones he was dissatisfied with the decision and he was desirous of appealing against the decision to get a second opinion of the superior Court. He depones, the time to file the appeal lapsed for reasons beyond his control. What were these reasons? They are not given and the Court has no means of



evaluating whatever reasons there may have been to satisfy itself they were reasonable and/or sufficient to warrant the exercise of discretion in favour of the Applicant.

19. The Applicant has given absolutely no reason for the delay and consequently has failed to furnish a basis to the Court to exercise its discretion.
20. Although the Applicant exhibited a Draft Memorandum of appeal he neither furnished the Court with a copy of the Judgment or decree for review to consider whether the Applicant had a good and/or viable appeal. The Applicant was too casual in the manner he approached the Court and is undeserving of the discretion of the Court. The Notice of Motion application dated 22nd March 2024 is devoid of merit and is hereby dismissed.
21. I order that each party bears their own costs of the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 30TH DAY OF SEPTEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

