



REPUBLIC OF KENYA



**Kangani v Kiriungi & 5 others (Environment and Land Miscellaneous Application  
E004 of 2024) [2024] KEELC 7145 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7145 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2024  
CK YANO, J  
OCTOBER 30, 2024**

**BETWEEN**

**TERESIAH EUSTACE KANGANI ..... DEFENDANT**

**AND**

**ANDERSON MWIATHI KIRIUNGI ..... 1<sup>ST</sup> PLAINTIFF**

**PETER MUTWIRI KIRIUNGI ..... 2<sup>ND</sup> PLAINTIFF**

**PETER MWENDA KIRIUNGI ..... 3<sup>RD</sup> PLAINTIFF**

**JULIET GAKII KIRIUNGI ..... 4<sup>TH</sup> PLAINTIFF**

**JOSEPH KIRIMI KIRIUNGI ..... 5<sup>TH</sup> PLAINTIFF**

**LEAH MUTHONI KIRIUNGI ..... 6<sup>TH</sup> PLAINTIFF**

**RULING**

1. Before me is a Miscellaneous Application dated 19<sup>th</sup> March, 2024 stated to be brought under Order 37 rule 2 of the Civil Procedure Rules, 2010, Section 27 of the *Limitation of Actions Act* and Section 1A, 1B and 3A of the *Civil Procedure Act*. The application is supported by the affidavit of Teresiah Wanjiru Kangangi sworn on 19<sup>th</sup> March 2024.
2. As rightly pointed out by the respondents, the application which was filed by the applicant in person, is wanting in form and substance, incoherent and is difficult to comprehend. However, the applicant later appointed the firm of B. Musili Advocates to represent her in the matter. From the submissions filed by learned counsel for the applicant, it came out that the applicant is seeking for leave to file an appeal out of time. I will therefore invoke the provisions of Article 159 (2) (d) and determine the application as such.



3. In her submissions dated 13<sup>th</sup> September, 2023, it is submitted that the applicant wishes to appeal against the judgment and decree of Hon. J. M. Gandani, CM delivered on 18<sup>th</sup> October, 2023 in Chuka Magistrates Court Case No. ELC 57/2010, but the time permitted by law has lapsed. That the delay in filing the appeal was not intentional, but was due to an accident involving the applicant who at the time was acting in person. The applicant contended that her intended appeal is arguable and meritorious and with high chances of success and it will be a great injustice to her if the time for filing appeal is not extended. That she will have been denied the right to be heard and will suffer substantial loss if the application is disallowed.
4. The applicant avers that she had filed ELC Appeal No. 7/2023 on 8<sup>th</sup> December, 2023, but the Memorandum of Appeal was struck out for being having been file out of time and without leave.
5. It is submitted on behalf of the applicant that there are good and sufficient reasons for this court to exercise its discretion and grant leave to the applicant to file appeal out of time. In her supporting affidavit, the applicant has exhibited evidence in the form of medical documents to confirm her averments that she was involved in an accident and sustained injuries on her eye which she states almost left her with a permanent disability. Further, that there was a delay in getting the proceedings which administrative delay should not be visited upon her. The applicant has exhibited a receipt requesting for copies of proceedings and judgment.
6. Concerning principles for extension of time, the applicant relied on the case of Nick Salat Vs. IEBC & 7 Others [2014] eKLR and Section 79G of the *Civil Procedure Act*. It is the applicant's submission that the phrase used in Section 79G is "an appeal may be admitted out of time," Which therefore means that an appeal may indeed be admitted out of time.
7. Learned counsel for the applicant submitted that the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. The applicant's counsel relied on the case of Mugo & Others Vs. Wanjiru & Another (1970) EA 482 and submitted that in the present case, the appeal was filed but out of time.
8. Learned Counsel for the applicant further submitted that decisions of the courts must be redolent of fairness and the best interest of the people whom the law is intended to serve. The applicant's counsel relied on the case of Kamlesh Mausukhlal Damki Patni Vs. DPP & 3 Others [2015]eKLR where the Court of Appeal held that judicial officers are bound to adhere to national values and principles of governance whenever applying or interpreting *the constitution* to ensure that the rule of law is upheld.
9. On the justification for delay, the applicant relied on the Court of Appeal decision in Patrick Wanyonyi Khaemba Vs. Teachers Service Commission & 2 Others [2019]eKLR and submitted that a plausible and satisfactory reason has been advanced to justify the delay in filing the appeal.
10. It is the applicant's submission that the respondents will suffer no harm nor will they be prejudiced in any way if this application is allowed. The applicant relied on the case of Patrick Maina Mwangi Vs. Waweru Peter [2015] eKLR which quoted the finding in United Arab Emirates Vs. Abdel Ghafar & Others 1995 IR LR 243. That the respondents have not demonstrated how they would suffer irreparable prejudice that cannot be compensated by award of interest if the application is granted.
11. It is also the applicant's submission that there is 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.
12. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through a replying affidavit dated 4<sup>th</sup> August 2024 sworn by Anderson Mwiathi Kiriungi the 1<sup>st</sup> respondent herein. The 1<sup>st</sup> and 2<sup>nd</sup> respondents



stated that the 3<sup>rd</sup> – 6<sup>th</sup> respondents abandoned the matter in Chuka CMC LDT No. 57 of 2010 leaving them to single handedly prosecute the suit to conclusion, fact they stated is well known to the applicant. That the judgment in the lower court was issued in favor of the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

13. It is the contention of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the application herein is fatally defective, incompetent, frivolous, vexatious, incoherent, bad in law and a serious abuse of the court process and should not be entertained by the court. That no sufficient explanation has been offered for the undue delay. The respondents accused the applicant of misleading the court that she had an accident yet the medical discharge document refers to hypertension.
14. In their submissions dated 20<sup>th</sup> September, 2024 filed through the firm of Waklaw Advocates, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the application herein is wanting in form and substance, defective, incompetent and frivolous in all its manifestations and contextual framework. That the inadequacy and deficiency in the substance of the application is glaringly apparent and cannot be cured through submissions as the counsel has attempted to do.
15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the Counsel ought to have at least attempted to rectify the deficiencies, which are quite significant. That the manner in which the application is filed makes it difficult to deal with it hence they urge that the entire application be struck out.
16. It was further submitted that the application does not meet the tests for granting leave. That it is trite that an applicant for extension of time must show good and substantial reasons for the delay, and prima facie good cause why the intended appeal should be heard. That the Applicant must demonstrate to the satisfaction of the Court first a satisfactory justification and to also show that the grounds of appeal are arguable. That it is upon satisfaction of both the above that the court invokes its discretion to grant the application. That the discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the case of Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 others (2014) eKLR.
17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that in granting leave, the court has a duty to balance the competing interests of the applicant with those of the respondents, a position well stated in *M/S Portreiz Maternity Vs. James Karanga Kabia Civil Appeal No 63 of 1997*.
18. It was submitted that applicant herein avers that she could not file the Appeal within the statutory time due to a handicap occasioned by injuries suffered in an accident and also blames purported delay in getting proceedings. That the applicant has not tendered evidence of the purported incapacitating injuries as the medical documents shows hypertension and nowhere does the document refer to an accident or such injuries. That the Applicant cannot, therefore, benefit from this misleading excuse.
19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that there is no evidence of delay in obtaining proceedings. That the applicant has not shown when she may have requested for the proceedings and when they were received. That there is not even a certificate of such delay. It is therefore the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submission that it is clear that the Applicant has not offered either reliable, satisfactory or justifiable reasons for the delay and therefore, it does not matter whether the appeal is arguable or not.
20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the draft/proposed Appeal by the Applicant is fatally incompetent and defective and incapable of being argued. That it stands no chance before the Court. That it is a flagrant abuse of the court process and should not be entertained by the Court and they prayed that the same be struck out with costs.
21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that they stand to suffer great prejudice and hardship as they are in occupation of the parcels of land which the Applicant has failed to cause to be registered in



their names against their legitimate expectation. It was submitted that the Applicant does not live and has never lived on the suit lands. That further delay will constitute a serious injustice against the Respondents. That the Respondents deserve to be allowed to enjoy the fruits of their successful litigation by bringing the matter to a conclusive closure.

22. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that in deciding whether sufficient cause has been shown, among the facts usually relevant are the explanation given for the delay and the prospects of success of the intended appeal. That it is notable that the list of the required threshold is not exhaustive and each case will depend on its peculiar facts and circumstances such as what is evident in the instant appeal that has fatal deficiencies. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the case of *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22.
23. It was submitted that the instant application and the proposed appeal constitute unforgivable flaws and deficiencies. That the application is predicated upon and based on an appeal that has zero chances of success. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urged the court to dismiss the application with costs.

### **Analysis and Determination**

24. I have considered the application, the response and the submissions filed by the respective parties. The issue for determination is whether applicant should be allowed extension of time to file appeal out of time.
25. The statutory provisions that deal with the requisite period for filing of appeals from the Subordinate Courts to the High Court is Section 79G of the *Civil Procedure Act* which 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 the lower court may certify as having been requisite for the preparation and delivery to the Appellant 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.”
26. In *First American Bank of Kenya Ltd Vs Gulab P Shah & 2 Others*. Nairobi (Milimani) HCCC No 2255 of 2000 (2002) 1 EA 65 the court set out the factors to be considered in deciding whether or not to grant such an application and these are;
  - i. The explanation if any for the delay;
  - ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the course of justice;
  - iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the Applicant.
27. The court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension time, the court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.
28. An applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.



29. This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014]eKLR set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated “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; ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; v) Whether there will be any prejudice suffered by the respondents if the extension is granted; vi) Whether the application has been brought without undue delay; and vii) whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
30. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in *M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No 63 of 1997* thus: - “That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”
31. In the instant case, the main reason given by the applicant is that she was involved in an accident and sustained injuries on her eyes. The discharge summary marked “TWK2” indicates that the applicant was admitted at Kathathani Medical Centre on 5<sup>th</sup> November, 2023 and was discharged on 3<sup>rd</sup> December, 2023. On 8<sup>th</sup> December, 2023, the applicant filed a memorandum of Appeal in ELC Appeal No. 7 of 2023 which was however struck out by the court for being filed out of time and without leave of court. The applicant has now filed the present application. The question here narrows to whether the delay is excusable. Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party’s control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.
32. In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefor, and the prospects of success. This list is not exhaustive and each case will depend on its peculiar facts and circumstances. In *National Union of Mineworkers Vs. Council for Mineral Technology* [1998] ZALAC 22 at para 10, the court held: - “The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”
33. In order to exercise its discretion whether or not to grant condonation, the court must be apprised of all the facts and circumstances relating to the delay. The applicant must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him or her to the court’s indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.



34. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.
35. I have evaluated the reason offered for the delay. I find and hold that the delay due to health reasons cannot be faulted on the applicant. I find and hold that the delay is excusable and that it has been satisfactorily explained. I also find that the application meets the tests for the court to exercise its discretion in the applicant's favour. Indeed, the applicant had proceeded to file ELC Appeal No. 7 of 2023 on 8<sup>th</sup> December, 2023 which was later struck out because the same was filed out of time and without leave of the court. The applicant, who was previously acting in person demonstrated her desire to file an appeal from the word go. I will therefore exercise my discretion in the applicant's favour. The respondents have indicated that they are the ones in occupation of the suit parcel of land. Therefore, they stand to suffer no prejudice as they are not being dispossessed.
36. Article 48 of *the Constitution* guarantees every person right of access to justice. In addition, under Article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In this case, the applicant has expressed her desire to exercise her constitutional right of appeal. It is only just and fair to allow to do so.
37. Accordingly, I allow the applicant's application dated 19<sup>th</sup> March, 2024 and order that the intended appeal be filed and served within 14 days from the date of this ruling.
38. Costs of the application to abide the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 30<sup>TH</sup> OCTOBER, 2024**

**In the presence of:**

Court Assistant – Kiruja

Kirimi for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Ms. Musili for Applicant

No appearance for 3<sup>rd</sup> to 6<sup>th</sup> Respondents

**C.K YANO,**

**JUDGE**

