



Mwango & 2 others v Maonga & another (Environment and Land Appeal E011 of 2024) [2024] KEELC 7141 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E011 OF 2024
NA MATHEKA, J
OCTOBER 30, 2024**

BETWEEN

**VINCENT MWANGO 1ST PLAINTIFF
DAVID MBARU 2ND PLAINTIFF
SAID SWALE 3RD PLAINTIFF**

AND

**ALBERT MAONGA 1ST DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT**

RULING

1. The application is dated 22nd April 2024 and is brought under Order 42(6) and Order 50 Rule 6 of the Civil Procedure Rules, Section 3A of *Civil Procedure Act* seeking the following orders;
 1. That this Application be certified as urgent and service be dispensed with.
 2. That pending the hearing and determination of this application the Honorable Court do grant a temporary order of stay of execution.
 3. That pending the hearing and determination of this Application this Honorable Court be pleased to stay the judgement entered herein on 27th November 2023 in Mombasa and any other order that may be issued pursuant thereto, pending the hearing of the appeal.
 4. That the Honorable Court be pleased to extend time for filing and service of Memorandum and deem the Memorandum of Appeal lodged today and served on the Respondent.
 5. That costs incidental to this application abides the result of the said appeal



2. The application is grounded on the annexed affidavit of Vincent Mwago and no other further grounds that a judgment was entered in favour of the Respondent on 27th November 2023. That the Applicant/Appellant is dissatisfied with the judgement of the Magistrate on 9th July 2023 and has filed an appeal. That the balance of convenience clearly weighs in favour of the Applicant in the matter owing to the drastic effect of the decision of the Principal Magistrate's Court delivered on 27th November 2023. That the judgement was delivered on the 27th November 2023 in Mombasa PMCC No. 24 of 2018 between the Appellant as the Defendants and the Respondent as the Plaintiff. That the Appellant's filed a Memorandum of Appeal out of the time. That filing the Memorandum of Appeal out of time was not deliberate as it was due to unforeseen reasons.
3. The Respondent relied on their grounds of opposition and stated that the suit was dismissed and hence there is nothing to stay. That the Applicant has failed to satisfy the conditions for stay and for granting of extension of time to file the appeal.
4. This court has considered the application, submissions and the grounds of opposition 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 Gichungo 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. This application is for the extension of time to appeal against the judgement of Hon F Kiamba in Mombasa



PMCC C No. 24 of 2018 delivered on the 9th July 2021. This application was filed on the 23rd April 2023 almost two years later.

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 and principles that guide the court. The reasons for the delay given is that it was due to unforeseen reasons. This is not a satisfactory explanation. The draft memorandum of appeal states in one of the grounds that the trial magistrate erred in fact and law in making findings which a total misdirection from the provisions of the law. I find that the applicant does not have an arguable appeal. I also that find that the applicant is guilty of inordinate delay and this application is an afterthought. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF OCTOBER 2024.

N.A. MATHEKA

JUDGE

