



REPUBLIC OF KENYA



KENYA LAW
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**Agatha v Azad & 3 others (Application 11 (E020) of 2021)
[2022] KESC 1 (KLR) (Civ) (10 February 2022) (Ruling)**

Neutral citation: [2022] KESC 1 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

APPLICATION 11 (E020) OF 2021

MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU & W OUKO, SCJJ

FEBRUARY 10, 2022

BETWEEN

MUTHEU AGATHA APPLICANT

AND

RAHEEM MEHDI AZIZ AZAD 1ST RESPONDENT

**CABINET SECRETARY MINISTRY OF FOREIGN AFFAIRS AND
INTERNATIONAL TRADE 2ND RESPONDENT**

**CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF
THE NATIONAL GOVERNMENT 3RD RESPONDENT**

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 4TH RESPONDENT

*(Being an Application for leave to extend time to file an Appeal against the
orders and Judgment of the Court of Appeal in Civil Appeal No. E445 of 2020
(Kiage, Sichale & Mohammed, JJ.A.) delivered at Nairobi on 4th June, 2021)*

Effect of an application for extension of time where the court contributed to the delay in filing the appeal.

Reported by John Ribia

***Civil Practice and Procedure** – appeals – appeals to the Supreme Court – appeals filed out of time – where the delay was occasioned by the Court of Appeal’s delay to issue typed proceedings – whether such a delay was inordinate - what principles guided the court in an application for enlargement/extension of time - whether the fact that a court had contributed to the delay of an applicant filing an appeal would automatically lead to a favourable outcome in an application for enlargement/extension of time – Supreme Court Rules, 2020 rules 15(2) and 36(1).*



Brief facts

The applicant sought leave of the court to file the appeal out of time, or to deem the appeal already lodged to have been so lodged with the court's leave. The applicant had within three (3) days lodged the notice of appeal on of June 7, 2021, and on the same day requested for typed proceedings and even paid the court charges. The proceedings were, however, not availed until September 20, 2021. Nine (9) days later, the instant application was made on September 29, 2021. Time began to run from June 7, 2021, being the date the notice of appeal was lodged. Within 30 days of that date, namely on July 19, 2021, in terms of section 57 of the Interpretation and General Provisions Act, the appeal ought to have been filed. The delay was attributed to the court's failure to furnish the applicant with a copy of the proceedings. They were subsequently availed on September 20, 2021. The 1st respondent opposed the application on grounds that the whole period of delay had not been declared or explained satisfactorily; and that the applicant had not provided a certificate of delay from the Deputy Registrar of the Court of Appeal, as proof that the delay was occasioned elsewhere, nor has she explained the steps, if any, taken to follow up the proceedings. The 1st respondent also contended that even if time was enlarged, the intended appeal was not arguable as it did not raise matters of general public importance or of novel constitutional nature.

Issues

- i. What principles guided the court in an application for enlargement/extension of time?
- ii. Whether the fact that a court had contributed to the delay of an applicant filing an appeal would automatically lead to a favourable outcome in an application for enlargement/extension of time.

Held

1. Under rule 15(2) of the Supreme Court Rules, 2020, the Supreme Court had unfettered discretionary powers to extend time limited by the rules or by any of its decisions. Any person intending to appeal to the court was required by rule 36(1) of the Supreme Court Rules, 2020, to file a notice of appeal within fourteen days from the date of the decision intended to be challenged; and that, subsequently, within thirty days of the date of lodging the notice of appeal, an appeal had to be filed. In terms of section 57 of the Interpretation and General Provisions Act, the appeal ought to have been filed. The delay was attributed to the court's failure to furnish the applicant with a copy of the proceedings. They were subsequently availed on September 20, 2021. The fact that a court had contributed to the delay would not automatically lead to a favourable outcome to an applicant as each case will be determined on its peculiar circumstances.
2. The proceedings were availed on September 20, 2021. Before that period the applicant could not take any step towards lodging the appeal. So that time could only start running from September 20, 2021. Therefore, the period in contention was between September 20, 2021 and of September 29, 2021, the date this application was made, in total a delay of 9 days.
3. The following principles guide parties in an application for the enlargement of time:
 - a. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party, at the discretion of the court;
 - b. a party who sought extension of time had the burden of laying a basis, to the satisfaction of the court;
 - c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
 - d. where there was a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court;
 - e. whether there would be any prejudice suffered by the respondents, if an extension was granted;
 - f. whether the application had been brought without undue delay; and
 - g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.



4. The delay not being inordinate and the applicant having sufficiently explained her predicament, the explanation was consistent with the court's position that an appeal filed out of time without leave of the court was irregular.

Application allowed.

Orders

- i. *The parties to appear before the Deputy Registrar for further directions as to the filing of the record of appeal and all related matters.*
- ii. *Each party was to bear its own costs.*

Citations

Cases

1. Anthony Raymond Cordeiro & 2 others v Adrian Noel Carvalho & 5 others (Civil Suit 627 of 2012 ; [2014] eKLR) — Explained
2. County Executive of Kisumu v County Government of Kisumu & 8 others (Civil Application 3 of 2016 ; [2017] eKLR) — Followed
3. Ferdinand Ndungu Waititu Babayao v Republic (Petition (Application) 2 of 2020 ;[2020] eKLR) — Mentioned
4. Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others (Application No.15 of 2014; [2014] eKLR) — Followed
5. Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others (Application No 16 of 2014; [2014] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 25, 50(1);159 — Interpreted
2. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 15(2), 36 (1) — Interpreted

Advocates

None mentioned

RULING

1. Upon careful perusal of the notice of motion dated September 24, 2021 brought pursuant to the *Supreme Court Rules, 2020* (although the applicant did not specify the rules relied on); the applicant seeks leave of the court to file the appeal out of time, or to deem the Appeal, Supreme Court Petition 014 of 2021, already lodged to have been so lodged with the court's leave; and
2. Upon reading the affidavit sworn by the applicant, Mutheu Agatha in support of the motion where she has averred that it is in the best interest of justice to allow the application so as to accord her an opportunity to be heard on merit of her appeal; that the delay in filing the appeal was occasioned by facts beyond her control as we have set out below in paragraph 3; that the orders sought will not occasion any prejudice to the respondents; and that the applicant is ready and willing to abide by any terms the court may impose; and;
3. Upon considering the written submissions by the applicant that both articles 25 and 50(1) of the *Constitution* guarantee the right to a fair and public hearing which are absolute; and further, that the application meets the threshold set in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & others, Supreme Court Application No 16 of 2014, [2014] eKLR* for extension of time; that the delay was occasioned when the superior court below failed to avail the typed proceedings in time; and



4. Upon bearing in mind the decision in [*Anthony Raymond Cordeiro & 2 others v Adrian Noel Carvalho & 5 others \[2014\] eKLR*](#), and the provisions of article 159 of the Constitution, to which the applicant has referred us; and
5. From the replying affidavit sworn by David Chege Mboche on behalf of the 1st respondent in opposition to the application and the written submissions, where the 1st respondent has urged us to be guided by our own ruling in [*County Executive of Kisumu v County Government of Kisumu & 8 Others, Supreme Court Application No 3 of 2016 \[2017\] eKLR*](#), to find that the whole period of delay has not been declared or explained satisfactorily; and that the applicant has not provided a certificate of delay from the Deputy Registrar of the Court of Appeal, as proof that the delay was occasioned elsewhere, nor has she explained the steps, if any, taken to follow up the proceedings; also the 1st respondent contends that even if time is enlarged, the intended appeal is not arguable as it does not raise matters of general public importance or of novel constitutional nature.

We therefore pronounce as follows:

6. Noting that the court, under rule 15(2) of the Supreme Court Rules, 2020 has unfettered discretionary powers to extend time limited by the rulator by any of its decisions; that any person intending to appeal to the court is required by rule 36(1) of the Supreme Court Rules, 2020, to file a notice of appeal within fourteen days from the date of the decision intended to be challenged; and that, subsequently, within thirty days of the date of lodging the notice of appeal, an appeal must be filed; and
7. While it is evident from the record that after the judgment of the Court of Appeal was rendered on June 4, 2021, the applicant timeously, within three (3) days lodged the notice of appeal on June 7, 2021, and on the same day requested for typed proceedings and even paid the court charges. The proceedings were, however, not availed until September 20, 2021. Nine (9) days later, the present application was made on 29th of September, 2021. Time began to run from June 7, 2021, being the date the notice of appeal was lodged. Within 30 days of that date, namely on July 19, 2021, in terms of section 57 of the [*Interpretation and General Provisions Act*](#), the appeal ought to have been filed. The delay was attributed to the court's failure to furnish the applicant with a copy of the proceedings. They were subsequently availed on September 20, 2021.
8. Restating our sentiments in [*Hassan Nyanje Charo v Khatib Mwashetani & 3 others \[2014\] eKLR*](#) and County Executive of Kisumu (*supra*), that the issue of delay of typed proceedings "is well known in our legal system"; that delays caused by courts to the detriment of the party cannot be visited upon the party because "such a delay is not on part of the party but the court and that this issue consists of facts beyond a party's reach"; and that it would not be in the interests of justice to turn away an applicant "who has, *prima facie*, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the court's administrative machinery".

See also [*Ferdinand Ndungu Waititu Babayao v Republic, SC Petition \(Application\) No 2 of 2020, \[2020\] eKLR*](#).

We nonetheless wish to throw this caution; the fact that a court has contributed to the delay will not automatically lead to a favourable outcome to an applicant as each case will be determined on its peculiar circumstances.

9. Considering that the argument by the 1st respondent that the delay was not justified on account of failure by the applicant to exhibit a certificate of delay issued by the Registrar, was without basis, because there is no provision in the rules of this court, as those in the Civil Procedure Rules or the Court of Appeal Rules for such a requirement.



10. Bearing all the foregoing in mind, we note that the proceedings were availed on September 20, 2021. Before that period the applicant could not take any step towards lodging the Appeal. So that time could only start running from September 20, 2021. Therefore, the period in contention is between September 20, 2021 and September 29, 2021, the date this application was made, in total a delay of 9 days.
11. The court has, in the case of *Nicholas Salat (supra)* enunciated the following principles to guide it, the parties and counsel in an application for the enlargement of time:
- “... extension of time is not a right of a party. It is an equitable remedy that is only
1. available to a deserving party, at the discretion of the court;
 2. a party who seeks 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court;
 5. whether there will be any prejudice suffered by the respondents, if 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”
12. Satisfied that this application meets the above threshold, the delay not being inordinate and the applicant having sufficiently explained her predicament, we find that this explanation is consistent with the court’s position that an appeal filed out of time without leave of this court is irregular, we reject the invitation that we deem the Appeal herein as duly filed. See *Hassan Nyanje Charo (supra)*.
13. In the circumstances, we now make the following orders;
- i. The notice of motion application dated September 24, 2021 and filed on September 29, 2021 is hereby allowed;
 - ii. The parties to appear before the Deputy Registrar for further directions as to the filing of the record of appeal and all related matters;
 - iii. Each party shall bear own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2022.

M.K. KOOME

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**CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT**

P. M. MWILU



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**DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE SUPREME COURT
M.K. IBRAHIM**

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**JUSTICE OF THE SUPREME COURT
NJOKI NDUNGU**

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**JUSTICE OF THE SUPREME COURT
W. OUKO**

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JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

SUPREME COURT OF KENYA

