



**Mohamed v Criminal Investigations Department & another (Miscellaneous Criminal Application E027 of 2023) [2024] KEHC 1221 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1221 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
MISCELLANEOUS CRIMINAL APPLICATION E027 OF 2023**

**JN ONYIEGO, J  
JANUARY 31, 2024**

**BETWEEN**

**ISMAIL MOHAMED ..... APPLICANT**

**AND**

**CRIMINAL INVESTIGATIONS DEPARTMENT ..... 1<sup>ST</sup> RESPONDENT**

**REPUBLIC ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant brought this application pursuant to section 7 of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya; Rule 4 and 44 of the *Court of Appeal Rules*, 2022; article 159 of the *constitution* of Kenya, 2010 and all other enabling provisions of the Law.
2. The applicant seeks the following orders:
  - i. That this Honourable Court be pleased to grant leave to the applicant file his Notice of Appeal annexed hereto and Appeal in the Court of Appeal out of time.
  - ii. That this Honourable Court be pleased to grant any other orders it deems just and fit in the circumstances.
3. The application is supported by an affidavit sworn by PLO Lumumba, the advocate on record for the applicant. It was his case that the applicant was dissatisfied in the ruling in Revision Application (Garissa High Court Cri, Revision No. E003 of 2021: In the matter of Inquest into the Death of Abdirizak Ismail Mohamed (Deceased) – From the Original Ruling and Order in Wajir Principal Magistrates Court Inquest No. 3 of 2018 delivered by Hon. Mugendi Nyaga SRM on 29.01.2021) – Ismail Mohamed v Criminal Investigations Department & Republic). That the law provides that a Notice of Appeal has to be lodged in Court within fourteen days from the date of the decision sought to be appealed. That in this case, there was a delay in lodging the same since a copy of the subject ruling



was availed to the applicant's advocates eight days after delivery thereof by the Court despite them applying on 25.09.2023 to be furnished with it.

4. Additionally, that once the applicant's advocate managed to get a copy of the ruling, they shared it with the applicant. That it took time for the applicant who is ordinarily a resident in the far flung Wajir to get back to his advocates with instructions on the way forward following delivery of the said ruling, which instructions were received on 24.10.2023.
5. That the applicant being dissatisfied with the ruling, wished to lodge an appeal in the Court of Appeal against the aforementioned findings by this Honourable Court. It was the applicant's case that this Honourable Court is clothed with discretion in the interests of justice to expand the time stipulated by the Rules for the doing of anything thereunder. That it is in the interest of justice that the orders sought herein be granted.
6. The respondent on the other hand did not object to the application.
7. I have given due consideration to the pleadings and the oral submissions by counsel for the applicant. The issue for determination is whether the applicant's prayer for extension of time should be granted.
8. The factors to be considered when determining an application for extension of time are found in various judicial pronouncements of the courts. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal discussed those factors as follows:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”

9. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time as follows:
  - i. 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.”



10. The applicant herein had previously filed an application seeking to invoke this court's revisionary powers. The court thus pronounced itself via a ruling dated 25.09.2023, a determination which the applicant did not agree with.
11. It therefore follows that in as much as the orders sought herein are discretionary in nature, it is my view that the same has been made in a wrong forum.
12. Good governance in my view demands that cases be handled procedurally in the right forum. The right forum to determine the issue herein which is criminal in nature ought to have been the Court of Appeal as it is the one with jurisdiction under Article 164(3) of the Constitution and Section 379(1) of the Criminal Procedure Code to hear appeals from this court.
13. As a consequence of the above, the application herein is dismissed for being unmeritorious.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**J. N. ONYIEGO**

**JUDGE**

