



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO. E164 OF 2021

FRANCIS G. MANYARA APPLICANT

VERSUS

RICHARD MURACHARESPONDENT

RULING

1. The applicant has filed a notice of motion dated 10th September 2021 brought under Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3(A), 63 (e) and 79 G Civil Procedure Act and all other relevant and all enabling provisions of the law seeking the following substantive orders:

a) That the Honourable Court be and is hereby pleased to extend time by 14 days within which the Applicant should have filed his intended Memorandum of Appeal and intended Record of Appeal emanating for the Judgment dated 2nd October 2019 as rendered by Hon G. Mmasi (Mrs) SPM in Milimani Commercial Courts; Civil Suit No 3111 of 2018; Francis G. Manyara Vs Richard Muracha.

b) That, upon the order 1 hereinabove being granted the Honourable Court be and is hereby pleased subject to payment of requisite Court fees deem the Draft Intended Memorandum of Appeal hereinafter Annexed as Exhibit “FGM -10” as duly filed before the Court.

c) That, upon order 1 hereinabove being granted the Honourable Court be and is hereby pleased subject to payment of requisite Court fees deem the Draft Intended Memorandum of Appeal hereinafter Annexed as Exhibit “FGM -9” as duly filed before the Court.

d) That, the Honourable Court be and is hereby pleased to order in the interests of justice and expediency that the Intended Appeal be set down for directions within a maximum period of 30 days from the date of actual filing of the Intended Memorandum of Appeal and Intended Record of Appeal.

e) That, the Honourable Court be and is hereby please to order that the Applicant herein bares the cost of this Application.

2. The applicant based his application on the grounds on the face of the motion and his affidavit sworn on 10th September 2021 and the affidavit of **Dr. Joseph C. Sokobe** equally sworn on the same date. On the other hand, the respondent filed a replying affidavit sworn on 5th November 2021 opposing the application. The gist of the applicant’s averments to support his application revolves around the following reasons; the failure to comply has not been intentional or negligent but was due to medical reasons since he has been in and out of hospitals and clinics since 2019 to date and as such he was not able to proceed with the appeal and that took a bit of time hence the delay and breach of **Section 79G of the Civil Procedure Act**.

3. When the matter came up for directions on 23rd September 2021 and 12th October 2021, it was directed that the application be canvassed through written submissions and parties would be given time to highlight their written submissions on 8th November 2021. The parties were given timelines within which to file and exchange their respective submissions. However, the material on record shows that the Applicant filed their submissions on 4th November 2021 whereas the Respondent's submissions were not filed.

4. On 8th November 2021, parties were granted an opportunity to highlight the written submissions. The applicant's counsel **Miss Badia** objected to the respondent's replying affidavit being considered. In response **Mr. Washika** counsel for the respondent urged the Court not to struck out the affidavit but consider the same since the delay was occasioned by his client being held up in Turkana.

5. Having considered the motion, supporting affidavit and annexures, replying affidavit and submissions filed by the applicant, the court considers that these are the issues falling for determination; (i) whether the respondent's replying affidavit filed on 5th November 2021 should be struck out as having been filed out of time and without leave of the Court. (ii) whether the applicant should be granted leave to file an appeal out of time.

6. Let me start my determination while focussing on the first issue. The Court has a constitutional mandate to ensure that a Court proceeding will be fair and therefore retains the power to disallow one party from tabling evidence out of time. This was indeed the reasoning of the Supreme Court in the case of *Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR*, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

7. This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of *Article 159 (2) (d) of the Constitution*.

8. Where such evidence can be adduced without causing undue prejudice to the other party, the court ought to allow the same, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence.

9. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such affidavits to be tendered, though outside the time frame provided by the rules.

10. The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the replying affidavit filed by the respondent.

11. When the applicant prepared his submissions he never had time to look at the respondent's replying affidavit which was filed out of time and as such he submitted that he will be greatly prejudiced since he won't have time to respond to the issues raised therein concerning that parties had been directed to file their written submission and highlight the same on 8th November 2021 upon which a ruling date would be given.

12. As earlier noted, the respondent's counsel **Mr. Washika** when responding to the objection raised by **Miss. Badia** urged the Court not to struck out the affidavit but consider the same since the delay was occasioned by his client being held up in Turkana. At that point counsel did not seek any leave to allow the said affidavit as being deemed as duly filed out of time.

13. The Court notes that from the directions issued on 12th October 2021, the respondent's counsel had not filed the replying and had also not complied with the earlier direction issued on 23rd September 2021. On 12th October 2021, Counsel for the respondent sought for more time and he even confirmed his willingness to file the affidavit within the next three days. The Court had thus granted him ample time. Court's directions should always be complied with unless they are exceptional and compelling reasons that would occasion challenges in their compliance. In the circumstances the Court cannot keep on indulging parties at their convenience.

14. I have to concur with the oral submissions of **Miss. Badia** that the applicant will be greatly prejudiced if the Court was to allow the replying affidavit by the respondent since he will totally have no opportunity to respond to the same.

15. For the above reasons, I am inclined to disallow the replying affidavit by the respondent having been filed out of time and without leave of this Court.

16. On the second issue, the provisions of law that clothes this court with discretionary jurisdiction to grant leave to file an appeal out of time lies with **Sections 79G and 95 of the Civil Procedure Act and Section 16A of the Environment and Land Court Act** and in order for a party to succeed in such a motion, an appellant must satisfy the court that he has a good and sufficient cause for not filing the appeal in time.

17. Being an equitable relief, they are underpinned on well settled principles which guide the Court to decline or grant the application. In the case of **Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR-SCK**, the Court held as follows on extension of time to file an appeal out of time:

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 ought to 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, which ought to be explained to the satisfaction of the Court;

5. Whether there would be any prejudices suffered by the respondents if the extension was granted;

6. Whether the application had been brought without undue delay; and;

7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

18. Has the appellant met the principles outlined in the **Nicholas Kiptoo Arap Korir Salat case (supra)**” Though the provisions of law do not set out the maximum or minimum period of delay, an applicant has to demonstrate that he has good and sufficient cause for the delay.

19. The time stipulation is a requirement of the law as clearly stated in Section 79 G of the Civil Procedure Act. In short, parties cannot, either unilaterally or by agreement between them, metaphorically, waive away the rules of the court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation of proceedings. Given the statutory limit, principally, the delay is inexcusable unless the applicant shows sufficient cause to justify the delay and that any such extension shall not prejudice the respondent. In this regard, the Court in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR** the Court of Appeal while referring to other authorities observed:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy and caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors states 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. In Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004, this Court held:- “It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize his principle by referring to the decision in Mwangi v Kenya Airways Ltd. [2003] KLR 486 in which this Court stated: _ “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing an application for extension of time under rule 4 of the Rules.

For instance, in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi- Civil Application No Nai. 255 of 1997 (unreported), the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of the time are: first, the length of delay; secondly the reason for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

20. The legal authorities demonstrate that it is indeed a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. That’s why in the *Salat case (Supra)* observed *“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”*.

21. In the present application, I have given due attention to the issue of delay and prejudice which may be occasioned to the respondent. Judgement was delivered on 2nd October 2019 and the Notice of Motion to extend time filed on 14th September 2021. From the evidence, the cumulative delay period is over 1 year and nine months from the original time of 30 days stipulated in *Section 79 G of the Civil Procedure Act*. The delay though inordinate has been explained by the applicant and may be excusable given his medical condition which one may consider extenuating circumstances.

22. The Court has also had a chance to look at the draft memorandum of appeal annexed to the applicant’s motion and the grounds set out an arguable case with possibility of success and it is the considered view that the applicant should not be denied access to the seat of justice.

23. Therefore, this Court being mindful of the applicant’s medical condition, will exercise its discretion to grant an extension of time on the filing of the Appeal.

24. In the circumstances, the Notice of Motion dated 10th September 2021, for extension of time is allowed on the following terms: -

- i) The applicant to file and serve a notice of appeal within 14 days from the date of this ruling.*
- ii) The applicant to compile, file and serve the record of appeal within 30 days from the date hereof.*
- iii) In default of compliance to (i) and (ii) above, the orders issued herein shall automatically lapse.*
- iv) Each party to bear its own costs of the application*

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF NOVEMBER 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Miss. Badia for the Applicant.

Mr. Washika for the Respondent.

Court Assistant; Caroline Nafuna.



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