



**Kwinga (Suing as the administrator Ad Litem of the Estate of Kwinga Maliango – Deceased)  
v Kavisi (Sued as the Administrator of the Estate of Kavisi Kinovi - Deceased) & another  
(Miscellaneous Application E008 of 2022) [2023] KEELC 18171 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18171 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
MISCELLANEOUS APPLICATION E008 OF 2022**

**TW MURIGI, J**

**JUNE 14, 2023**

**BETWEEN**

**JUSTICE KWINGA (SUING AS THE ADMINISTRATOR AD LITEM OF THE  
ESTATE OF KWINGA MALIANGO – DECEASED) ..... APPLICANT**

**AND**

**PHILIP NYAMASYO KAVISI (SUED AS THE ADMINISTRATOR OF THE  
ESTATE OF KAVISI KINOVI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**BENJAMIN KIMWELI KAVISI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated September 30, 2022 brought under Sections 13, 16A and 30 of the *Environment and Land Court Act*, Sections 3 and 3A of the *Civil Procedure Act* and Orders 50 Rule 5 of the *Civil Procedure Rules* in which the Applicant seeks the following orders: -
  1. That the Applicant be granted leave to file a Memorandum of Appeal out of time and/or time for filing a Memorandum of Appeal be extended to allow the Applicant to file a Memorandum of Appeal against the Ruling by the Hon Justice Mbogo CG in Makueni ELC Misc App No E005 of 2021 delivered on the July 6, 2022 dismissing the Applicant's Application dated April 29, 2021.
  2. That the costs of this application abide the outcome of the intended appeal.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Justice Kwinga on even date.



### **The applicant's case**

3. The Applicant averred that his father, Kwinga Maliango, died intestate on December 31, 2021. That his late father had filed Misc Application No E005 of 2021 dated April 29, 2021 seeking leave to appeal against the decision of Makueni District Land Adjudication Office. He further averred that the application was dismissed vide the ruling delivered on July 6, 2022. That being aggrieved by the ruling he wishes to challenge the decision at the Court of Appeal.
4. The Applicant further averred that upon receipt of the ruling, he immediately applied for a grant of administration ad litem to enable him to file the appeal and the same was issued on August 15, 2022. That by the time the was issued of the grant, the time for filing the appeal had already lapsed. The Applicant averred that the delay in filing the appeal was occasioned by the demise of his father coupled with the delay in obtaining the grant ad litem, which were circumstances beyond his control.
5. It was further averred that this Court has the power to enlarge time for filing an appeal out of time. The Applicant maintains that the Intended Appeal has high chances of success. He argued that the memorandum of appeal will be ready for filing as soon as the Court grants leave to appeal out of time. Lastly, it was averred that the Applicant stands to suffer great prejudice as he would lose ancestral land in the event that the application is disallowed.
6. Though duly served, the Respondents did not file a response to the application.
7. The Applicant was directed to canvas the application by way of written submissions.

### **The applicant's submissions**

8. The Applicant's submissions were filed on February 17, 2023. Counsel for the Applicant submitted that the only issue for determination is whether the Applicant has met the conditions required for leave to be granted to file an appeal out of time. In the Applicant's submissions, Counsel reiterated the contents of the supporting affidavit.
9. Counsel submitted that the Applicant has met the threshold for grant of leave to appeal out of time as outlined under Section 7 of the *Appellate Jurisdiction Act*. It was further submitted that the power to extend such time for giving notice of intention to appeal is discretionary and that the main concern is to do justice to the parties. Counsel cited the case of *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others* [2002] 1 EA 65 for the factors to be considered when deciding whether or not to grant such an application. Counsel also cited the case of *Stanley Kaiyongi Mwenda v Cyprian Kubai* [2000] eKLR to buttress his submission.

### **Analysis and determination**

10. Having considered the application and the written submissions, the only issue for determination is whether the Applicant has met the threshold to be granted leave to file an appeal out of time..
11. Rule 75 of the *Court of Appeal Rules, 2010* outlines the duration for filing of a Notice of Appeal in relation to civil appeals to the Court of Appeal and provides as follows: -
  1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
  2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.



12. As correctly submitted by the Applicant, the power to enlarge such time for the filing of a Notice of Appeal against an order or decree that has been issued by this Court is discretionary. Section 7 of the [Appellate Jurisdiction Act](#) provides as follows: -

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

13. From the reading of Section 7, it is clear that the High Court (which now in light of [the Constitution of Kenya, 2010](#) includes the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court.
14. Rule 4 of the [Court of Appeal Rules](#) also gives the Court of Appeal power to extend time and provides as follows :-

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

15. From the reading of the above provisions, it is clear that the power to extend time for filing a Notice of Appeal is vested in both the High Court and Courts of equal status and the Court of Appeal.
16. The Court of Appeal in the case of [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR held as follows:-

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso v 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 time are: first, the length of the delay: secondly, the reason for the 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.”

17. The Court has wide unfettered discretion in granting leave to file an appeal out of time. However, in exercising its discretion to grant extension of 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.
18. In explaining the delay in filing the Notice of Appeal within time, the Applicant averred that the delay was due to fact that he was pursuing the grant ad litem for the estate of his deceased father. The impugned Ruling was delivered on July 6, 2022. A Notice of Appeal ought to have been filed on or about July 20, 2022. It is not in dispute that the Applicant’s father died on December 31, 2021. As per annexure “JMK1” and “JMK3”, the grant ad litem was issued on August 11, 2022. In the grant



ad litem, the intention to file an appeal against the Ruling of the Court delivered in Makueni ELC Miscellaneous Application No E005 of 2021 was unequivocally expressed.

19. The application herein was filed on October 13, 2022 which is slightly less than three months since the last date when the Notice of Appeal should have been filed. The Applicant's explanation for the delay is acceptable.
20. On whether the appeal is arguable, the Applicant annexed a copy of the limited grant annexure "JMK3" to demonstrate his willingness and intention of appealing the impugned Ruling. In addition, the Applicant averred that the Memorandum of Appeal is ready for filing as soon as leave is granted.
21. Lastly, on the prejudice that is likely to be suffered by the Respondent if an appeal is filed out of time, there has been no demonstration that it cannot be adequately compensated by costs. The Court in *George Kianda & Another v Judith Katumbi Kathenge & Another* (2018) eKLR aptly held as follows: -

“The Respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.”
22. Going by the above considerations, it is clear that the Applicant has sufficiently demonstrated merit in the application for enlargement of time for filing an appeal out of time.
23. In light of the foregoing I find that the application dated September 30, 2022 is merited and the same is allowed in the following terms:-
  1. Leave be and is hereby granted to the Applicant to file a Notice of Appeal out of time.
  2. The Notice of Appeal to be filed and served within the next 14 days from the date hereof.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14<sup>TH</sup> DAY OF JUNE, 2023.**

.....  
**HON. T. MURIGI**

**JUDGE**

In The Presence Of:-

Court assistant - Mr. Kwemboi.

Amwayi holding brief for Maroa for the Applicant.

