



**Justus v Nchebere & another (Environment and Land Miscellaneous Application
E044 of 2022) [2023] KEELC 15973 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15973 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E044 OF 2022**

CK NZILI, J

MARCH 8, 2023

BETWEEN

STANLEY KIMATHI JUSTUS APPLICANT

AND

SILAS NTARANGWI NCHEBERE 1ST RESPONDENT

EVANGELINE MUBWEKA 2ND RESPONDENT

RULING

1. The court is asked to extend time within which the applicant can file an appeal against the judgment delivered in Meru CMCC ELC No 57 of 2018, on September 15, 2022. The grounds of the application as contained in the affidavit in support by Stanley Kimanthi Justus are that: - the applicant became aware of the judgment on November 17, 2022; the former advocates on record failed to notify him and that the appeal has arguable grounds as per the attached draft memorandum of appeal.
2. The application is opposed by the respondents through a replying affidavit sworn by Silas Ntarangwi Nchebere, the 1st respondent. The grounds are that: the application is an afterthought filed in bad faith; if allowed it will prejudice her and inflict financial wounds of litigation which have taken in excess of 20 years over the same subject matter yet all costs ordered and due to them have not been paid; several cases including Meru Central District Ldt No 101 of 2000 (later registered as Meru CMCC Ldt No 4 of 2001 Provincial Ldt No 26 of 2001; Meru CMCC No 57 of 2015 and Meru CM CR. Case No 676 of 2015 have all been filed against them by the applicant and dismissed; the prejudice was real and hence litigation must come to an end; the applicant has not explained why he went to the court registry and not his advocate's offices; the appeal has no chances of success and that the evidence by the 2nd respondent in the Ldt tribunal indicated that the applicant bought the land after her husband (the applicant's father) passed on. Reliance was placed on *Omar Shurie v Marion Rushie Yafar* (2020) eKLR.



3. The power to extend the time to appeal outside the stipulated time is a discretionary that under Section 79 G of the Civil Procedure Act must be exercised judiciously based on sound, factual and legal basis.
4. The principles to apply in such an application were considered by the court in Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others (2014) eKLR. The court held that extension of time is not a right of any party but an equitable remedy only available to a deserving party; that a party who seeks the discretion has the burden to lay a basis to the satisfaction of the court; that consideration on whether to extend or not is to be considered on case to case basis; the delay must be explained; any prejudice to the opposite party must be considered and that the application should be brought without undue delay.
5. In the same vein, the court in Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No Nai 255 of 1997 held that some of the factors to consider include inter alia, the length of the delay; reason for the delay; chances of the appeal succeeding and the degree of prejudice to the opposite party.
6. Applying the foregoing principles to the instant case, the applicant filed the application on November 21, 2012 following the delivery of the judgment, against him on September 15, 2022. The reasons for the delay are attributed to a mistake by the former lawyers who failed to notify the applicant on the date for the delivery of the judgment, until November 17, 2022 when he perused the court file. The delay is of 2 ½ months which in my view is not inordinate. The second reason given is that the intended appeal raises arguable grounds. The court has perused the judgment sought to be appealed against. The applicant's suit was based on a customary trust. The trial court appears to have declined to hear it on account of lack of jurisdiction. To my mind, the appeal raises some arguable points of law which require the determination of this court.
7. On the prejudice likely to be occasioned to the respondents, in the case of Liberato Kivanga Manga v Prime Bank Kenya Ltd (2021) eKLR, the court cited with approval Muringa Ltd v Archdiocese of Nairobi Registered Trustee Civil Application No 190 of 2019 where the court said that courts have to consider the need to balance the interests of both parties bearing in mind the constitutionally guaranteed right of appeal. Similarly, in the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (2018) eKLR, the court said that the law did not set out any minimum or maximum period of delay so long as there were valid and clear reasons upon which the discretion can be favorably exercised. In this application, the respondents are not saying that the subject matter of the appeal has changed but complain over the cost of the protracted litigation spanning several years and in different forums. This likely prejudice can be compensated by way of costs. The respondents are at liberty to demand the same by way of security for costs.
8. Therefore, I find the application with merits. On the issue of leave to come on record for the proposed appellant, there are no requirements in law for leave to come on record at the appellate stage. The prayer for leave, therefore, has no merits.
9. In the premises, I grant leave to file and serve the intended appeal within 14 days from the date hereof. Costs to the respondents in any event.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8TH DAY OF MARCH, 2023

IN PRESENCE OF:

C/A: KANANU

MISS MAORE FOR APPLICANT



HON. C.K. NZILI
ELC JUDGE

