



**Wainaina v Bwana & 3 others (Environment & Land Case  
364 of 2012) [2023] KEELC 18848 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18848 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 364 OF 2012**

**A NYUKURI, J  
JULY 12, 2023**

**BETWEEN**

**NG'ANG'A WAINAINA ..... PLAINTIFF**

**AND**

**HAMISI BWANA ..... 1<sup>ST</sup> DEFENDANT**

**MUTUA KASYUMA ..... 2<sup>ND</sup> DEFENDANT**

**PETER MAINGI ..... 3<sup>RD</sup> DEFENDANT**

**MUSANDI WAMBUA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated December 22, 2020 filed by the Defendants seeking the following orders;
  - a. Spent.
  - b. Spent.
  - c. That the Honourable Court be pleased to extend the time for filing and serving the Notice of Appeal against the court's decision made on the July 30, 2020 in respect of the Applicants' application dated September 3, 2019.
  - d. That the costs of application be provided for.
2. The application is anchored on the grounds on its face as well as the affidavit in support thereof sworn by Mutua Kasyuma the 2<sup>nd</sup> Defendant. The Applicants' case is that the Applicants are threatened with eviction from the suit property yet the Applicants and their counsel were not aware of the court's ruling



made on July 30, 2020 until December 15, 2020 when the Respondent came to the suit property in the company of police officers. That when the application dated September 3, 2019 came up on June 17, 2020, before the Deputy Registrar of this court, the parties were informed that the ruling would be delivered on notice. That the Applicants kept inquiring on the date of the ruling and on 27<sup>th</sup> of November 2020, counsel wrote to court asking for the ruling, but were only made aware of the delivery of the ruling, on December 15, 2020 when the OCS Kithimani Police Station went to their home and asked them to vacate the suit property. That the Applicants' advocate was only able to confirm that the ruling had been delivered after looking at the court file on December 18, 2020.

3. The Applicants state that they are dissatisfied with the ruling made on July 30, 2020 and intend to appeal against the same; and that had they been made aware of the ruling, they would have filed the Notice of Appeal in time.
4. The application is opposed. Ng'ang'a Wainaina, the Plaintiff herein filed a replying affidavit sworn on July 14, 2020 in response to the application. He stated that he was the registered proprietor of land parcel Number Ndalani/Ndalani Block 1/1618 (Suit property) and that the judgment sought to be stayed was delivered on January 18, 2019 while the application herein was filed close to two years later, on December 23, 2020. That the court dismissed the Applicants' application aforesaid noting that the Plaintiff was the registered proprietor of the suit property and that although the Defendants alleged to have been on the land for 20 years, their defence neither raised a defence of adverse possession nor made any allegation that the Plaintiff's title was obtained by fraud or mistake, their defence being a mere denial of the Plaintiff's claim without raising any triable issues.
5. The Plaintiff stated that the Applicants have not demonstrated substantial loss that they may suffer if stay is not granted and that the prayer sought will deny the Plaintiff the fruits of his judgment. He asserted that the application herein lacked merit as the Applicants had not shown the explanation for delay in filing the appeal, merits of the intended appeal and whether they can compensate the Respondent adequately in costs for the prejudice he may suffer. He stated that it was upon the Applicants to take steps to ensure they were up to date with the matter that was pending.

### **Analysis and Determination**

6. I have considered the application and the response. I note that the prayer for stay of execution is spent as the same was sought pending determination of the application herein and therefore this court need not address the same. Therefore the only question for determination is whether the Applicants have placed sufficient material before court to enable the court exercise its discretion in extending time for the Applicants to file Notice of Appeal out of time.
7. The discretion to extend time is a discretion which ought to be exercised judiciously as extension of time is not a right of parties but an equitable remedy as the party seeking for extension of time ought to explain to the court's satisfaction the reason for the delay. In considering an application for extension of time, the court will usually consider the reason for delay, the period for delay and the prejudice that may be suffered by the opposite party if the orders sought are granted, among other factors.
8. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014 eKLR, the Supreme Court held as follows;
  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 should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the 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.
9. Having considered the application herein in view of the principles guiding the court in the exercise of its discretion in determining the application for extension of time, the issue that this court ought to determine is whether the Applicant has placed before court a satisfactory explanation for the delay in filing Notice of Appeal. The Applicants stated that on June 23, 2020, the Deputy Registrar of this court informed their counsel that the ruling in regard to the application dated September 3, 2019 was to be delivered on notice. Having considered the record, I note that indeed an email was sent to the advocates for the parties on June 23, 2020 by the Deputy Registrar communicating that the ruling will be delivered on notice. The record also shows a letter dated November 27, 2020 by the firm of Mutua Mbuya and Nzissi Advocates to the Deputy Registrar of the court requesting for a copy of the ruling dated July 30, 2020. This shows that as at November 27, 2020, counsel for the Applicants was aware that the ruling was delivered on July 30, 2020. That being the case, the court record has no evidence that such notice was served on the parties. Indeed, on July 30, 2020 when the ruling was delivered, none of the parties was in court. The counsel for the Applicants could only appeal upon communicating the ruling to the Applicants and obtaining instructions to appeal.
10. In the premises, I am satisfied that the failure by the court to communicate the notice for delivery of the ruling was part of the reason for the delay. The explanation given by the Applicants is satisfactory and the application is merited. I therefore allow the application and order the Applicants to file and serve Notice of Appeal within 14 days of this ruling. The costs of the application shall be borne by the Applicants.
11. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 12<sup>TH</sup> DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

