

**IN THE COURT OF
APPEAL AT NAIROBI**

CORAM: KIAGE, JA (IN

CHAMBERS) CIVIL APPLICATION NO.

E001 OF 2022 BETWEEN

**PETER GICHUI (Chairman)
SIMON KIMUNGE MWIHOTI (Secretary)
STEPHEN KAMAU MUCHIRI (Treasurer) Suing on Behalf of MARURUI
ESTATE RESIDENTS WELFARE ASSOCIATION.....APPLICANT**

AND

**JACINTA WAIRIMU MWANIKI..... 1ST
RESPONDENT THE CITY COUNCIL OF NAIROBI
2ND RESPONDENT**

(An application for extension of time to file a notice of appeal out of time from the judgment, orders and decree of the Environment and Land Court at Nairobi (Obaga, J.) dated 16th September 2021

in

***ELC Case No. 473 of
2008)***

RULING

Brought principally under **Rule 4** of the **Court of Appeal Rules**, the motion dated 26th April 2022 prays for leave to be granted to the applicant above-named to file and lodge a notice of appeal out of time, and that the one filed on 12th October 2021 be deemed as duly filed.

In the grounds appearing on the motion and the supporting affidavit of the applicant's chairman, **Peter Gichuhi** sworn on the

said 26th April 2022, it is stated that after the hearing of the case in the Environment and Land Court, Obaga, J. reserved judgment for 7th

July, 2021. However, on that date the case was not listed as the learned judge had been transferred. The applicant's advocates made follow up with the registry of the court below and were promised notice once the judge indicated a new judgment date. They got no such notice but learnt, on or about 8th October, 2021, that the file had been returned from Eldoret when the judge had been transferred. They also discovered that judgment had in fact been delivered at Eldoret on 16th September, 2021 in their absence and without notice to them. They thereupon filed the notice of appeal, out of time, which they seek to regularize.

The first respondent **Jacinta Wairimu Mwaniki** opposes the motion. In her affidavit sworn on 28th June, 2022, she confirms that judgment was indeed delivered on 16th September, 2021 but states that the same was preceded by a mention before the learned judge on 30th June, 2021 to confirm compliance with the filing of submissions. She states that counsel for all parties were present and the judge gave "15th September, 2021 and not 7th July, 2021" as the date for delivery.

She then goes on to swear at paragraphs 5, as follows;

"5. I am advised by my advocates on record which advice I believe to be correct that on 15th September 2021, my advocate called the registry and made an inquiry about the delivery of the judgment of the court owing to transfer of the

honourable Justice Obaga to a new station. They were informed by the registry staff

that the judgment would be delivered on 16th September 2021 at his new station and were advised to use the virtual link that was assigned to him. A copy of an extract of the case tracking system of the judiciary is annexed herewith and marked JWM1.”

The respondent goes on to assert that it was the applicant’s duty to follow up with the court registry and enquire as to delivery of the judgment upon the judge’s transfer, and that he also “must give sufficient reasons” that caused the delay in filing the appeal. She concludes that to grant the prayers sought would occasion her prejudice in the form of “further unnecessary litigation.”

I have carefully considered the motion and the replying affidavit as well as the rival submissions made and authorities cited by the parties. I have done so bearing in mind that an application such as the one before me calls upon me to exercise my discretion, which is wide and unfettered, to extend time for the doing of an act, in this case the filing of a notice of appeal, the time allotted for which has already passed. The discretion is to be exercised on the basis of sound principle to the end that justice shall be done.

It was stated by a full bench of the Court in **LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI [1999] 2 EA 231** that

some of the matters that fall properly for consideration in such an

application include the length of the delay; the reasons for the delay;

(possibly) the chance of the intended appeal succeeding and the degree of prejudice, if any, that may be suffered by the respondent were the application to be granted. These grounds, which are logical and commonsensical, are indicative only, and not meant to fetter the discretion of a single judge.

In the present case, the applicant contends that the learned judge of the superior court below gave reserved judgment for 7th July 2021 but no judgment issued on the said date. Even though the respondent avers that the parties did, in fact, appear before the learned judge on 30th June, 2021 when he gave 15th September, 2021 as the date for judgment, and not 7th July, 2021, it is common ground that the judgment was not delivered on either date. It is also not disputed that some time after the end of the hearing and submissions, but before the judgment was delivered, the learned judge was transferred to a different court station.

Whereas the respondent swears that her advocates called the registry on 15th September, 2021 to follow up on the judgment and were informed by staff there that it would be delivered on 16th September, 2021 at the judge's new station, she does not suggest that formal notice of such judgment date was issued to the parties. Indeed, the applicant's explanatory complaint is that no such notice was ever

issued after non-delivery of the judgment on the date first fixed. It is only on 8th October, 2021 *“due to [their] continued follow up”* that they learnt that the file had been returned from Eldoret with a judgment delivered thereat on 16th September, 2021.

I think that given the undisputable fact that notice of the judgment was not issued, and it being uncontroverted that the applicant’s advocates did make continual follow up inquiring after the judgment, the failure to file the notice of appeal within fourteen days of the judgment date is fully and satisfactorily explained. They filed the same on 12th October, 2021, some four or so days after gaining knowledge of the delivery of the judgment which to me speaks to diligence and not indolence as suggested, a little too harshly, by the respondent.

Our rule 4 allows a party to first take action, albeit out of time, and thereafter apply to extend time to regularize the same. I, for one think that it is a practical and wise step to take as, given the vagaries of a hearing court docket, it may take a while for application for extension of time to be heard, as this case amply, if sadly, demonstrates. Thus, it helps to have already filed the notice of appeal and to seek its regularization than to have a judge first grant such leave or extension many months, or a few years, later before such

notice is filed. At any rate, such filing and hearing at the earliest even before obtaining leave, means that the respondent cannot be heard to say they are learning of an intention to appeal much later, on receiving the application for extension of time.

Whereas the applicant could and should have brought this application in more timely fashion instead of over 6 months later, I would not, in conscience come down hard on them when I note that their application was finally listed before a single judge some 3 years and six months after filing. To do so might appear a wee bit hypocritical and it cannot be a judge's place to sink so low. In short I do not think, in the circumstances of this case, that the delay was inordinate.

That said, I am satisfied that this motion is for allowing despite the respondents' objections, some of which are based on a misapprehension of the nature of a single judge's discretion. It is free and unfettered and the requirement for "sufficient reasons" as she states in paragraph 7 on the legal advice received, it a test of a by gone era. At any rate, I am not persuaded that extending time will occasion her real prejudice.

Ultimately, the motion is hereby allowed. The notice of appeal be and is hereby deemed to be valid. The applicant shall file and serve

the record of appeal with twenty one **(21) days** of today. The costs shall be in the intended appeal.

Order accordingly.

Dated and delivered at Nairobi this 9th day of October, 2025.

P. O. KIAGE

.....
..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

