Mlegwa & another (Suing as the legal representatives of the Estate of Samuel Mbogho Mshila) v Duwe (Civil Application E017 of 2024) [2025] KECA 1871 (KLR) (7 November 2025) (Ruling)

Neutral citation: [2025] KECA 1871 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E017 OF 2024

P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

NOVEMBER 7, 2025

BETWEEN

ALLEN MWADALI MLEGWA & STANLEY BARISA MLEGWA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SAMUEL MBOGHO MSHILA) ..... APPLICANT

AND

GETRUDE SOKO DUWE ..... RESPONDENT

(Being a reference under Rule 57(1)(b) of the Court of Appeal Rules from the Ruling of this Court (A.K.Murgor J.A) dated 20th September, 2024 in an application for extension of time to file and serve an appeal against the Judgment and decree of the Environment and Land Court of Kenya at Voi (N. Matheka, J.) dated 23{{^rd}} January 2024 in Voi ELC LA No. 21 of 2023)

RULING

1. The applicants herein are dissatisfied with the decision made by a single Judge of this Court (Murgor, JA) in a ruling delivered on 20th h September 2024 and, by a letter dated 27th September 2024, they applied for a reference before a full bench of the Court under Rule 57 (1) (b) of the Court of Appeal Rules of 2022. The said ruling was on an application filed by the applicants dated 16th February 2024 seeking leave to file an appeal out of time from the judgment delivered on 23rd January 2024 by the Environment and Land Court at Voi (N. Matheka, J.) in Voi ELC LA No. 21 of 2023; and that their Notice of appeal dated 16th February 2024 be deemed to be duly filed upon payment of the requisite fees.

2. The Honourable single Judge, in dismissing the application, was not persuaded that the applicants had placed any material before the Court on the basis o which she could exercise her discretion, and in particular found as follows on the grounds relied upon by the applicants:

> "In the instant case, save for stating that they had no money to instruct an advocate, the applicants have not adduced any evidence of their impecuniousness, or the demands for payment of the legal fees made by their counsel prior to the filing of the Notice of appeal, for which they were unable to pay. As a consequence, the afore going cannot be relied upon to explain the delay in lodging the Notice of appeal.
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> Regarding the assertion that they required consensus of the family, the applicants have not told the Court what rendered a family meeting impossible, or how many members were required to meet to form a consensus. Further the record discloses that the applicants have alleged that they reside together on the land and are apprehensive about being evicted. If that be the case, there ought not to have been any difficulty in the relevant family members convening to agree on the lodging of an appeal. In view of the above, I am not persuaded"

3. In addition, the Honourable Judge found that, after considering the memorandum and grounds of appeal, it was apparent that the applicants had focused on matters of fact that are not within the remit of this Court for consideration on a second appeal and the chances of success of an appeal were therefore not altogether assured; and that, unlike the applicants, the respondent had demonstrated the extent of the prejudice she is likely to suffer in the event that the applicants occupy the suit property and cultivate it, which would occasion her loss and deprive her of the usage of the suit property.

4. In summary, the main explanation offered by the applicants in their application dated 16th February 2024 for the delay in filing the notice of appeal was that, after judgment was delivered by the first appellate Court, the applicants and their extended family were unable to convene and obtain consensus on filing the appeal or mobilize the fees to retain counsel and lodge an appeal within the 14-day period prescribed by the rules of this Court for filing a notice of appeal. They also averred that they have been occupying and residing in the suit property since they were born; that it is their ancestral land, and that unless leave is granted to the applicants to file the appeal out of time, they will be evicted and rendered homeless; and that their intended appeal raises triable issues and has a high chance of success. They annexed a copy of the Notice of Appeal dated 16th February 2024 and a draft Memorandum of appeal.

5. The application was opposed by the respondent, who averred that the applicants had not explained the delay in filing the notice of appeal; that the notice of appeal should have been lodged before the Registrar of the Court of Appeal and not in the Environment and Land Court Registry at Voi; that the draft memorandum of appeal did not raise any issues of law for consideration by this Court; and that the respondent would be prejudiced, given that she has already incurred significant legal costs since 2021.

6. During the hearing of the reference on 7th April 2025, Mr. Paul Gichuhi Kivindyo, learned counsel for the applicant, highlighted his written submissions dated 5th April 2025. There was no appearance for the respondent despite her counsel having been duly served with the reference, the applicants' submissions thereon, and the hearing notice. Additionally, the respondent did not file any submissions on the reference, which is therefore not opposed.

7. Mr. Kivindyo, while citing the decision in the case of Benson Mbuchu Gichuki vs Evans Kamende Munjua & 2 Others (2006) eKLR on the circumstances in which a full bench of this Court can interfere with the exercise of discretion by a single judge, submitted that: the single Judge failed to take into account a relevant factor, namely that the applicants' delay was only 10 days outside the time

frame prescribed under rule 39 of the Court of Appeal Rules and, therefore, neither inordinate or unreasonable; that the single Judge considered an irrelevant factor namely, that the respondent stands to suffer prejudice through being denied the right to possession or use of the suit property, while in fact she not only has a title deed but has been in occupation and use of the suit property for over 20 years, and thus, no such prejudice maybe suffered or became precipitate; and that the single Judge's finding that the appeal raise no issues of law and has little chances of success was wrong as the draft memorandum of appeal raises the following clear issues of law, including the application of Taita customary laws to intestate succession, the right of non-citizens to acquire absolute freehold interests in Kenya; and the law and procedure applicable for conversion of community grazing land to private land, as was the case in the land allotted to the respondent's husband.

8. It is now well established that, for a full bench of this Court to interfere with the decision of a single Judge, an applicant must demonstrate that the single Judge failed to take into account a relevant matter which he/she was obliged to take into account, took into account an irrelevant matter which he/she ought not to have taken into account, applied a wrong principle of law, or misunderstood the evidence or the effect of the evidence on a particular aspect of the matter and thus reached a wrong conclusion, or, short of any of the foregoing factors, that the decision of the single Judge is plainly wrong, taking into account all the surrounding circumstances of the case.

9. This Court (O'kubasu, Githinji & Nyamu, JJ.A.) while dealing with a reference from the decision of a single judge in John Koyi Waluke v. Moses Masika Wetangula & 2 others [2010] eKLR stated thus:

> " Having considered all that has been urged before us in this Reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single Judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion, the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result."

10. It is notable that Murgor, JA., in the ruling dated 20th September 2024, duly considered the settled principles to be applied by the Court when considering an application brought under rule 4 of the Court of Appeal Rules for extension of time and cited the decision in the case of Leo Sila Mutiso vs Hellen Wangari Mwangi [1999] 2 EA 231 that set out the principles to be applied in exercise of its discretion in determination of any application under rule 4. The learned Judge, in addition, noted that the judgment sought to be appealed against was delivered on 23rd January 2024, and that the notice of appeal was filed on 16th February 2024, which was 10 days outside the prescribed period of 14 days, and considered the reasons given by the applicant for delay as illustrated in the foregoing.

11. The Honourable single Judge discounted the reasons given by the applicants on account of no evidence having been availed by the applicants of their impecuniousness and the lack of an explanation on what rendered a family meeting impossible. Upon perusal of the record, we however noted that the 1st applicant did swear an affidavit on 16th February 2024 in support of the application in which he attests to the difficulties they faced on this account, and that the suit property involved ancestral land involving many members of their extended family.

12. It is also notable that had the fact of the 10 days' delay, which was not inordinate in the circumstances, been factored in the circumstances, it may have worked in the applicants' favour, coupled with the prejudice they averred they would suffer if their intended appeal is not heard. The prejudice the applicants alleged in this regard was that of eviction as opposed to that of legal costs that would be suffered by the respondent. Lastly, we also note that the applicants raised sixteen (16) grounds of appeal in the draft memorandum of appeal, most of which challenged the findings of the first appellate court for not being supported by the applicable laws, which is an issue of law.

13. In the circumstances, we are satisfied that there are sufficient grounds to interfere with the Honourable single Judge's exercise of discretion. Accordingly, this reference is hereby found to have merit and therefore succeeds. We accordingly allow the applicants' application dated 16th February 2024 and grant the applicants leave to file a notice of appeal out of time against the judgment delivered on 23rd January 2024 by the Environment and Land Court at Voi (N. Matheka J.) in Voi ELC LA No. 21 of 2023. We hereby order the applicants to file and serve the said notice of appeal within fourteen (14) days of the date of this ruling. Lastly, we make no order as regards the costs of the application dated 16th February 2024, or of the reference dated 27th September 2024.

14. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER, 2025.

NYAMWEYA

JUDGE OF APPEAL

.....

Dr. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

.....

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR