

IN THE COURT OF APPEAL

AT NYERI

**(CORAM: MUMBI NGUGI,
JA)**

CIVIL APPEAL (APPLICATION) NO. E099 OF 2024

BETWEEN

**CONSOLATA KANUNGO MWAMBA...1ST
APPELLANT/APPLICANT GREGORY KIMATHI MWAMBA
.....2ND APPELLANT/APPLICANT AND
KENNON MWITI MBAE (*As the legal
representative
of the estate of SILAS JUDAH MBAE (deceased)*)..1ST
RESPONDENT KENYA FINANCE BANK LTD (*In liquidation*)
.....2ND RESPONDENT ZAVERIO KIAMBI
MWAMBA.....3RD RESPONDENT AND
LAND REGISTRAR, IMENTI NORTH)
THE LAND SURVEYOR, IMENTI
NORTH) ATTORNEY GENERAL)
Z. NYAMU M'ARIMI)
FESTUS RIUNGU RIMBERE).....AS AFFECTED
PARTIES**

*(Being an application for extension of time to file an appeal from
the judgment and decree of the Environment and Land Court in
Meru (C.K.
Nzili, J.) dated 24th January 2024*

in
Meru ELCC No. 42 of 2018

RULING

1. In the application dated 30th May 2024, the applicants seek extension of time to file and serve their record of appeal from the judgment of the ELC in Meru (Nzili, J.), and that their Record of appeal filed on 28th May 2024 be deemed

as duly filed.

2. The application is based on the grounds on its face and is supported by an affidavit sworn on 30th May 2024 by the applicants' learned counsel, Mr. Isayah Mwenda Mwarania. Mr. Mwarania avers that the Record of Appeal in this matter was filed on 28th May 2024, which was one day late; that efforts to file it on 27th May 2024 proved futile due to a system down time, and the documents had to be archived and the process re-started on 28th May 2024. Evidence for this averment is presented in a copy of a print-out from the Court's e-filing portal annexed to the affidavit as annexure **"IMM 1"**.
3. Mr. Mwarania further avers that the two weeks preceding the filing of the Record of Appeal saw him struggle with a very sick father-in-law, who died thereafter and was buried on Friday 24th May 2024, a fact which he avers was within the knowledge of the advocate for the respondent, who participated in the burial arrangement WhatsApp group.
4. He avers further that the complete set of the certified copies of the proceedings in the matter was supplied to the applicants on 28th March 2024; and that the 60 days within which the appeal was to be filed lapsed on or about 26th May 2024 which, according to the applicants, was a

Sunday as

evidenced in a Certificate of Delay at pages 588 and 529 of the applicants' Record of Appeal. It is the applicants' averment that there has been no inordinate delay in either filing the Record of Appeal or this application, and they pray that their application be allowed.

5. The 1st respondent opposes the application by a replying affidavit sworn on 14th October 2024. The gist of this rather lengthy affidavit, which sees no merit in either this application or the applicants' appeal, is that there is no proper notice of appeal filed and served as the one that had been filed had not been endorsed by the Registrar. He further avers that in those circumstances, there is no proper application before the Court, and no proper Record of Appeal, in respect of which the Court can exercise its discretion.
6. In submissions dated 28th October 2024, the applicants substantially reiterate the averments by Mr. Mwarania; that their attempt to file the Record of Appeal on 27th May 2024 had failed due to a system downtime; that the Certificate of Delay in their Record of Appeal indicates that the last day certified as having been necessary to prepare and supply certified copies of the proceedings and

judgment was 28th

March 2024, making Monday, 27th May 2024 the last day for filing of the Record of Appeal. The applicants submit that this Court has the requisite jurisdiction and discretion to allow their application, noting that there was no inordinate delay in filing either the application or the Record of Appeal. They note that at the time of filing their submissions, they had not received a response to their application, so it was unopposed.

7. In submissions dated 3rd November 2024, the 1st respondent reiterates the averments in his affidavit sworn on 14th October 2024. He submits that the applicants have not given sufficient explanation for the delay in filing the Record of Appeal and the present application; that the intended appeal has no chance of succeeding; and that he stands to suffer irreparable loss should the application be allowed. It is his submission that the notice(s) of appeal on which the intended Record of Appeal is premised are defective in law; that the applicants are not even sure which notice of appeal they are relying upon; that they have not sought extension of time to file the notice of appeal; and that there being no proper notice of appeal, there is no appeal with respect to which time can be

extended.

Further, that without a competent notice of appeal, this Court lacks jurisdiction to entertain this application. It is his submission that the statutory 60 days to file the record of appeal begin to run from the date of filing the notice of appeal, being 20th February 2024, and the Record of Appeal ought to have been filed on 20th April 2024. He submits that the Certificate of Delay annexed to the Record of Appeal shows that the proceedings were collected by the applicants on 22nd February 2024; and that the Certificate of Delay is defective and is in violation of the law as it was not applied for or served.

8. The 1st respondent makes further detailed submissions with regard to the viability of the appeal and the *locus standi* of the applicants, which I need not go into for purposes of determining the application for extension of time.
9. The applicants filed submissions dated 10th November 2024 in which they reiterate the assertion in their earlier submissions that they had not been served with the 1st respondent's replying affidavit, which they had learnt about from the submissions dated 3rd November 2024; that a search through the Court's CTS did not reveal any

affidavit filed on

the said date; and they reassert that their application was not opposed. They further reiterate that they had filed both the Notice of Appeal and the application for certified copies of the proceedings on 6th February 2024, though the Notice was not endorsed by the Deputy Registrar until 20th February 2024; but that out of an abundance of caution, they had served copies of both the notice filed on 6th February 2024 and the notice endorsed by the Registrar on 22nd February 2024. They submit further, with respect to the Certificate of Delay dated 20th February 2024, that it had omitted four crucial rulings '*which were not certified until 28th March 2024*'. The applicants submit that in his submissions, the 1st respondent seeks to challenge the Notice and Record of Appeal, and they submit that under rule 86 of this Court's Rules, such a challenge ought to have been filed within 30 days of service of the Record of Appeal; and the Record having been served on 31st May 2024, it is too late to challenge either the notice or Record of Appeal. They submit further that the 1st respondent is arguing the merits of the appeal, which is outside the jurisdiction of a single judge of this Court.

10. I have considered the application, the affidavit in response, and the submissions of the parties. This application has been brought under rule 4 of this Court's Rules, which grants the Court the discretion to extend time for the doing of any act prescribed by the Rules, '*whether before or after the doing of the act*'. In exercising that discretion, the Court is required to be satisfied with respect to certain settled factors-see **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR and **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi** [1999] 2 EA 231. In exercising discretion under rule 4, the Court should consider the length of the delay; the reason for the delay; (possibly) the chances of the appeal succeeding; and the degree of prejudice to the respondent should the orders sought be granted.

11. In this case, the judgment that the applicants seek to appeal against was delivered on 24th January 2024. The 1st respondent does not dispute that a Notice of Appeal was filed on 6th February 2024, and that he was served with the said Notice and a copy thereof endorsed by the Deputy Registrar on 20th February 2024. The Certificate of Delay

dated 24th May

2024 in the applicants' Record of Appeal indicates that the certified copies of the judgment and proceedings were furnished to the applicants on 28th March 2024. The 60-day period prescribed under the Rules would therefore have started running from 28th March 2024 and expired on 27th May 2024. The Record of Appeal was filed on 28th May 2024.

12. As averred by counsel for the applicants, there was only a delay of one day in filing the Record of Appeal. Such a delay is not inordinate. From the averments by counsel for the applicants, he was involved in dealing with the illness and demise of his father in law, with the burial taking place on 24th May 2024. The printout from the Court's e-filing portal indicates that the applicants attempted, unsuccessfully, to lodge the appeal on 27th May 2024, but succeeded a day later.
13. In the circumstances, I am not persuaded that there was inordinate delay in filing the record of appeal. The one-day delay has been sufficiently explained; the present application was filed two days after the filing of the Record of Appeal; and I am satisfied that the application dated 30th May 2024 is merited.

14. Having found that there was no delay to speak of in filing the Record of Appeal, I need not consider the other factors on a rule 4 application; nor will I enter into the question raised by the 1st respondent on the validity or otherwise of the Notice or Record of Appeal, which, under rules 86 and 55(2) of this Court's Rules, are outside the remit of a single judge of the Court.
15. The applicants' application dated 30th May 2024 is allowed as prayed, and the Record of Appeal filed on 28th May 2024 is deemed as duly filed.
16. There shall be no order as to costs.

Dated and delivered at Nyeri this 30th day of January 2026.

MUMBI NGUGI

**JUDGE OF
REPUBLIC OF KENYA
APPEAL**

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

Signed
DEPUTY REGISTRAR