



**Mwachidzungu v Mwachidzungu & 3 others (Environment & Land
Case 90 of 2014) [2024] KEELC 247 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 90 OF 2014
EK MAKORI, J
JANUARY 25, 2024**

BETWEEN

DANIEL MWACHINGA MWACHIDZUNGU PLAINTIFF

AND

TOM MWACHIDZUNGU 1ST DEFENDANT

PHILIP KATANA MWACHIDZUNGU 2ND DEFENDANT

WILLIAM TSUMA MWACHIDZUNGU 3RD DEFENDANT

PETER MWAGONA KARISA 4TH DEFENDANT

RULING

1. Application dated March 23, 2023 sought the following orders from this Court:
 - a. This Court be pleased to grant leave to the firm of O. M. Robinson & Company Advocates to come on record as acting for the applicant in place of Kenga & Company Advocates.
 - b. This Court be pleased to grant the applicant leave to file an appeal out of time against the whole of the judgment written by Olola J. on 23rd January 2020 and as a result of enlarging the time for filing a Notice of Appeal of the decision and service thereof on the respondent and further enlarge the time for filing a letter requesting for proceedings and service thereof on the respondent as per provisions of Rule 82 of the Court of Appeal Rules.
 - c. The Costs of this application be provided for.
2. The defendants/ respondents filed grounds in opposition dated November 15, 2023 setting among other grounds that:
 - a. The plaintiff/applicant's application is frivolous, vexatious, and an abuse of the Court process.



- b. There was an inordinate delay in filing the application almost four years after the judgment was delivered.
 - c. The grounds upon which the application is brought is an afterthought.
3. The application was canvassed by way of written submissions.
 4. The applicant averred that he was aggrieved with the judgment delivered on January 23, 2020 and had duly instructed his advocate on record to file an appeal. A notice of appeal was ostensibly drawn by his former lawyer and handed to him and he believed that an appeal had been filed and was awaiting the outcome. The said document was attached to the affidavit in support of the application. He came to realize later that the appeal was never filed at all upon visiting the Court registry. The applicant stated that he is desirous of pursuing the appeal to its logical conclusion and no prejudice will be suffered by the r if the current application is allowed. He further argued that the mistakes of his former advocate in so far as failure to file an appeal should not be visited on him as a client.
 5. The applicant submitted that the Civil Procedure Rules require that after judgment, the court grants leave for a new lawyer to come on record for a party.
 6. The applicant opined that under section 7 of the *Appellate Jurisdiction Act*, this court has jurisdiction to grant the orders sought, citing the case of *Peter Adams Ludavaa v Housing Finance Co. of Kenya Limited* [2021] eKLR.
 7. The issues that fall for the determination of this Court is whether to grant the firm of O. M. Robinson & Company Advocates to come on record as acting for the applicant in place of Kenga & Company Advocates. Whether to grant the applicant leave to file an appeal out of time against the whole of the judgment by Olola J. delivered on 23rd January 2020 and as a result of enlarging the time for filing a Notice of Appeal of the decision and service thereof on the respondent and further enlarge the time for filing a letter requesting for proceedings and service thereof on the respondent as per provisions of Rule 82 of the Court of Appeal Rules. And the issue of costs.
 8. There is no apparent objection raised to the firm of O. M. Robinson & Company Advocates to come on record as acting for the applicant in place of Kenga & Company Advocates. This limb of the application is allowed.
 9. On whether to extend the time within which to appeal, the factors this Court ought to consider before granting an extension are as held in the case of *Editb Gichungu Koine v Stephen Njagi Thoitbi* [2014] eKLR, Otieno-Odek JA. had this to say when faced with a similar issue:

“I have anxiously considered the application, the affidavits on record, and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See *Fakir Mohamed v Joseph Mugambi & 2 Others*, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate, and affordable resolution of disputes before the Court.”



10. The judgment in this case was delivered by this Court (Olola J.) on 23rd January 2020. The current application was brought on the 23rd of March 2023. That is about 3 years and 3 months. That is to say, the applicant was late by about 3 years and 2 months within which he ought to have filed an appeal. The only reason cited is that his former lawyer did not take his instruction to immediately file an appeal only supplying him a blank and unsigned Notice of Appeal which he mistakenly took that it was sufficient for the appeal to be admitted only to be taken aback when he visited the Court registry to discover the appeal was not lodged at all.
11. The 3 years and 3 months is inordinate to bring the current application. On the ground that this was occasioned by his lawyers that period was long. The applicant did not seem to have been vigilant in following up with his lawyer. In his supporting affidavit, he does not disclose at what time and point he came to learn from the Court registry that no appeal had been filed. Perhaps that could have indicated whether he was further vigilant enough not to prolong an already overtaken event. I do not find such a reason plausible. On the point of prejudice to the respondent, this is a matter that has been in our Court system since 2014. Another trial phase in the Court of Appeal will prejudice the respondent.
12. On the merits of the appeal, I did not see any matter raised of public importance to warrant this Court to exercise its discretion for the applicant given the inordinate delay. From the judgment of Olola J. the applicant wanted to eject the respondent from the suit property. The judge found that the respondent had been on the land since time immemorial. He found the land to have been family land, with its history of ownership tracing back to the 1970s and the adjudication period.
13. I see nothing to sway this Court to extend the time within which to appeal. Application dated 23rd March 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 25TH DAY OF JANUARY 2024.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Malombo for the applicant

Mr. Otara for the Respondent.

Court Clerk. Happy

