



Gusii Farmers Coffee Co-operative Union Limited & another v Omayio (Civil Application E173 of 2024) [2025] KECA 321 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 321 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E173 OF 2024
LA ACHODE, JA
FEBRUARY 21, 2025**

BETWEEN

GUSII FARMERS COFFEE CO-OPERATIVE UNION LIMITED 1ST APPLICANT

ROBERT GN MAINYA 2ND APPLICANT

AND

PETER ONDARI OMAIYO RESPONDENT

(Being an application to seek leave to extend time within which to file and serve a Notice of Appeal against the judgment of the High Court at Nyamira, (Mugo J) dated 15th November 2023 in ELC No. E001 OF 2021)

RULING

1. The omnibus notice of motion dated 22nd November 2024, is expressed to be brought under section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9 LK), rule 4, 5(b), 41(b), 43, 44(1) and (2), 45 and 49 of the *Court of Appeal Rules 2022*. The applicants are Gusii farmers Coffee Cooperative Union Limited (1st applicant) and Robert G. N. Mainya (2nd applicant) respectively. The Respondent is Peter Ondari Omaiyo.
2. This manner of presenting an application is frowned upon for the reason that it is untidy. This can be deduced from the fact that in one breath the applicants seek a temporary stay of the judgment and decree delivered in Nyamira ELC E001 of 2021 on 15th November, 2023 by Kamau J, together with all subsequent orders, pending the hearing and determination of this application and the intended appeal.
3. This is an application that should go before a bench of 3 judges and does not belong before a single judge. I will therefore, say no more on these portion of the application.
4. The second part of application is seeking leave to file and serve notice of appeal against the stated judgment out of time and that the Notice of Appeal dated 21st November 2024 annexed thereto, be



- deemed as properly filed and served. This is the portion of the application that is properly before a single judge.
5. The grounds of the application as stated on the face thereof are that, upon the judgment being delivered on 15th November, 2024, the Notice of Appeal “was duly lodged on 28th November, 2024 within the requisite time” (this must have been intended to be 2023 as can be seen from the supporting affidavit and the submissions). The service of the Notice of Appeal was challenged in Kisumu C.A Misc. Civil Application No E003 of 2024, whereupon the Notice was withdrawn when the application came before a bench of three judges on 20th November 2024.
 6. The applicants are still desirous of challenging the judgment, hence this application. They aver that the delay in filing the Notice of Appeal was predicated on the fate of the earlier Notice of Appeal on which orders were issued on 20th November 2024. They could not file another Notice of Appeal, or make this application until the miscellaneous application was heard and determined.
 7. The applicants state that the intended appeal has very high chances of success, as the respondent’s claim before the Environment and Land Court was for specific performance, based on an offer to tender for purchase of the applicant’s land. The offer lapsed for want of compliance with its mandatory condition in 1997, and the respondent filed the suit for specific performance in 2021 after a period exceeding 24 years and was obviously time barred.
 8. The applicants assert that they stand to suffer irreparable loss if the orders sought are not granted, as they will lose 10 acres of land which they are in possession and occupation of. On the other hand, the respondent stands to suffer no prejudice as he has never been in occupation of the claimed land from 1997 to date, or any other time before that.
 9. The application is supported by the affidavit of Robert G. Mainya the 2nd applicant, sworn on 29th November 2024 on his own behalf and that of the 1st applicant reiterating the grounds of the application. The deponent avers that the Notice of Appeal was filed on 24th November, 2023 which was within the requisite 14 days. Upon being challenged on grounds of service, it was withdrawn on 20th November 2024, and the Applicants moved with speed to file the current Notice of Appeal.
 10. The applicant also avers that the appeal has overwhelming chances of success as it raises serious issues of law and facts such as the respondent’s claim before the ELC which was time barred, being a claim for specific performance premised on a lapsed offer; the learned judge ordered the applicant to surrender 10 acres of their land while there was no contract between the applicants and the respondents; lastly, that the orders sought in the lower court had been overtaken by events as the letter of offer was on Simbauti Farm LR No 7487/2 and yet in its decree, the ELC court gave blanket orders over any of the applicants parcels of land.
 11. The Respondent swore and filed a replying affidavit dated 29th November, 2024 and averred that the application is incompetent, convoluted and an abuse of the court process and should be dismissed. That it is not contested that the applicant filed a defective Notice of Appeal dated 24th November 2023 and filed on 28th Nov. 2023, thereby complying with rule 79(2). However, it was not served within 7 days as prescribed. They admitted that the Notice of Appeal was served late, thus acknowledging non-compliance, but failed to invoke rule 4 to seek extension of time to regularize service.
 12. The respondent avers that rule 83 allows the appellant to withdraw an application at any time, and having admitted the defect in their submissions dated 28th February, 2024, the applicant had ample opportunity to withdraw the notice and file an appropriate application under rule 4 for extension



of time. They waited until 20th November, 2024 to withdraw their application and this amounts to inordinate, unreasonable and inexcusable delay, since they were represented by counsel.

13. The respondent deposes that the applicant's averment that they refrained from filing an application to enlarge time due to the pendency of an application to strike out the Notice of Appeal, is unconvincing and lacks merit, as nothing stopped them from filing the applications concurrently. Their failure to act timeously demonstrates indolence and lack of vigilance. The grant of leave to extend time for filing is discretionary and subject to demonstration of sufficient cause by the applicants.
14. The applicants filed submissions dated 2nd December, 2024 through the firm of M/s Riech Miinda and Associate Advocates and reiterated the grounds of the application and the averments in the supporting affidavit.
15. The respondent filed submissions dated 4th December 2024 through the firm of M/s Moses Nyambega and co Advocates and also reiterated the averments in the replying affidavit. Counsel further submitted that instead of rendering a cogent explanation, the applicants elected to attribute the delay to the application for striking out their defective Notice of Appeal. He contends that the Notice of Appeal was not only served late but was also filed under rule 75 instead of rule 76.
16. Counsel urged that the applicants had two clear options to file an application for extension of time to regularize the defective service, or to promptly withdraw the Notice and nothing barred them from filing two applications contemporaneously. Counsel urged this Court to find that the cocktail of prayers for extension to time and for stay of execution rendered the application fatally defective and dismiss this application.
17. I note that the applicant has cited a plethora of provisions of law for invoking the jurisdiction of this court. However, this being an application for extension of time all they required was to invoke the jurisdiction of this court under rule 4 of the [Court of Appeal Rules 2022](#) and no more. I have considered the grounds of the application and the submissions in light of the principles set out in [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others](#), Supreme Court of Kenya Application No 16 of 2014 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 an 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 petition, public interest should be a consideration for extending time."
18. In the end, I find that the delay is not inordinate, since the original notice of appeal was filed within 14 days as required under rule 77(1) of the [CA Rules 2022](#) but was contested on the basis of service. The reason for the delay has therefore been sufficiently explained. I also find that the intended appeal



is arguable and I say no more on this lest I should embarrass the bench that will be seized of the appeal should it be filed.

19. In considering the question of prejudice to be suffered I weighed the right of the applicants to pursue the intended appeal, which is pegged on the need to do justice to the parties and boost the confidence of the public in the justice system, against that of the respondent to have finality and conclusiveness to litigation so that he can enjoy the fruits of a judgement that was rendered in his favour. It is my considered view that the respondent will not suffer prejudice since it is in the interest of justice that justice be done to the parties and there be finality and conclusiveness to the dispute.
20. Reasons wherefore the application dated 22nd November, 2024 succeeds partially and I order as follows:
 - i. The prayer in the Notice of Motion dated November 22, 2024 seeking leave to file Notice of Appeal out of time is hereby allowed.
 - ii. The Notice of Appeal dated November 21, 2024 annexed to the application be and is hereby deemed to be duly filed and served.
 - iii. The appellants shall bear the cost of this application.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

L. ACHODE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

