



Wanjau (Suing as the administratrix of the Estate of Sammy Njoroge Maina - Deceased) v Mararui Farmers Co Limited & another (Civil Application E337 of 2024) [2025] KECA 302 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 302 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E337 OF 2024
W KARANJA, JA
FEBRUARY 21, 2025**

BETWEEN

STELLA MUTHONI WANJAU (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF SAMMY NJOROGE MAINA - DECEASED) APPLICANT

AND

MARARUI FARMERS CO LIMITED 1ST RESPONDENT

ALBERT KIHIANYU GIKARIA 2ND RESPONDENT

(Being an application for enlargement of time to file and serve a notice of appeal from the Judgment of the Environment and Land Court at Nairobi (L. Kimingoi, J.) dated 17th February 2022 in ELC Case No. 763 of 2015)

RULING

1. Stella Muthoni Wanjau, the applicant, has moved this Court by way of a Notice of Motion dated 1st of July 2024 in which she seeks extension of time to file and serve a Notice of Appeal against the judgment of Nairobi Environment and Land Court (ELC) delivered on 17th of February 2022. She also prays that the Notice of Appeal dated 28th of March 2024 be admitted and be deemed to have been properly filed within time.
2. The application is premised on several grounds on its face and the supporting affidavit sworn by her counsel on record, Elijah Bitange Mageto dated 1st of July 2024. There is no affidavit sworn by the applicant in support of the application, and some of the facts deposed to relating to events that happened before counsel on record coming on record amount to hearsay and will be treated as such. For instance, counsel cannot depose to the fact that –

“the appellant believed that the Notice of Appeal had been filed.”



3. It is deposed that judgment in the matter was entered against the applicant on 15th of February 2022 and being dissatisfied with the judgment she instructed her advocates on record Oundu & Co. Advocates to file a Notice of Appeal and apply for certified copies of the proceedings. Counsel says that the applicant believed that the Notice of Appeal had been filed. With respect, this is hearsay and is inadmissible. Counsel deposes that the applicant instructed another firm of advocates M'njau and Mageto Advocates, now on record, to appear for her and they discovered that neither the Notice of Appeal was filed nor was the application for proceedings made.
4. Counsel states that mistake of counsel should not be visited on the applicant and that she should be granted extension of time in the interest of justice. He says that the intended appeal is not frivolous and that the same raises serious issues of substantive and procedural law on acquisition and possession of land.
5. Following the impugned judgment, the applicant was ordered to give vacant possession to the respondents within 60 days failing which she would be evicted. She filed an application to stay the eviction but the same was dismissed for being filed with inordinate delay. It was then that she moved to this Court with the application now under consideration seeking extension of time to prefer the appeal.
6. The application is opposed through the replying affidavit sworn by Albert Kihianyu Gikaria, the respondent, on the 20th of August 2024. In his affidavit the respondent asks the Court to dismiss the application with costs and allow execution to proceed so that he can enjoy the fruits of the judgment. According to the respondent, the applicant was given 60 days within which to voluntarily leave the suit premises but as of the time of filing the application, she had not done so which was two years down the line.
7. He deposes that a delay of two years is inordinate and that the applicant acquiesced to the delay and she should have found out whether the application had been filed or not.
8. Both parties filed submissions in support of their positions in the matter. In her submissions the applicant contends that the delay in filing the application was not inordinate that she had filed an early application before the trial court which was dismissed on 13th of June 2024, and that thereafter on 1st of July 2024 which was within 16 days she filed the present application. She says that the intended appeal is arguable and she has got good chances of success as can be seen from the Memorandum of Appeal which is annexed to counsel's affidavit.
9. On the other hand, in his submissions dated 11th of February 2025, the respondent avers that the appeal is not arguable. He states that the delay involved was inordinate and the reasons given for the delay were implausible and not sufficient.
10. The discretion under Rule 4 of the Court of Appeal Rules, 2022 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in 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 and interested parties if the application is granted, and whether the matter raises issues of public importance. In Henry Mukora Mwangi -vs- Charles Gichina Mwangi Civil Application No. Nai. 26 of 2004, this Court held:-

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-



“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported)*, the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

11. I have considered the application the rival affidavits and the submissions filed by the parties. To start with, in view of what I have said above about the absence of an affidavit from the applicant, there is in my view no explanation given by the applicant explaining why she did not file the Notice of appeal in time. The delay of 2 years is definitely inordinate in the circumstances of this case.
12. In regard to the excuse that the delay was caused by mistake of counsel the respondent drew this court’s attention to the case of *Rajesh Ragani -vs- Fifty investments limited* and another [2016] eKLR where this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. He stated that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. The case of *Habo agencies limited versus Wilfred Othiambo Musingo* [2015] eKLR was also cited. The respondent states that in view of insufficient explanation for the delay, the application should be dismissed. The respondent says that the grounds of appeal raised are not arguable and that the applicant has no proprietary interests in the land in question and she will not, therefore, suffer any prejudice if leave is not granted.
13. On the other hand, the respondent says he is the one who continues to suffer and that the applicant has failed to comply with the lawful orders of the trial court for two years. The respondent is the one in occupation and that litigation must come to an end.
14. Extension of time, though at the discretion of the court is granted based on the law and not on a whim or sympathy. The applicant has not presented before this Court any credible evidence to persuade me to grant leave to file the appeal out of time. The judgment was given over 2 years ago but the applicant has not complied and seems to osculate between this court and the trial court seemingly in an attempt to delay the conclusion of this matter.
15. I find no reason whatsoever for me to extend time in this matter.

The application does not meet the threshold set for applications of this nature as set out above. Accordingly, I dismiss this application with costs to the respondent.

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

W. KARANJA

JUDGE OF APPEAL

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

Signed

Deputy Registrar

