



Sing'oei & 2 others v Teleposta Pension Scheme Registered Trustees (Civil Application E440 of 2023) [2025] KECA 187 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 187 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E440 OF 2023**

**M NGUGI, JA
FEBRUARY 7, 2025**

BETWEEN

**CHARLES SING'OEI 1ST APPLICANT
BEATRICE CHELIMO 2ND APPLICANT
JENNIFER MUMBI KIILU 3RD APPLICANT**

AND

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES RESPONDENT

(Being an application for extension of time to file and serve the memorandum of appeal and record of appeal and stay of execution from the decree and judgment of the High Court at Nairobi M. Odero J.) dated 30th July, 2020 in High Court Comm. Case No. 161 of 2008 consolidated with HCCC No. 162 of 2008)

RULING

1. Jennifer Mumbi Kiilu, the sole applicant before me (though described in the pleadings as 'the 3rd Applicant/Intended Appellant'), has filed the application dated 19th September 2023 seeking extension of time to file and serve a memorandum and record of appeal against the judgment of Maureen A. Odero J. dated 30th July 2020. The application is expressed to be brought under rules 4, 42 and 82 of this Court's Rules and sections 3A and 3B of the Appellant Jurisdiction Act. (The proper rules, I believe, should be rules 4, 44 and 84 of the 2022 Rules).
2. The application is based on the grounds set out on its face and is supported by an affidavit sworn by the applicant on 19th September 2023. The applicant gives the background leading to the application: that she had filed suit against the respondent seeking to restrain it from interfering with the property known as L.R. No. Nairobi/Block /69/117-Unit No. 57 and a declaration that the sale agreement between her and the respondent is valid and legally binding; and to compel the respondent to execute a transfer



in her favour in respect of the said unit. In its judgment dated 30th July 2020, the trial court found that there was no legally binding contract between the applicant and the respondent, and dismissed her suit.

3. The applicant avers that she was aggrieved by the decision and immediately instructed her previous advocates, Messrs T.K. Rutto & Company Advocates, to file an appeal against it.

On 31st August 2020, she filed an application before the trial court seeking expansion of time within which to lodge an appeal, which was allowed on 8th April 2021, with an order that she file a notice of appeal within 14 days of the ruling. Her former advocates lodged a notice of appeal on 13th April 2021.

4. According to the applicant, on 4th September 2023, she was served with a demand notice from Kenstate Valuers Limited, agents of the respondent, to pay purported rent arrears of Kshs 1,960,000 within 7 days, failing which they would instruct auctioneers to recover the said amount from her. She attempted to enquire from her previous advocates on the progress of her appeal but despite several attempts to reach the advocate over the phone, she was unsuccessful. On 6th September 2023, she sent her brother, one Michael Ndola to her previous advocates' chambers and, upon insisting on getting a copy of the filed appeal, he was informed that the appeal had not been filed.

5. The applicant avers that the failure by her former advocates to file an appeal on her behalf is a grievous mistake on their part and should not be visited upon her.

6. The applicant has filed submissions dated 23rd October 2023 in which she reiterates the averments in her affidavit. She admits that there was a delay of 2 years and 3 months in filing her appeal from 13th April, 2021 when a notice of appeal was lodged. She submits, however, that the mistake of her counsel should not be visited upon her despite the period of delay.

7. The respondent has filed grounds of opposition dated 6th October 2023 on the basis that the application is res judicata; is misconceived, lacks merit, is frivolous and vexatious; and is brought after inordinate delay which is not factually explained. The respondent has also filed submissions dated 13th December 2024.

8. I have read and considered the application, the affidavit in support, the respondent's grounds of opposition and the submissions of the parties. The sole issue for determination is whether I should exercise discretion under rule 4 in favour of the applicant and extend time for her to file her memorandum and record of appeal. The Court has wide and unfettered discretion under rule 4 in deciding whether or not to extend time.

9. In exercising this discretion, the Court is required to consider certain factors which are now well settled- see *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 and *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231.

These are the length of the delay, the reason for the delay;

(possibly) the chances of the appeal succeeding if the application is granted; and finally, the degree of prejudice to the respondent if the application is allowed.

10. There is no dispute that there has been a delay in filing the memorandum and record of appeal. The applicant had applied in the High Court, successfully, for extension of time to file her notice of appeal. She filed the notice on 13th April, 2021. She had not applied for extension of time to file the memorandum and record of appeal, so this application is not, contrary to the respondent's submission, res judicata.



11. Upon filing the notice of appeal, however, the applicant went into deep slumber. She remained in this somnolent state until 4th September 2023, two years and four months after filing her notice of appeal, when she was rudely awakened by a demand for arrears of rent from Kenstate Valuers, acting on behalf of the respondent. She avers that she sent her brother on 6th September 2023 to inquire from her previous advocate whether they had filed an appeal, and it is then that she realized that no appeal had been filed. The applicant blames her previous advocates for the failure to file the memorandum and record of appeal on time. She pleads that the grievous mistakes of her previous advocates should not be visited upon her.
12. In *Habo Agencies Limited v Wilfred OdhiamboMusingo* (2015) eKLR, this Court held that:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”
13. It is possible, as the applicant alleges, that the applicant instructed her previous advocates to file an appeal on her behalf. However, it must always be borne in mind that litigation belongs to the client. The applicant had a duty to follow up on her case. She did not do so, and for two years and 4 months, she did nothing to ensure that her appeal was in progress.
14. She would have gone on in this state if the respondent had not taken action to recover rent arrears for the suit property. I find that the delay of two years and four months is inordinate, and the delay has not been explained to my satisfaction to enable exercise of my discretion in the applicant’s favour. I therefore find the application dated 19th September, 2023 to be devoid of merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

