



REPUBLIC OF KENYA



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Thendu & another (Suing as the legal representatives of the Estate of Thendu Wathingira - Deceased) v Wathingira (Civil Application E419 of 2023) [2025] KECA 231 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 231 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E419 OF 2023
M NGUGI, JA
FEBRUARY 7, 2025**

BETWEEN

WAIRIMU THENDU & PETER MWATHU (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THENDU WATHINGIRA - DECEASED) APPLICANT

AND

PATRICK NDUNG’U WATHINGIRA RESPONDENT

(Being an application for leave to file an appeal out of time from the judgment of the Environment and Land Court in Thika (B.M. Eboso J.) dated 17th May 2023 in ELC APPEAL No. E110 of 2021)

RULING

1. In their capacity as the legal representatives of the estate of Thendu Wathingira (deceased) the applicants, Wairimu Thendu and Peter Mwathu, have filed the application dated 21st July, 2023 seeking leave to file an appeal out of time.
2. The application is brought under rule 4 of the Court of Appeal Rules, 2010 and section 1A and 3A of the *Civil Procedure Act*. I pause here to observe that the applicable Rules are the 2022 Rules, which revoked the 2010 Rules.
3. In the grounds and affidavit in support of the application sworn by Wairimu Thendu on 21st July 2023, the applicants aver that judgment was delivered on 17th May 2023; that they instructed their advocates to file a notice of appeal before the ELC, awaiting further instruction on filing of an appeal, and a notice was filed, dated 5th June 2023; that immediately thereafter, the 1st applicant fell ill and has been ailing for a while.



4. The 1st applicant further avers that her illness made it impossible for her to reach out to their advocates on record to give them instructions on filing the appeal. That by the time she recovered and approached their advocate with instructions to file an appeal, the statutory period had lapsed, thus necessitating the filing of this application. The applicants aver that their intended appeal against the decision of the ELC has high chances of success, and that the delay in lodging this application is not inordinate, and is excusable.
5. The applicants have filed submissions dated 10th July 2024 in which they reiterate the averments by the applicant and cite the principles applicable on an application for extension of time.
6. The respondent opposes the application by way of a replying affidavit which he swore on 27th September 2024. His case is that the present application is frivolous, without merit and an abuse of the court process; that after the lapse of orders of stay of execution, he proceeded with execution of the judgment; that in adherence to that judgment, the amended decree issued on 18th October, 2023 and the Court order of 11th March 2024, the Land Registrar Kiambu, and the District Land Surveyor, Kiambu, proceeded to subdivide the suit land and issued new numbers; and they are now in the process of processing the title deeds in accordance with the orders of the Court. It is his case, therefore that the present application has been overtaken by events as the court orders have already been executed.
7. The respondent contends further that the reasons for the delay have not met the threshold for grant of leave to file an appeal out of time; that the application is an afterthought, has been brought after inordinate delay, is misconceived and based on falsehoods, aimed at misleading the Court and denying him the fruits of the judgment, and should be dismissed with costs.
8. I have considered the application, the affidavits in support and opposition thereto, and the submissions of the parties. Rule 4 of the Rules of this Court, 2022, gives the Court discretion to extend the time stipulated under the Rules for the doing of any act. In exercising this discretion, which is wide and unfettered, the Court is required to consider the length of the delay, the reasons for the delay, (possibly) the chances of the appeal succeeding and the prejudice to be suffered by the respondent should the orders sought be granted- see *Mwangi v. Kenya Airways Limited* (2003) KLR 486.
9. A perusal of the documents before the Court indicates that judgment in the matter was delivered on 17th May 2023. The notice of appeal dated 5th June 2023 was lodged in the ELC on 13th June, 2023, 27 days later, and outside the 14 days' statutory timeline prescribed under rule 77 of the Rules of this Court. This application, dated 21st July, 2023, was filed 38 days from the date the notice of appeal was filed.
10. The applicants attribute the delay to the 1st applicant's illness.

They have annexed to her affidavit treatment notes from Ngewa Health Centre dated 17th July 2023 which indicate that she suffers from diabetes and hypertension. The notes do not indicate, however, whether the 1st applicant was so indisposed as a result of these conditions, which I believe are chronic, as to render her incapable of giving instructions. Nor do they indicate for how long she was indisposed. Further, I note that the estate of the deceased has two personal representatives, but no reason has been given for the failure by the 2nd personal representative to issue instructions to their counsel to file the appeal.
11. The respondent has opposed the application primarily on the basis that it has been overtaken by events as he has executed the orders of the Court. This, in itself, would not be sufficient reason to deny the applicants extension of time had they satisfied the Court that they had a good reason for the delay.



12. A further consideration in a rule 4 application is, possibly, the chances of the applicants' appeal succeeding. I observe that in this case, the applicants seek to file a second appeal to this Court. The issue they seek to raise is whether the first appellate court erred in finding that the respondent had not acquiesced to the subdivision of the suit property in the manner undertaken by the deceased. Without entering into the merits of the intended appeal, I observe that the question whether or not the respondent acquiesced to the subdivision relates to findings of fact, which are outside the remit of this Court on a second appeal.
13. Accordingly, it is my finding and I so hold that the application dated 21st July 2023 is without merit. It is hereby dismissed, but with no order as to costs.

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.

