



Embu Gaturi Housing Co-op Society v Njenga & 2 others (Civil Application E089 of 2024) [2025] KECA 591 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 591 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E089 OF 2024**

JW LESSIT, JA

MARCH 7, 2025

BETWEEN

EMBU GATURI HOUSING CO-OP SOCIETY APPLICANT

AND

WAMAE NJENGA 1ST RESPONDENT

SIMON NJOGU MUTURI 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(An application for leave to file a memorandum of appeal and record of appeal out of time from the Judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 22nd February 2017 in H.C. Civil Appeal No. 22 of 2014)

RULING

1. Before me is an application dated 6th September 2024 brought by Embu Gaturi Housing Co-op Society pursuant to rule 4 & 49(4) of the Court of Appeal Rules. The applicant seeks orders for extension of time to file its memorandum of appeal and record of appeal against the judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 22nd February 2017 in Embu High Court Civil Appeal No. 22 of 2014. The applicant seeks to have the memorandum of appeal and the record of appeal attached to the application admitted for hearing and determination.
2. The application is premised on the grounds on the face of it and in the affidavit in support of the application sworn by Jacob Nyagah Gachau, Secretary Manager of the applicant, both of even date. The applicant avers that it filed a similar application to wit, Civil Application No. 119 of 2018, where it sought to file its appeal out of time. That vide a ruling of this Court delivered by Murgor, JA. On 23rd September 2021, the learned Judge dismissed the application. The applicant avers that there was a pending application for extension of time to file a reference from the ruling of Murgor, JA, but that



- before the application could be heard, by this Court's ruling dated 12th April 2024, in Civil Application No. 71 of 2018 the memorandum and record of appeal were struck out, albeit on a technicality that both were filed out of time without leave of the Court.
3. The applicant attributes the delay in filing the record of appeal to the delay in the hearing and determination of its application for extension of time to file a reference against the decision of Murgor, JA. The applicant contends that it has a meritorious appeal with high chances of success and that no prejudice will be suffered by the respondents if the prayers sought are granted.
 4. In response through a replying affidavit sworn on 4th October 2024, the 1st respondent averred that the application is res judicata and is not only an abuse of the Court process but a waste of the Court's precious time. He contended that the applicant has mastered the trend of moving the Court with various applications over the same subject matter which has made litigation in the instant case fail to come to an end: that on 2nd May 2018 the applicant filed a memorandum of appeal dated 9th April 2018 in Nyeri Court of Appeal No. 71 of 2018 and vide an application dated 31st May 2018, the 1st respondent sought for the appeal to be struck off record and by the ruling of this Court delivered on 12th April 2024, the same was struck out with costs to the him and the 2nd respondent; that vide Nyeri Court of Appeal Civil Appeal No. 119 of 2018 and by an application dated 18th September 2018 the applicant moved this Court to file an appeal out of time and the same was dismissed vide a ruling delivered on 23rd September 2021.
 5. The 1st respondent argued that the instant application lacked merit for reason the impugned judgment was delivered on 22nd February 2017, which means the instant application has been brought 7 years and 6 months after the judgment. He urged that it was inexcusable and thus an afterthought, tainted with half-truths and is a deliberate measure to derail execution of the notice to show cause which came up for ruling on 24th April 2024 in Embu Civil Appeal No. 22 of 2014. The 1st respondent urged that after the ruling of 24th April 2024, the applicant filed an application dated 20th June 2024 seeking stay.
 6. The 2nd and 3rd respondents have not filed their responses to the application.
 7. Turning to the written submissions filed, beginning with the applicant, their written submissions are dated 4th October 2024. The applicant submits that the ruling of Murgor, JA in Civil Application No. 119 of 2018 was pending challenge through a reference and as such, the applicant was yet to exhaust its judicial options. The applicant urges this Court to find that the delay in filing the present record of appeal is to be computed from 12th April 2024 to 20th September 2024 totaling to 160 days which length is neither inordinate nor unreasonable and placed reliance in the case of *Fakir Mohamed v Joseph Mugambi & 2 others* [2015] eKLR.
 8. The applicant submits that the reason given for the delay are satisfactory and excusable as there was a pending challenge to the ruling of Murgor, JA. and that the said challenge was never set down for hearing more than 2 ½ years after filing and was consequently overtaken by the ruling of this Court of 24th April 2024 and therefore the applicant urges this Court to exercise its discretion in its favor and extend time within which it may file a record of appeal. The applicant contends that it communicated its intention to file a reference against the ruling of Murgor, JA. via email to the Court and subsequently filed an application dated 22nd October 2021 and that further, on 21st November 2022 it's advocate sent a reminder. Additionally, the applicant filed a supplementary reference dated 6th June 2024 in an attempt to get audience with this Court. The applicant thus submits that the reasons for the delay in filing the present record of appeal are excusable, plausible and the same were beyond its control. It submits that no undue prejudice will be suffered by the respondents if the application is allowed. The applicant contends that the respondents have the benefit of the judgment of the High Court.



The amount that they were awarded by the High Court will be paid by the applicant in the event the applicant exhausts its judicial options and is unsuccessful. The applicant submits that the 1st and 2nd respondents have already waited for six years and implores this Court to find that by waiting for the determination of the instant application, they will suffer no prejudice and that it is only in the interest of justice that the applicant is given the opportunity to pursue its appeal so that its dissatisfaction is conclusively addressed.

9. The applicant submits that its memorandum of appeal dated 6th September 2024 raises legitimate matters of law and principles. Further, that in light of the foregoing, the applicant submits that the reference dated 6th September 2024 raises legitimate and valid matters of law and principle with regard to the judgment of the High Court.
10. In conclusion the applicant submits that it has met the threshold for grant of extension of time to file the record of appeal dated 6th September 2024 out of time, and therefore prays that this Court finds that its application has merit and allow it and the orders sought therein be granted.
11. In the written submissions dated 11th November 2024, the 3rd respondent supports the application. It submits that the principles to be considered in exercising the Court's discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi Civil Appeal No. 255 of 1997*. The 3rd respondent submits that the applicant was yet to exhaust its judicial options and contends that the length of delay is neither inordinate nor unreasonable. The 3rd respondent further submits that there is no evidence that the application is an afterthought nor proof that the same is intended to abuse the Court process. Furthermore, it urged, there is no evidence to demonstrate what prejudice the respondent will suffer if the applicant is granted extension of time. The 3rd respondent contended that delay in filing the record of appeal was occasioned by circumstances beyond the control of the applicant. It submits that the applicant has given a reasonable explanation for the delay and that the explanation should satisfy the Court. The 3rd respondent relies on the case of *Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR* and urges that the Court be guided by the laws and grant the applicant the extension of time as sought.
12. In his written submissions dated 9th October 2024 the 1st respondent submits that the instant application is incompetent, an abuse of court process and bad in law. He maintains that it is *res judicata* and offends the provisions of section 7 of the *Civil Procedure Act*. Furthermore, that on 12th April 2024 a three judge bench struck out the record of appeal with reason that the same had been filed out of time and without leave of the Court.
13. The 1st respondent contends that the issues raised in the instant application have already been addressed, thus the same is devoid of merit and urges that the respondents should not be harassed on the account of a similar litigation. The 1st respondent submits that this Court having addressed the issues in the instant application in *Nyeri Court of Appeal Civil Application No. 119 of 2018* and *Nyeri Court of Appeal No. 71 of 2018* and having conclusively resolved the issue of time to finality, which findings have not been set aside, the Court should hold that it has no further authority to hear or determine any matter attendant to the judgment date 22nd February 2017 in *High Court Civil Appeal No. 22 of 2014*. The 1st respondent urges this Court to rely on the Supreme Court's decision in *Odinga v Independent Electoral & Boundaries Commission & 3 Others (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling)* and declare itself *functus officio*.
14. The 2nd respondent has not filed any submissions.
15. I have carefully considered the application and the supporting affidavit, the replying affidavit and the rival submissions by the parties. The factors to consider in an application for extension of time like this



one have been discussed by various Judges and I wish to go by the ruling of Waki, JA., as was confirmed by the full Court in the case of Fakir Mohamed v Joseph Mugambi & 2 Others in Civil Application No. 33 of 2004 where the learned Judges analyzed factors to be the following:

“The exercise of this court’s discretion under Rule 4 has followed a well beaten path since the stricture ‘sufficient reason’ was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso v Mwangi Civil Application No. Nai. 255 of 1997 (ur), Mwangi v Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta v Mulika M’Ethare and Attorney General, Civil Application No. Nai 8/2000 (ur) and Murai v Wainana (No. 4) [1982] KLR 38.”

16. There is a lot that has been stated by the parties to this application, some which are incorrect. I therefore want to begin by setting the record straight. First of all is the sequence of the events surrounding the current application. I see from the record that the applicant filed its notice of appeal and served it on 9th March 2017. Then on 2nd May 2018 the applicant filed a memorandum and record of appeal dated 9th April 2018 in Nyeri Court of Appeal No. 71 of 2018, which was out of time as the same should have been filed by 13th April 2017. The 1st respondent, vide an application dated 31st May 2018, sought to have the notice of appeal, the memorandum and record of appeal to be struck off. The full bench of this Court allowed the application in part and struck out the memorandum and record of appeal in its ruling delivered on 12th April 2024. In the said ruling, this Court observed that the notice of appeal was properly on record since Murgor, JA had saved it in her ruling dated 23rd September 2021 in which she dismissed the applicant’s application dated 18th September 2018 for extension of time to file the memorandum and record of appeal.
17. It is clear from this events that the application for leave to extend time to file the memorandum and record of appeal is not res judicata since it was dismissed on a technicality that it was filed out of time without leave. The second observation is that from the date the application to extend time was made on 18th September 2018, the ruling on it was delivered on 23rd September, 2021, a period of three (3) years. That delay cannot be attributed to the applicant and ought not to be visited against it. Furthermore, it took this Court six (6) years to hear and determine the 1st respondent’s application to have the appeal struck out, again a period that ought not to be visited upon the applicant. That is from 31st May 2018, date of the application and 12th April, 2024, the date of the Court’s ruling.
18. Considering the above sequence, it is clear that the greater delay involved in this matter is attributable to the delay in the hearing and determination of the applications by the Court. Of course the Court has a good reason for this, it is in the public domain that this Court has far too few Judges to manage the work, despite exerted efforts by the Court. That said, I see that the delay the applicant can be vilified for is from date the memorandum and record of appeal ought to have been filed (13th April 2017) and the date it was actually filed, (9th April 2018) a period of slightly below one year.
19. As for the reason for the delay, the applicant explained the delay generally, citing the delay in the hearing and determination of its application and the one by the 1st respondent. The explanation is reasonable and plausible. The preliminaries took over time, causing nine years delay. I find that it will not be in the interest of justice to blame the applicant, yet it is clear that it is not to blame for the bulk of the delay.



- 20. As for the likelihood of the appeal succeeding, the memorandum of appeal is on record. I note that it raises arguable grounds of appeal. The same are no frivolous or idle. They are deserving to be heard and determined.
- 21. As for the degree of prejudice to be suffered by the respondent. The prejudice is the delay that has occurred in the preliminary stage of the appeal, to have the record straightened and ready for hearing, a matter, as I have observed, that cannot be blamed entirely on the most part, to the applicant.
- 22. It is now settled by plethora of cases that in determining whether or not to grant an extension of time to file an appeal or a memorandum and record of appeal, the Judge exercises unfettered discretion, as long as the discretion is exercised judiciously, based on sound principles. See Rael Munyaka & 6 Others v Waitaluk Land Disputes Tribunal & 3 others [2007] eKLR and Paul Musili Wambua v Attorney General and 2 Others [2015] eKLR.
- 23. I am satisfied that the application is merited. Accordingly, the application dated 6th September 2024 is allowed. The applicant granted 30 days from the date hereof to file and 14 days thereafter to file and serve the memorandum and record of appeal. Costs shall be in the appeal.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF MARCH, 2025.

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

