



REPUBLIC OF KENYA



**Ntinyari v Rauga (Civil Application E012 of 2025)
[2025] KECA 600 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 600 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E012 OF 2025**

JW LESSIT, JA

MARCH 7, 2025

BETWEEN

ELIZABETH NTINYARI APPLICANT

AND

JOYCE KABURO RAUGA RESPONDENT

*(An application for leave to file an appeal out of time from the
Judgment of Environment and Land Court at Meru (C. K. Yano,
J.) delivered on 5th July 2023 in E.L.C. Case No. 3 of 2019 (O.S.).)*

RULING

1. This application is brought under rule 4 and 84 of the [Court of Appeal Rules](#). It is dated 28th January 2025. The applicant seeks:
 - “2. That time to file the Memorandum of Appeal and the Record of Appeal against the decision of the superior court in Meru Environment and land case No. 3 of 2019 (OS) be extended.
 3. That costs be provided for.”
2. The application is premised on the grounds on the face of the application and in the affidavit sworn in support thereof by the applicant.
3. The applicant states that Judgment in the superior court was delivered on 5th July 2023. Being dissatisfied with the decision of the superior court she instructed her erstwhile Advocate Mr. Gatari Ringera (Deceased) to lodge an Appeal, who filed the notice of Appeal and served it within the prescribed time. She avers that a request for typed proceedings was also made in good time but the proceedings were not ready for collection until 21st March 2024. She avers that unfortunately by



- the time the proceedings were ready for collection, her erstwhile Advocate was ailing and t h a t h e eventually succumbed on the 30th day of October 2024.
4. The applicant urged that it is not until 21st January 2025 that she was able to retrieve the file from the appointed liquidator of the deceased Advocate's firm and that she instructed the present Advocates to proceed with the matter, by which time the prescribed period for filing and serving the Memorandum of Appeal and the record of appeal h a d lapsed. That the period lapsed on or about 21st May 2024. That the delay in filing the memorandum of appeal and the record of appeal was occasioned by the long period of ailment and the eventual demise of the former Advocate.
 5. The applicant avers that she has an arguable appeal with high chances of success. She also argues no undue prejudice will be caused to the respondent if the orders sought are granted.
 6. The respondent has sworn a replying affidavit on her behalf and that of her siblings who are the beneficiaries of the estate of their late mother, Joyce Kaburo Rauga (deceased) and is dated 11th February 2025. She avers that the applicant is extremely guilty of laches and that the delay in filing this instant a p p l i c a t i o n is so inordinate and unexplained that it is incurable. She avers further that the judgment of the superior court rendered by C.K Yano, J. on 5th July, 2023 has been implemented in full and ownership of LR No. Nyaki/Kiburine/12 t h e subject of the suit changed vide orders issued by the superior court on 20th December 2023. She avers further that the applicant, she cannot explain why, she did not opt to change advocates for two years since 5th July 2023 when the judgment of the superior Court was rendered. .
 7. I have considered this application, the submissions by Messrs Mithega Kariuki advocates for the applicant and Messrs Mutuma advocates for the respondent, together with the affidavits and annexures filed by both parties.
 8. The exercise of this court's discretion under rule 4 of the Court of Appeal Rules is unfettered and as such, there is no limit to the number of factors the court would consider so long as they are relevant. They include the period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. See Fakir Mohamed vs. Joseph Mugambi & 2 Others in Civil Application No. 33 of 2004; Mwangi vs. Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta vs. Mulika M'Ethare and Attorney General, Civil Application No. Nai 8/2000 (unreported) and Murai vs. Wainana (No. 4) [1982] KLR 38.
 9. Counsel for the applicant relies on the case of Pothiwalla vs. Kidogo Basi Housing Cooperative Society Ltd & 31 Others [2005] eKLR urging that the factors an applicant must demonstrate are:
 - “(a) That there is merit in his appeal;
 - b. That the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and
 - c. That the delay has not been inordinate.”
 10. Counsel for the respondent relies on the case of Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi, [1999] 2 EA 231 that sets out the factors to be considered in determining whether the discretion to extend time should be granted to an applicant. The factors are the same as those in the Pothiwalla vs. Kidogo Basi Housing Cooperative Society Ltd & 31 Others, supra, cited by the applicant's counsel.



11. Counsel also relies on the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral & Boundaries Commission & 7 Others*, the Court held that

“It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the. Court to exercise its discretion in favour of applicant.”

12. In regard to the length of the delay, counsel for the applicant relies on the case of *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR for the proposition that the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained.

13. On the other hand, Messrs Mutuma Koskei have urged that the communication the applicant relies on was from the Law Society but not addressed to her. They also argue that the applicant did not explain the delay from the date the notice of appeal was filed to the date the application was made, further that the case belonged to her and not her advocate and that she was not diligent, that had she been, she should have taken away the file and instructed new counsel. Counsel cites the ^{Supreme Court decision in} *Fabim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others* [2015] eKLR that laid down guidelines for exercise of discretion in extending time including:

- “ 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 extension of time has the burden of laying a basis, to the satisfaction of the Court.”

14. I have considered the length of the delay involved in this application. It is not disputed that the notice of appeal was filed and served on the 10th July 2023. The applicant averred that the period for filing the memorandum and record of appeal lapsed on 21st May 2024, and annexed a certificate of delay that shows that the period required for preparing the proceedings was between 20th July 2023 and 21st March 2024. The period of the delay is therefore eight (8) months.

15. As for the explanation given for the delay, she avers that unfortunately by the time the proceedings were ready for collection on 21st March 2024, her erstwhile Advocate was ailing and t h a t h e eventually succumbed on the 30th day of October 2024. She explains that she was not able to take her file from him, and that, upon his death, the Law Society of Kenya appointed a liquidator of the deceased advocates firm, which liquidator released her file to her current advocate on 14th November 2024, as evinced by the letter to that effect annexed as EN5.

16. I have considered the period of the delay, which is eight months. I have considered the explanation for the delay. I find that the applicant has given reasonable and plausible explanation why the delay occurred. The advocate on record for her fell ill, and by the time the proceedings were ready for collection, she says he could not do it due to his illness, neither could she manage to collect her file from him. The seriousness of the illness is clearly evident. The advocate ailed for some time before his demise. Thereafter, the LSK appointed an advocate’s firm to liquidate the deceased advocate’s practice. These are factors beyond the control of the applicant, neither can they be attributed to indolence or lack of diligence on her part. I am satisfied that the delay was due to extenuating circumstances beyond the applicant’s control. I am also satisfied that in the circumstances, the delay is not inordinate.



17. As for whether the appeal is arguable. The respondent's counsel urged that the suit property has already been registered in the names of the beneficiaries of the estate of the deceased owner. That in the circumstances, the appeal is spent and will only be an academic exercise. In response the applicant's counsel urges that the applicant's claim before the superior court was one of adverse possession which is not affected by any subsequent changes on the ownership of the suit land. That therefore the claim that the subsequent transfers of the suit property impede the applicant's rights in the appeal is baseless.
18. I have looked at the annexed memorandum of appeal. I see that issue is raised in regard to the evaluation of the evidence adduced before the court, the applicant faulting the trial Judge of failing to properly evaluate the evidence presented by the parties and particularly the evidence that the applicant was in open and exclusive possession of the suit for over 12 years; failing to find that as at the time the claim was filed, the applicant was in adverse possession of the suit land and that the collateral suits filed against her did not and could not extinguish the applicant's claim. These are arguable grounds that are deserving consideration by the appeal Court.
19. I am satisfied that the applicant has satisfied the requirements for consideration of this application in her favour. Accordingly, I allow the applicant's application dated January 28, 2025, grant the applicant thirty (30) days to file the memorandum and record of appeal, and fourteen (14) days from date of filing to serve the respondent. The costs of this application will 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

