



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Otieno v Ngani (Civil Application 67 of 2018) [2025] KECA 473 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 473 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 67 OF 2018
MSA MAKHANDIA, P NYAMWEYA & LK KIMARU, JJA
MARCH 7, 2025

BETWEEN

MILKA AKINYI OTIENO APPLICANT

AND

CHARLES ODONGO NGANI RESPONDENT

(Being an application seeking for extension of time to appeal out of time to the Supreme Court of Kenya, from the judgment and/or decision of this Court at Kisumu (M’Inoti, Kantai & Tuiyott, JJ.A) dated 17th day March 2023 in Civil Appeal No. 67 of 2018)

RULING

1. On 17th March 2023, this Court rendered its judgment in Kisumu Court of Appeal, Civil Appeal No. 67 of 2018, between Milka Akinyi Otieno (“the applicant”) and Charles Odongo Ngani (“the respondent”). By that judgment, the court dismissed the applicant’s appeal. That appeal had been precipitated by the judgment and decree of the Environment and Land Court (“ELC”) sitting in Kisii delivered on 6th October 2017.
2. The case before ELC was initiated by the respondent, by way of Originating Summons claiming that he had acquired one acre out of all that piece or parcel of land known as Kamagambo/ Koluoch/1000 (“the suit property”), through prescription and or adverse possession. He claimed that he had openly and adversely occupied and cultivated the portion claimed for over 20 years since 1984, based on a sale agreement between his father, Zakayo Ngani (deceased), and the husband of the applicant, Ongoma Ochuka, also deceased. After his father’s death in 2000, the applicant continued to use the subject portion without interruption. He, therefore, prayed that he be declared the owner of that portion by way of adverse possession.
3. On 16th January 2012, the applicant filed a replying affidavit, asserting that the respondent had trespassed onto the suit property and built structures thereon illegally. He deposed that this was not a



case of adverse possession but pure trespass and that in any event, the suit had not met the threshold for the grant of the orders sought.

4. The trial court, in its determination, found that the respondent had proved his case for adverse possession and granted the orders prayed for in the Originating Summons.
5. Aggrieved by that decision, the applicant lodged an appeal before this Court citing several grounds of appeal, the principle among them being, that the trial court erred in law and in fact in finding that the respondent was entitled to the suit property by way of adverse possession; and arbitrarily granting the respondent a portion of the suit property without any prior survey to establish the exact position that would have been occupied by the respondent, if at all.
6. After considering the said appeal, this Court upheld the ELC's decision and dismissed the appeal. That dismissal would have put this dispute to rest but it appears that the applicant is still aggrieved, and now wishes to appeal the decision to the highest court in the land under the hierarchy of our court system, the Supreme Court, but he is caught up with time.
7. In that regard, he has filed a notice of motion dated 11th July 2023. It is expressed to be brought pursuant to Articles 163 (3) (b) and (4) (b) of *the Constitution* of Kenya, sections 15, 15 (b) of the *Supreme Court Act*, Rules 15, 32, 33, 36, and 38 of the Supreme Court Rules and sections 3A and 3B of the *Appellate Jurisdiction Act*. Rules 1(2), 4, 12, 41, 43, 45, 49, and 54 of this Court's Rules and all other enabling provisions of the law. The motion seeks a multiplicity of prayers. In other words, it is the kind of application in this Court, we commonly refer to as an omnibus application which is ordinarily frowned upon.
8. The applicant nonetheless seeks that this Court grants her leave to file a notice of appeal from its judgment to the Supreme Court out of time; leave to file an application for certification also out of time; a certification that the intended appeal to the Supreme Court constitutes or involves a matter of general public importance, and lastly, a stay of execution of the decree.
9. The motion is supported by an affidavit sworn by the applicant in which she deposes that, this Court's decision involved the issue of adverse possession and the Supreme Court will be called upon to make a proclamation as to whether there can be adverse possession where entry to the property is pursuant to the existence of a sale agreement; and such entry is by consent of the registered proprietor. That the Supreme Court too will have the opportunity to settle the legal controversy as to whether or not a purchaser of land under a contract of sale who is in possession with the permission of the vendor pending completion, can find a claim of adverse possession of such land without the contract of sale having been repudiated or rescinded by the parties. Further, the applicant intends the Supreme Court to make a determination on whether the failure on the part of the purchaser to obtain the consent of the land control board within the required six months rendered the transaction void, in the circumstances where the purchaser did nothing to obtain such consent. Lastly, that the apex court will have an opportunity to determine what the position of the law is with respect to the failure to obtain the consent of the Land Control Board, and its effect on the doctrine of adverse possession.
10. According to the applicant, the Court in its judgment, referred to previous determinations of this Court, including Isaac Cypriano Shingore vs. Kipketer Togon [2016] eKLR, which held that a sale agreement is void without the relevant consent. Additionally, in David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others [2014] eKLR, the Court emphasized that the *Land Control Act* requires consent from the Land Control Board for transactions involving agricultural land, and failure to obtain this consent renders the transaction void and any subsequent occupation of the land becomes a criminal offence. However, the Court has also ruled in various cases that the failure to obtain the necessary consent within six months does not void the transaction, but instead creates a constructive



trust in favour of the purchaser, as held in *Alinza vs. Saul* (Civil Appeal 134 of 2017 [2022] KECA 583 (KLR)) and *Macharia Mwangi vs. Mwangi* [2014] eKLR. That all these issues are matters of general public importance, requiring the input of the Supreme Court.

11. As to the prayer for stay, the applicant depones that since an appeal does not operate as an automatic stay of execution, the prayer ought to be granted pending the hearing and determination of the intended appeal to the Supreme Court lest it be rendered otiose.
12. On the question of delay and reasons for the delay, it was deponed that this Court delivered its judgment on 17th March 2023, but it was only shared with the parties on 23rd June 2023, and received by the applicant's advocates on 26th June 2023, after several follow-ups. This delay of over three months was due to an inadvertent omission by the Court's Registry to share with the parties the judgment in time. That due to the said delay, the statutory timelines under rule 36 of the Supreme Court Rules, 2020, for filing a notice of appeal and application for certification to the said court elapsed. That it is on this basis that the applicant now seeks enlargement of time to both file the notice of appeal and the application for certification all out of time.
13. The application was opposed by the respondent through his replying affidavit sworn on 7th October 2024 in which he deponed that the application did not meet the constitutional threshold to warrant this Court to grant the various leaves sought. That there was no element of general public importance involved in the suit that transcended the interest of the parties to the litigation as would impact the whole society. Further, that the application raised no important or cardinal issues of law of jurisprudential moment that deserved further input from the Supreme Court. The respondent denied that there was any uncertainty of the applicable law, as the law regarding adverse possession was well settled by statute and precedents of various courts in this country. That the delay was inexcusable and had not been sufficiently explained by the applicant. He therefore urged for the dismissal of the application with costs.
14. During the inter partes hearing of the application, through written submissions with limited oral highlights, Ms. Edel Guandaru Mumbi learned counsel appeared for the applicant, whereas Mr. Edwin Karori, learned counsel appeared for the respondent.
15. Counsel for the applicant in her submissions merely regurgitated what had been set in the grounds and the supporting affidavit to the application. We therefore see no need to reiterate them. Suffice to add that counsel urged that the delay of over three months was due to an inadvertent omission by the Court's Registry to dispatch the judgment to the parties for which the applicant should not be penalized. As a result of the delay aforesaid, the statutory timelines under rule 36 of the Supreme Court Rules, 2020, had lapsed. That rule 4 of this Court's Rules, allows the Court to extend timelines for sufficient reasons to ensure the ends of justice are met.
16. Counsel placed reliance on the case of *Charles Karanja Kiiru vs. Charles Githinji Muigwa* [2017] eKLR, where this Court held that it has the mandate to enlarge time for lodging an appeal and to deem one already filed as validly filed to ensure justice. That the factors to be considered for extension of time include the period of delay, reasons for the delay, prejudice to the respondent, and public importance of the matter, as demonstrated in the cases; *Wanjohi Mathenge vs. Duncan Gichane Mathenge* [2013] eKLR and *John Karani Mwendu vs. Japheth Bundi Chebari* [2021] eKLR. Counsel further relied on the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, which outlined the principles for extension of time, emphasizing that it is an equitable remedy available at the Court's discretion. That the applicant had explained that the delay was due to an omission by the Court's Registry.



17. Further, counsel argued that the respondent will not suffer prejudice if the extension is granted, while the appellant will face injustice and potential loss of the suit property if denied the opportunity to appeal to the Supreme Court. Citing various cases, including *Sokoro Savings and Credit Co-operative Society Ltd vs. Mwamburi* (Civil Application E032 of 2022) [2023] KECA 381 (KLR) (31 March 2023) (Ruling) and *Kiu & Another vs. Khaemba & 3 Others* Civil Appeal (Application) E270 Of 2021) [2021] KECA 318 (KLR) (17 December 2021) (Ruling), the applicant emphasized the importance of the right to be heard and the principles of natural justice. The applicant submitted that the application meets the necessary legal thresholds and that it is in the interest of justice to allow it.
18. In opposition, counsel for the respondent argued that this Court lacks jurisdiction to entertain the motion, as the definition of (“Court”) under rule 2 of the Supreme Court Rules, 2020, does not include this Court. That the application for extension of time can only lie in the Supreme Court and not this Court, under rule 15 (2) of the Supreme Court Rules. To that extent, the application was incompetent and an abuse of the court process. Citing various cases, including *Kenya Revenue Authority & 2 Others vs. Mount Kenya Bottlers & 4 Others* [2022] KESC 3 (KLR) and *Patel vs. Lagat* (Civil Application E048 of 2021) [2022] KECA 509 (KLR), counsel emphasized that the Supreme Court’s jurisdiction for granting extension of time is governed by strict provisions and that the application does not meet the necessary conditions. Additionally, he asserted that the issue of certification is a full- bench matter and cannot be entertained by a single Judge in an omnibus application. Counsel went on to submit that the dispute between the applicant and the respondent was a private matter over property ownership and does not raise issues of public importance.

That the applicant had exhausted all legal recourse and should not misuse judicial time. Counsel concluded by submitting that the application was misconceived, ill-advised, and should be dismissed for want of jurisdiction and merit.
19. Having considered the application, the issues for our determination are whether: this Court has jurisdiction to extend the time within which to file the notice of appeal and application for certification to the Supreme Court, secondly, whether the application meets the threshold under the law for certification, and lastly, whether the court should grant stay.
20. Before we commence our determination of the above issues, we wish to point out that this application ought, ideally, to have been placed before a single Judge of this Court to deal with the aspects of leave (see rule 55 of this Court’s Rules). The record shows though that indeed this was done. However, the learned Judge (Omondi, J.A) before whom the application was placed on 21st June 2024, declined to deal with it on the grounds that since it was an omnibus application, it was better handled by a full bench of this Court.
21. Back to the application, it is evident that the applicant wishes to exercise his undoubted right of appeal provided for in Article 164 (4) of *the Constitution*. Under that Article, appeals from this Court to the Supreme Court lie as of right where they involve interpretation or application of *the Constitution*. However, all other appeals must meet the strictures set thereunder; that this Court’s or the Supreme Court’s certification must first be obtained before the Supreme Court hears them. The other stricture or requirement is that the intended appeal must raise a matter of general public importance, which this Court or the Supreme Court must certify.
22. On the first issue, the applicant has relied on rule 4 of this Court’s Rules as the main foundation of the prayers for leave. However, our understanding is that rule 4 of this Court’s Rules, 2022, deals with appeals to this Court from the lower courts and not to the Supreme Court. This rule grants this Court the jurisdiction and discretion to extend the time for doing any act authorized or required by the Rules, but it does not extend to appeals to the Supreme Court. We say so bearing in mind the holding in the



case of Kenya Revenue Authority & 2 Others vs. Mount Kenya Bottlers & 4 Others [2022] KESC 3 (KLR) in which, the Supreme Court emphasized that the extension of time for filing an appeal to the Supreme Court must be sought under the Supreme Court Rules, 2020, and not under the Court of Appeal Rules.

23. Further, in Patel vs. Lagat (supra), this Court clarified that its jurisdiction to extend time is limited to appeals within this Court and does not extend to appeals to the Supreme Court. These cases illustrate therefore that while this Court has the jurisdiction and indeed, power to extend time for appeals within its jurisdiction, any extension of time for appeals to the Supreme Court must be sought under the relevant provisions of the Supreme Court Rules. This in essence means that such an application can only be entertained by the Supreme Court and not any other court, this Court included.

We confidently say so because the Supreme Court Rules can only be invoked and applied by that court and not any other. Having said that much, the first issue is therefore resolved in the negative. That being the case, it will be an exercise in futility to address the other issues framed, for without any valid or proper notice on record, we are divested of the jurisdiction to entertain the application.

24. The application must, therefore, fail for incompetence. It is accordingly struck out with costs to the respondent.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

